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FOREWORD

Institute of Comparative Law (Serbia), in cooperation with "Josip Juraj Strossmayer" University of Osijek Faculty of Law (Croatia) and University of Pécs Faculty of Law (Hungary) initiated a new international conference, Regional Law Review, in 2020. Our goal was and remained to create an opportunity for lawyers from the region, the whole of Europe and the countries that share the European legal heritage, to gather and discuss current topics from various fields of law.

The problems caused by the pandemic have affected our plans this year as well. The conference was held on October 22 and 23 in a hybrid format, with a combination of presence of authors in the conference room or online via Zoom application.

Nevertheless, a large number of authors responded, including some authors who participated in the first conference last year. A total of 26 authors from nine countries researched and presented the results of their researches in the form of 19 scientific papers that you will find in this collection. We owe a great deal of gratitude to all of them. Thanks to their efforts and time they invested, RLR lived up to expectations for the second time, and continued to grow and develop.

I would like to thank the members of the Scientific and Organizational Committee, the representatives of all three institutions that jointly organized the conference, as well as all the reviewers (a total of 22 reviewers from nine countries) who certainly played siginificant role in establishing the academic standard of the quality of published papers. My gratitude is also directed to all those who worked diligently on the organization of technical and essential details of the Conference and proceedings, and above all for the selfless help of my colleagues from the Institute of Comparative Law, who bore significant burden of the organization. We have continued to develop mechanisms for academic communication in adverse circumstances that have prevented us from fully realising our research efforts for almost two years. First results of our efforts to become visible and recognisable at the international level are being visible. We have been listed in HeinOnline Law Journal Library, and that is just the begining. Thank you all for overcoming all technical and other difficulties, as well as for achieving high quality of the Conference.

Due to our liberal policy of using citation methods, two styles have been used in the collection, with several different variations. I think that in a way such freedom of expression contributes to the dynamics of reading the texts and (in a technical manner) corresponds to the diversity of topics covered by researchers.

I want to conclude this address with optimism - I am sure that in the coming years RLR will be recognised as an important scientific event in the region, but also that the network of cooperation created around the Conference will be further developed and will attract even more lawyers who want to share their ideas and researches with the scientific community.

In Belgrade, November 2021

Mario Reljanović
Editor

IN MEMORIAM

Dr. Stefan Andonović (1991 – 2021)

Dr. Stefan Andonović, secretary of the first Regional Law Review Conference and proceedings, our dear colleague at the Institue of Comparative Law, passed away this year at the age of 30. With his efforts, Stefan helped RLR grow from an idea into an international event. We will miss his energy, dedication and professionalism. He will always be a part of our team, remembered for his kindness, selflessness and optimism. We will try to continue to see the world through his eyes.

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Avi Zamir*

AN INDEPENDENT JUDICIARY: THE ISRAELI EXPERIENCE WITH A MIXED JURISDICTION SYSTEM

The Israeli legal system is unique, combining principles and traditions from common law and civil law. Israel strives to see itself as a constitutional democracy. It is a democracy, as it is a system of government governed by the principle of the majority and in which fundamental values and at their core, the human rights, are guaranteed against the abuse of the power of the majority. It is a constitutional democracy, as the structure of governmental authorities and human rights are enshrined in basic laws, chapters of an entire though unfinished constitution. The state of Israel operates through three bodies: the legislature ("Knesset"), the executive (Government), and the judiciary (courts). The powers of these organs are enshrined in the Basic Law. There is a "checks and balances" relationship between the authorities designed to ensure that each authority operates within its mandate and that none of them has unlimited powers. And what about the judiciary? From the judges' point of view, there is independence in several aspects that will be discussed. But from a budgetary and administrative point of view, the judiciary does not enjoy independence and autonomy from the executive branch. The executive branch is also litigating in the courts. Can the personal independence of the individual judge be complete as long as the independence of the judiciary is not complete?

Keywords: Israeli legal system; "checks and balances"; independence of judges; judiciary.

1. JUDICIAL INDEPENDENCE – OPENING WORDS

This paper seeks to highlight one of the most valuable assets of a democratic state, vital for protecting citizen rights from the state and other citizens: an independent judicial system. The theoretical basis of this asset is the doctrine of the separation of powers. In its modern meaning, this doctrine does not ask for an absolute separation between governing powers but rather for the presence of "checks and balances". According to this mechanism, the judiciary should be independent from the other two powers. Since this independence is

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not created of its own accord, it can be achieved *via* the balances determined by legislation, judicial decisions, and the formation of ideological perceptions. I will try to present the status of the Israeli judiciary's culture of independence. I will indicate a few aspects concerning the independence of the judicial system from an institutional point of view, mainly with regards the process of appointing judges; the personal independence of judges with respect to external factors which may impact their decisions; the collective independence of the entire system with respect to other government authorities; the internal independence of a single judge with respect to other judges.

2. APPOINTMENT OF JUDGES

The first and probably the essential factor that impacts the judges' independence is the way they are appointed, whether politically, professionally, in some combination of both, etc. Inspired by the method applied in France, Israel had adopted in 1953 a new groundbreaking method for appointing judges: a commission for electing judges that incorporates representatives from the three authorities, the executive, the legislature, and the judiciary, as well as professionals from the practice of law. Since then, this method has spread worldwide and international organizations recommend it as a suitable means to balance the principle of judicial independence and the democratic accountability of judges. These principles are based on the understanding that in addition to the legal authorization to adjudicate, judges have an important role in protecting the state's fundamental values and human rights and impact the formation of the political, social and economic policy. Since judges need the public trust and legitimacy when ruling on such issues, the judiciary, and more specifically, the process of appointing judges, is to be designed according to the two competing principles: independence and accountability. On the one hand, the process of nominating and promoting judges should ensure their independence from government authorities and enable them to rule professionally, independently and following the law in order to prevent government authorities from violating human rights and the rule of law; on the other hand, especially given the understanding that the judge has an impact on forming the customary policy, the accountability of the judges towards the sovereign, *i.e.* the citizens. The Basic Law: The judiciary determines that the President nominates judges in Israel according to the decision of the Commission for the Selection of Judges. [1] The Commission comprises nine members: three judges: the President of the Supreme Court along with two other judges selected by the Supreme Court members; two ministers: the Minister of Justice who is the head of the Commission and an additional minister selected by the government; two members of Knesset which it elects by secret ballot.[2] This format was adopted in 1953, as mentioned, following the transition which started taking place from the method of appointing judges by the executive authority to the one that reduces their dependence on this authority. Pinhas Rozen, who was then the Minister of Justice,

[1] Section 4 of the Basic Law: The Judiciary. Available at: https://www.mfa.gov.il/MFA/MFA-Archive/1980-1989/Pages/Basic%20Law-%20The%20Judiciary.aspx (26/6/2021).

[2] Section 6(1) of the Courts Law [consolidated version], 1984 (hereinafter: "The Court Act").

explained in a Knesset assembly that while the nomination of judges, in Israel and around the world, was formally done by the executive authority, he wanted to ensure the independence of judges and had thus decided to follow the method applied in France and Italy. To a large extent, the establishment of the Commission for the Selection of Judges in 1953 was ahead of its time, given that already at that time this institution adhered to what has now become a trend of appointing judges in other democratic countries. Creating the judicial bureaucracy of the central government was an essential step in establishing the modern nation.[3] In the modern era, the executive authority was responsible for appointing judges. In the European kingdoms of the late Middle Ages and the beginning of the modern era, appointing judges was considered the king's role and responsibility. Looking at the history of democratization, especially in the twentieth century, we can observe many attempts to separate the role of appointing judges from the executive authority.

The many methods applied today for appointing judges may be classified into four main classes:[4] direct election by the public (applied, for example, in a few states in the USA and some cantons in Switzerland); the nomination is conducted by one of the political authorities: the executive, the executive along with approval by the legislature or the legislature; appointment by a "judiciary commission" (similar in composition to the Commission for the Selection of Judges in Israel); appointment by the judiciary or representatives of the legal practitioners. Mixed methods exist, and different methods are used in the same country for nominating judges for different types of courts and instances. All method classes may thus be located on a continuum where the democratic accountability or the democratic legitimacy towards the citizens is on one end while judicial independence is on the other.

In classifying the methods for appointing judges, it is vital to discern between common law *vs* civil law traditions, applied in and outside Europe, mainly due to the significant difference in the nature of the judicial career and the judge's role as a "lawmaker". In the common law method applied in countries such as Britain, Canada, New Zealand, and Israel, judges are elected among experienced lawyers. In contrast, in countries applying the civil law method, such as Italy, Germany, Spain, France, and Sweden, being a judge is a career in the public service that starts after completing law studies.[5] Since World War II, the civil law tradition formed a mixed approach for appointing judges: politicians nominate the judges of the constitutional court, usually a two-thirds or three-fifths qualified majority is required, with a broad political agreement between the coalition and opposition; the judges of the other instances are appointed by a "judiciary commission" where judges are the majority of members or have a crucial impact on the decision.[6] In law traditions exercised in Britain, Canada, Australia, and Israel, officials from the executive authority used

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[3] See, for example: Paul Brand, *The Making of the Common Law* (1992); Steven Gunn, Political History, New Monarchy and State Formation: Henry VII in European Perspective, 82 *Historical Research* 380 (2009).

[4] See: Kate Malleson, Introduction, in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* 3-4 (Kate Malleson & Peter H. Russell eds., 2005); Tom Ginsburg, Judicial Appointments and Judicial Independence (Paper written for the US Institute for Peace, January (2009). Available at: http://comparativeconstitutionsproject.org/files/judicial_appointments.pdf.

[5] Mary L. Volcansek, Appointing Judges the European Way, 34 *Fordham Urb. L. J.* 372-376 (2007).

[6] Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* 98-99, 103 (2009).

to have a significant say in judges' appointments. Occasionally, judges would be appointed by officials who held a mixed position in the executive authority and the judiciary, such as the Lord Chancellor in England. In these judicial methods and pre-1953 Israel, the entity responsible for appointing judges used to consult with judges and representatives of the legal practitioners. This practice of informal consulting is extremely important since it provides a glimpse of the gap between the legal *vs* the actual procedures for appointing judges. Considering the custom of consulting with officials from the judiciary and the immense weight given to their opinion, one may conclude that in methods that provide the formal authority for appointing judges to public representatives, the actual nomination is highly influenced by the opinion of judges. This observation regarding the informal weight given to the opinion of judges is actual in both the common law and the civil law traditions.[7]

From the twentieth century onward, changes were made in these principal traditions in that the procedure for appointing judges is less dependent on the political authorities. However, it seems that during the last decade, some countries withdrew from this trend. In other words, it may generally be pointed out that the trend around the world is to give increasing weight to professional considerations on the account of the impact of political officials.[8] The constitutional court judges in the civil law tradition are appointed by the political authorities by a qualified majority. In contrast, those of other instances are selected by a special commission in which the judges are either the majority or their opinion is given significant weight. The "judiciary commission" model adopted in Israel in 1953 for appointing judges in all instances (the Commission for the Selection of Judges) was first adopted by France and Italy and gradually spread in Europe and worldwide.[9] In the beginning, this idea took hold in countries applying the continental law tradition to increase the independence of judges whose appointment was then governed, like in Israel, by political officials. This way, judiciary commissions for appointing judges and disciplinary actions, when required, were established in France, Italy, Portugal and Spain. From the 1980s, the judiciary commission model spread worldwide, including South America, East European countries and Commonwealth countries, such as South Africa, Malesia, Kenia, and the Caribbean. Giving major weight to the opinion of judges, this commission appoints judges or is consulted by the appointing entity, sometimes even concerning Supreme Court judges.[10] The judiciary commission became the dominant model in both common law and civil law traditions and is not restricted to countries with constitutional courts.

International institutions also started recommending this model. *De facto*, many judges, sometimes a majority of judges, are members of these commissions, in line with

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[7] Rachel Davis, George Williams, Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia, 27 *Melbourne Uni. L. Rev*. 819, 823-825 (2003); Lee Epstein, Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 9 (2005).

[8] Nuno Garoupa, Tom Ginsburg, *Judicial Reputation: A Comparative Theory* 98 (2015).

[9] Wim Voermans, Councils for the Judiciary in Europe, 8 *Tilburg For. L. Rev*. 121 (2000); Wim Voermans, Pim Albers, *Councils for the Judiciary in EU countries* (2003).

[10] Jan Van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (2015).

the recommendations of international institutions.[11] Nevertheless, it should be clarified that the composition of these commissions may change from country to country. They usually comprise representatives of judges, selected by their colleagues or by the political authorities, representatives of the political authorities, lawyers and others. As mentioned, this model is perceived as a suitable means for balancing between the independence of judges and their accountability towards the citizens.[12]

Here are two examples: the first relates to Britain. In a reform conducted in Britain in 2005, the authority to appoint judges was transferred from the Lord Chancellor, who was at the same time part of three entities (the executive authority, the legislature and head of the judiciary), to professional commissions where judges' opinions were given a significant weight. As part of the reform, a new Supreme Court of the United Kingdom was founded. Its members are nominated by a commission comprising the Chief Judge of the Supreme Court, the Vice-Chief, and one representative from each commission for appointing judges for courts in England, Scotland and Ireland. At least one of the representatives is not a judge. The commission includes neither a representative of the executive authority nor of the legislature. The commission is allowed to recommend only one candidate to the Lord Chancellor – the equivalent of the Minister of Justice in Israel – who makes the actual nomination decision. He may postpone the nomination once and ask the commission to reconsider its recommendation. Commissions with a varied composition of judges, lawyers, and other members are responsible for appointing judges in the lower courts in England, Scotland and Ireland. The English commission consists of fifteen members: seven judges, two lawyers, and six other members, who may be, for example, senior academy members, army and public service retirees, and human resources experts, out of which one is the head of the commission. Though the commission members are recommended by the Lord Chancellor and nominated by the Crown, a binding recommendation is *de facto* given by the commissions for nominating candidates, whose members are assigned in a complex procedure which gives great weight to the head of the judiciary or a council of judges.[13] One may thus conclude that judges and professional commissions independent of the

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[11] See *Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary* (May 21-23, 2008); Council of Europe, *Judges: Independence, Efficiency and Responsibilities* (Recommendation CM/Rec (2010) 12, November 17, 2010); The General Assembly of the European Network of Councils for the Judiciary, *The Sofia Declaration on Judicial Independence and Accountability* (June 2013); European Network of Councils for the Judiciary, *Independence and Accountability of the Judiciary and the Prosecution: Improving the Performance Indicators and Quality of Justice* (ENCJ Report 2015-2016, June 3, 2016).

[12] The criticism sometimes expressed in research literature against the judicial commissions is less relevant for us for two reasons: firstly, it usually concerns judicial commissions that started working in the new Eastern European democracies while ignoring the existing judicial culture, unlike in Israel which was the first to adopt this procedure out of a special sensitivity to the political-legal culture of the time. Secondly, this criticism refers to judicial commissions handling the administrative management of the courts, not the appointment of judges. For exploring this criticism, see: Markus B. Zimmer, *Judicial System Institutional Frameworks: An Overview of the Interplay between Self-Governance and Independence*, 2011 Utah L. Rev. 121, 130-131 (2011); Michal Bobek & David Kosaˇr, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* (Research Paper in Law, College of Europe, 2013).

[13] See Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom*, 14 Int'l J. Const. Law 752 (2016).

political authorities have a crucial impact on the procedure for appointing judges in the UK.

The second example concerns Canada. In Canada, the Prime Minister had had the authority to appoint the judges of the Canadian Supreme Court, having, supposedly, the broad discretion to do so. However, the procedure for appointing judges had many informal rules, such as the dominance of the professional considerations and the rule that judges appointed to the Supreme Court usually should be judges from lower courts. Moreover, Canada conducted reforms in the procedure for nominating the Supreme Court judges. It adopted a model where these judges were appointed by a professional independent advisory commission, seemingly informal status which is not formulated under the law and which is based on a government decision. The commission comprises seven members: four professional members – an ex-judge, two lawyers and an academy member – and three members appointed by the Minister of Justice out of which at least two are not supposed to be lawyers. The commission, which recommends three to five candidates based on their professional skills, is in line with the prevalent trend in the Canadian provinces and the lower federal courts since the 1960s, where the provinces' Ministers of Justice are authorized to appoint judges.

In contrast, the government is authorized, given the recommendation of the Minister of Justice, to appoint federal courts' judges in a procedure that involves independent professional commissions. The power of these commissions is diverse and includes providing consultations, selecting candidates and providing a binding recommendation. Their composition is also diverse, though the majority of their members are judges and lawyers.[14]

The trend to neutralize the politicization of the procedure for appointing judges by applying mechanisms involving independent professional commissions skipped the constitutional courts whose judges are appointed by political officials. These courts, established in increasing number of countries since World War Two, are the sole authority with the power to judicially scrutinize the congruity between legislation and the constitution. The methods to appoint these judges seem less relevant in Israel since the Israeli Supreme Court is not a constitutional court – most of its work is not constitutional in nature. It has no exclusivity on judicial scrutiny of legislation since other courts may do so as well. Nevertheless, given the call of some people in the Israeli public to turn the Supreme Court into a constitutional court or alternately, the counter-call to narrow its power of judicial scrutiny of legislation because of the "democratic deficit" in the way its judges are appointed, it is worth mentioning that mechanisms for preventing partiality in appointing judges are also exercised in constitutional courts. Very frequently, mechanisms that give weight to judges and the parliamentary opposition are applied in selecting the judges of constitutional courts.

The three dominant mechanisms for appointing judges for constitutional courts, in all of which attempts were made to moderate the politicization of the appointment procedure, are as follows:

Appointing judges by the three state authorities. In Italy, Bulgaria and Ukraine, for example, the executive authority, the legislature, and the judiciary appoint the constitutional

[14] Peter McCormick, *Judging Selection: Appointing Canadian Judges*, 30 Windsor Y.B. Access Just. 39 (2012).

courts' judges, each nominating a specific lot of judges: one-third of judges are appointed by the President, one third by the legislature and one third by the Supreme Court. This composition ensures a balance and susceptibility to varied interests: the judiciary usually appoints incumbent judges; the President nominates judges from a variety of sources: court judges, law professors, or highly experienced lawyers. This method creates a balance between the ideological and professional composition of the court.

The appointment through a consensus between the coalition and the opposition: as mentioned above, the elected authorities appoint the constitutional court judges in many European and non-European countries, but a qualified majority of two-thirds or three-fifths is required in order to give weight to the opposition's stand. This method is used in electing at least part of the judges of the constitutional courts in Italy, Belgium, Mexico, Spain and Portugal. This mechanism has a positive impact as judges are nominated through a broad consensus, and their nomination is accepted by diverse political parties rather than by just a specific political wing. Moreover, the judges are loyal to the constitution and the law and not to a particular political ideology.

The collaborative model: applying this model necessitates collaboration between a few elected bodies. Being elected by the citizens, each body is bestowed an independent democratic legitimacy and reflects different political powers. For example, in Czech Republic and Belgium, the President proposes the candidate and the legislature approves him or *vice versa*. A certain degree of broad consensus between the governing bodies is required in this model as well. Applying this model in Belgium enables appointment of judges by a general consensus, including the opposition.

In addition to the different methods for appointing judges, the power of the regular courts in Europe, in matters of judicial scrutiny of the legislation, has been strengthened in recent years on account of the constitutional courts. One reason for this is that the nations that are signatories of the European Convention for the Protection of Human Rights have subordinated themselves to the judicial scrutiny of the European Court of Human Rights on these matters. England has additionally included the law for the protection of human rights, enabling its courts to apply the Convention's provisions on human rights and even indicate an incongruence between the Parliament's laws and the Convention. The second reason for the rise of power of the regular courts is the subordination of the EU countries to the judicial scrutiny of the European Court of Justice, the central judicial institute of the EU. As a result, the signatory states subordinated themselves to the doctrine that is increasingly taking hold, which deems that the EU countries' regular courts should interpret the local state laws according to the EU's laws as expressed in the "displacement doctrine".[15] The European Court of Justice ruled that ordinary courts of a country should do so – in cases when an internal appeal is not possible – when they think a state law does not comply with the EU law, even if the national constitutional court objects to it. This trend adds to the increasing number of appeals of regular courts in the European Union member states to the EU's Court of Justice due to violation of human rights in their country. These trends

[15] Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy*, 12 Int'l J. Const. L. 525 (2014); Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy: A Rejoinder*, 15 (3) Int'l J. Const. L. 815 (2017).

combined signify that the ordinary courts in EU states – where judges are appointed in a non-political procedure that gives a lot of weight to judges – have more and more power to scrutinies legislation on account of the constitutional court's power.

Observing the international trends over a long period of time indicates that the method for appointing judges in Israel is not exceptional but rather part of a worldwide trend of attempts to neutralize political considerations in appointing judges. Ensuring professional and independent judiciary along with preserving public trust in the judiciary by preventing its politicization are primary goals of this trend. Nevertheless, and more so in the last decade, growing attempts have been made to reverse the trend and increase the government's involvement in several European countries as well as in Israel. In this sense, judicial independence is under constant threat.

The manner in which judges are elected and their work terms – which release them from being supervised by the government with regard to their appointment, salary, immunity, suspension, dismissal, and the like – guarantee their personal independence.

3. THE PERSONAL INDEPENDENCE OF THE INDIVIDUAL JUDGE

After being nominated and in order to ensure their independence, the judges' tenure should be guaranteed by appointment for life or at least up to a certain age. Had the nomination been restricted for a limited period of time, their job security would not have been guaranteed, and the nomination of a "desired" judge may have been preferred over that of an "undesired" judge. That would have impaired their judicial independence. International standards determine that judges should be appointed, if not for life, then at least until the law's retirement age.[16] Nevertheless, judges are appointed for life only in a few countries; usually, there is a fixed age for retirement or different ages according to the judge classification. In Israel, the binding retirement age for judges in all instances is age of 70.

It is worth mentioning the procedure in Israel which enables the Minister of Justice, pending the approval of the President of the Supreme Court, to appoint a judge in office to a higher instance for a limited period of up to a year. This temporary appointment for a "trial period" is undesired and is usually considered as being contrary to the international standards.[17] The motives for such a temporary appointment may result from political or some other pressures and not of pure judicial interests. For this reason, such an appointment sets a problem in terms of personal independence and may appear to be inadequate.

Concerning the judges' salaries, the principle of personal independence necessitates that their salary is not decreased either due to changes in the direct salary or the financial benefits. International standards enable impairing the judges' employment terms only if they are part of public financial measures in that State, *i.e.* not due to a policy that selectively damages the judicial sector.

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[16] IBA Minimum Standards of Judicial Independence (Adopted 1982), Art. 22. Available at: https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29

[17] The Montreal Universal Declaration on the Independence of Justice (10 June 1983), Art. 2.20. Available at: https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf

An individual judge's material independence means that judges are subject only to the law and their own conscience in the judicial work. This ensures they are neutral, impartial and free from any undesired influence. This principle is enshrined in section 2 of the Basic Law: The Judiciary [complete]. The prevention of irrelevant considerations in the judicial act serves two purposes: the first is the social interest of attaining the judges' neutrality and impartiality; the second is the appearance of justice and the public trust in the courts, the judges, and the procedure itself. This entails a requirement of rules that protect judges from any inappropriate influence. Part of the rules restricts the judges themselves, such as the rule prohibiting judges from holding any office in other government authorities or having business relationships. Different practices limit the manner judges are treated by others, such as the sub judice principle, and limit the parliament's criticism of judges.

4. COLLECTIVE-INSTITUTIONAL INDEPENDENCE

Collective-institutional independence refers to the judiciary in its entirety. Any intervention may impact the sense of independence of individual judges in the judiciary. Institutional independence of the judiciary – *inter alia*, supervision, and control of workforce, court budgeting, and maintenance – is an essential measure for evaluating collective judicial independence.

The Minister of Justice is responsible for the court administration. With the approval of the President of the Supreme Court, the Minister nominates the Director of the Courts, who is responsible for the administration of the courts and reports directly to the Minister. Additional powers of the Minister of Justice is the power to establish courts and the power to enact rules that regulate the courts' administration and procedures. S/he also heads the Commission for the Selection of Judges and has the power to initiate disciplinary measures against judges, which may directly impact the independence of the individual judge. Additional powers, which require the approval of the President of the Supreme Court, include: temporarily appointing a judge for a different instance, appointing presidents of the courts (except for the Supreme Court), etc. The judges' salary is determined by a committee of Knesset, the Israeli parliament. In my opinion, reform is urgently required *vis-à-vis* the broad powers given to the Minister's and his responsibility for the courts' administration. The desired arrangement would be to give the responsibility for the administration of the courts and the power to determine administrative measures to the President of the Supreme Court or at least to the President and the Minister conjointly.

5. INTERNAL INDEPENDENCE

Internal independence is required in order to prevent other judges' pressures or instructions from influencing an individual judge's judicial roles. That may refer to three responsibilities: the judge's administrative responsibilities such as managing files, scheduling hearings, expediting hearings, etc.; procedural accountability while the trial is conducted; material responsibility pertaining to ruling and decision-making.

A subtle balance is required between tight administrative control *vs* loose or lack of such control – unrestricted administrative control in allocating files to judges may impair the independence of a nonconformist judge, for example. At the same time, lack of administrative control is also undesirable for reasons of efficiency.[18]

6. CONCLUSION: THE APPROPRIATE APPROACH WHERE THE JUDICIARY IS AN INDEPENDENT AND SELF-GOVERNING POWER

A public committee in Israel examined and recommended this approach in the 1990s, yet the recommendations were rejected. The current problematic situation is especially criticized since independence is given to other state bodies. The President, for example, is not part of the executive power but rather an independent branch that is elected by Knesset and budgeted separately from the government's budget. So are the National Bank and the State Comptroller. On the other hand, the courts' budget is part of the Ministry of Justice budget, and the Minister of Justice controls the judicial system's administration. This situation is abnormal as in many legal proceedings the state is a party, which happens very frequently – in all criminal proceedings, most of the legislative and administrative proceedings, and in many civil law proceedings as well. The courts rule in many proceedings where the state is a party and should consequently be free from any dependence or undesired interests. The judiciary's budget should thus be determined directly by Knesset and not by the government.

It is important to clarify that an independent judiciary does not mean a "privatized judiciary". Clearly, the judiciary should always remain an organic part of the state; the state employs its employees, and its acts are considered the state's acts. We refer to the independence of the judiciary, not to an independent power. Moreover, the desired independence is from the executive power, *i.e.* the government. As for the budget, our approach does not imply budgetary independence from the legislative power but, quite the contrary, we wish to strengthen the Knesset's status relative to the government's. Phrased differently, we "rely" on the parliament more than on the government.

Once this model is applied, one may ask how the independent system should be administered and how it would make decisions. In the USA, for example, the judiciary is run by other judicial bodies like the judicial conference or the judicial council. The federal courts are not sub-units of the executive branch. Neither the President nor the Minister of Justice has any power over the court system, and Congress determines the courts' budget.

[18] J. Zagel, A. Winkler, *The Independence of Judges*, 46 Mercer L. Rev. (1995) 795.

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The Montreal Universal Declaration on the Independence of Justice (10 June 1983), Art. 2.20. Available at: https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf

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THE PERCEPTION OF JUSTICE IN WESTERN BALKANS COUNTRIES

The EU accession process is the main driver of judicial reforms in Western Balkan countries. The judicial reforms have been a continuous process for over 15 years, and each Western Balkan country adopted several strategies as a key policy document. As a result of reforms, all countries established new judicial bodies, transferred governance powers from executive to the judicial councils, introduced new judicial professions (notaries, bailiffs), adopted and strengthened rules and procedures for the appointment of judges and prosecutors, optimised court network, etc. Despite the fact that reforms were conducted with the aim to increase efficiency and integrity of judiciary, trust in the justice system across Western Balkans is still low, and position on international indices raises concerns on the impact of reforms. In the article, the author will analyse and compare the results of reforms in the Western Balkan countries in the key justice areas: efficiency, access and independence of the judiciary. The purpose of the analysis is to find out whether countries in the region are closer to the EU judicial standards and what has to be done to align the judiciary with EU standards.

Keywords: judiciary, independence, integrity, EU standards, judicial reform

1. INTRODUCTION

The relevance of justice for overall development is recognised in key international documents. At the heart of the 2030 UN Agenda for Sustainable Development lies a vision of a "just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met."[19] The justice gap undermines human development, reinforces the poverty trap, and imposes high societal costs.[20] Justice is a thread that runs through

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[19] United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, New York, 2015.

[20] The World Justice Project, Measuring the Justice Gap, 2019, https://worldjusticeproject.org/ sites/default/files/documents/WJP_Measuringpercent20thepercent20Justicepercent20Gap_final_20Jun2019. pdf

all 17 of the Sustainable Development Goals (SDGs) and is critical to end poverty, reduce inequality and promote peace and inclusion.[21]

On the regional level, the European values on the rule are relevant for EU member states and accession countries. Western Balkans countries continued to follow the EU accession process for more than two decades and the rule of law, as the common value specifically mentioned in the Treaty of European Union[22], remains the foundation of the EU integration process. The core elements of the rule of law are reflected in the negotiation Chapter 23 of the *acquis*. European Commission expects of candidate countries to fully comply with EU principles related to the rule of law, specifically the principle of independent judiciary, fundamental rights and anti-corruption. In the field of judiciary, areas of focus of Chapter 23 accession negotiations relate to judicial independence, impartiality, accountability, professionalism and efficiency of the judiciary. The importance of the independent and efficient judiciary is twofold and relates to the rule of law and mandate of the national courts for the effective application of the EU *acquis* and upholding the rule of law within the EU (Lenaerts, 2020: 30).

In the process of justice sector reforms, Western Balkan countries strive to incorporate and achieve the European judicial standards on independence, quality and efficiency since it is an essential part of the overall enlargement process (Bobek, Kosar, 2014: 1275). Implementation of each standard requires numerous reforms that should lead to establishing an independent justice system resistant to any undue influence. In addition to the independence, the reforms are directed to the creation of the high quality judicial services, including an accessible judicial system and equality to all citizens before the court. Furthermore, the increase of efficiency is the goal that is focused on trial within a reasonable time as the right guaranteed in the European Convention on Human Rights.[23] However, in the previous waves of enlargement, the EU requirements for reforms mostly had an impact on the governance of the judicial branch and the governance of the courts, with divergent outcomes across countries (Sedelmeier, 2011: 19). As a lesson learned from previous enlargement processes, the Western Balkans countries need to present sustained efforts, track record and irreversibility of reforms in fundamental areas.[24]

The aim of the article is to assess impact of the reforms in the Western Balkan based on triangulation of different sources (statistical data, analytic reports and survey on perception and experience). The comparative approach enables comparing of similarities and differences of impact of judicial reforms in Albania, Bosnia and Herzegovina, Kosovo,[25] Montenegro, North Macedonia, and Serbia.

[21] UN Taskforce on Justice, Justice for All: Report of the Task Force on Justice, April 2019.

[22] According to the European Commission, the rule of law can be defined as "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law". European Commission, Communication: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 Final, pp. 4.

[23] Article 6 of the European Convention on Human Rights.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018)65 final, Strasbourg, 06.02.2018.

[25] Kosovo in line with UNSCR 1244(1999).

2. BACKGROUND OF JUDICIAL REFORMS

Success in the judicial reforms is important for the EU accession process, but also for the business sector and citizens due to the importance of creating an enabling business environment, as well as for economic growth and protection of rights. A sound system of commercial legal and regulatory frameworks and well-functioning public and judicial services are important contributors to economic growth.[26] The rule of law, justice and access to redress may support contract enforcement, reduce transaction costs and facilitate investments (Acemoglu, Johnson, Robinson, 2005: 397). Effective and equal access to justice for business also fosters good governance, legal certainty and predictability.[27] That is confirmed in the World Bank 2019 Regional Survey of How the Justice System Impacts the Business Climate in South East Europe, which concludes that across South East Europe, courts and existing laws are viewed as having the most significant negative impact on business operations, ahead of other institutions in the justice sector.[28]

To achieve progress in the EU accession process, the Western Balkan countries have been implementing judicial reforms within their national strategic framework for more than 15 years following the EU-Western Balkan Summit in Thessaloniki in 2003 (van Meurs, 2003: 10). The EU is monitoring progress in the justice sector through the different mechanisms and tools since there is clear indication that the EU will not take the Western Balkans seriously if there is a continuation of political interference in judicial decisions (Mendelski, 2018: 116). While the achievement of some standards, such as efficiency, is easier to measure, other standards are more challenging to assess, such as access and independence of the justice system. While the accession status of Western Balkans countries differs, the EU requirements related to the rule of law are the same for all. The Commission identified Serbia and Montenegro as front-runners for EU accession and recommended that both countries be allowed to join the EU by 2025.[29] The accession negotiations were opened in June 2012 with Montenegro and in January 2014 with Serbia. North Macedonia and Albania are candidate countries. The Council decided in March 2020 to open accession negotiations with Albania and North Macedonia, however, accession negotiations have not been opened yet. Bosnia and Herzegovina, and Kosovo have the status of the potential candidate countries.

Key reforms included changes of the constitutional and legislative framework with the aim to strengthen the independence of the judiciary and ensure separation of powers. North Macedonia amended the Constitution in 2005 to introduce a judicial self-governance body and strengthen independence of judiciary in line with the Council of Europe

[26] OECD, What makes civil justice effective?, Economic Department Policy Notes, No. 18, 2013.

[27] OECD, Equal Access to Justice, Expert Round Table, Background Notes, 2015, available at: http://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf

[28] Senderayi, R. G., Svircev, S., Skopljak, Z., Ilic, S., (2019) Understanding Barriers to Doing Business: Survey Results of How the Justice System Impacts the Business Climate in South East Europe, World Bank Group, available at: http://documents.worldbank.org/curated/en/168701564080491520/Understanding-Barriers-to-Doing-Business-Survey-Results-of-How-the-Justice-System-Impacts-the-Business-Climate-in-South-East-Europe

[29] European Commission Communication on a Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans, COM (2018) 65 final.

recommendations.[30] However, challenges in implementation and poor results implicated the drafting of new Constitutional amendments (Preshova, 2018: 5). Montenegro amended Constitution in 2013 in the part related to the judiciary with the aim to strengthen independence and enable country-wide recruitment and merit-based promotion.[31] Albania in 2016 adopted changes of more than one-third of its Constitution to strengthen the integrity of the judiciary and enable the vetting process as a major precondition to the opening of accession talks with the EU (Hoxhaj, 2020: 251). Kosovo in 2016, following the recommendation of the Venice Commission and the European Commission for other countries,[32] adopted a constitutional amendment on the composition of the judicial council.[33] Serbia opened discussion for the constitutional amendments in 2017 within the framework of the implementation of interim benchmarks and the Action plan for Chapter 23 with the aim to reduce political influence over the judiciary.[34]

It could be concluded from the constitutional reforms that within the EU accession conditionality framework particular focus was on the judicial governance and independence. Although across Europe judicial governance systems differ since they have a historical background, over the past few decades, it is noted that the standards regarding judicial governance have evolved and promoted strong and independent judicial councils and training academies as a key indicator of progress in judicial reforms (Preshova, Damjanovski, Nachev, 2017: 13).

At the institutional level, all Western Balkan countries introduced judicial councils as guarantees of independence of the judiciary.[35] In line with European standards and recommendations, judicial councils were created to take over tasks previously handled by the ministries of justice. The main competence of the councils across the Western Balkans is to decide on status matters of judiciary, namely appointment, evaluation, promotion and dismissal. The composition of the councils is regulated differently, but in all countries the members of the judiciary present at least a slight majority.

At the end of the 90s and the beginning of the 2000s, across Western Balkans the relevance of judicial training institutions was recognized.[36] The EU accession process accelerated the transformation of judicial training institutions into a crucial factor for

[30] European Commission for Democracy through Law – Venice Commission, Opinion on Draft Constitutional Amendments Concerning the Reform of the Judicial System in "The Former Yugoslav Republic of Macedonia", CDL-AD (2005)038, para 38-54.

[31] European Commission, Montenegro 2013 Progress Report, SWD(2013) 411 final.

[32] European Commission, Kosovo 2016 Report, SWD(2016) 363 final, November 2016.

[35] Amendment of the Constitution of the Republic of Kosovo No. 05-V-229 24 February 2016, Official Gazette of the Republic of Kosovo, No. 9 / 11 March 2016.

[34] European Union Common Position Chapter 23: Judiciary and Fundamental Rights, AD 20/16, Brussels, 8 July 2016.

[35] Albania introduced the High Judicial Council in 1992, Bosnia and Herzegovina introduced the High Judicial and Prosecutorial Council in 2004, in Kosovo the Judicial Council was established by UNMIK Regulation in 2005, Montenegro established the Judicial Council in 2008, North Macedonia established the Judicial Council by constitutional amendments in 2005, and Serbia introduced the High Judicial Council by law in 2008.

[36] In Albania, the School of Magistrates was established in 1996 for the organisation of initial training of candidates for judicial and prosecutorial positions and continuous training of judges and prosecutors. In Bosnia and Herzegovina, training for the judiciary is provided by the Judicial and Prosecutorial Training Centres

raising the capacities of the judiciary.[37] Specifics of the transformation is the establishment of training institutions as independent bodies competent for both initial and continuous training of judges and prosecutors.[38]

In addition, new judicial professions were introduced in all Western Balkan countries with the aim to strengthen the efficiency of the judicial procedures and remove the administrative burden from the court administration and judges. While notaries were introduced in some countries already in the 90s of the XX century, the introduction of private bailiffs was more challenging and happened over the last decade.[39]

The main driver of the reforms remains the European Union integration process through annual reports and assessment of the results. However, despite Western Balkans remaining on the EU integration path, its constant failure to adhere to the recommendations of the European Commission, GRECO, and the relevant EU and Council of Europe bodies might be a sign that the perspective of EU integration is not a strong motivating factor (Vachudova, 2019: 64). The problem might be two-fold**:** on the one hand, Western Balkan countries have been on the EU path for almost two decades without having an accession date in the foreseeable future (or opening negotiations). On the other hand, the constant incapability of Western Balkans to deal with issues such as corruption, independence of judiciary, and accountability of officials, demonstrate a lack of the political will to undertake substantial reforms.

Integrity and independence issues of judicial stakeholders, alongside the lack of effective monitoring and accountability of the work of judicial professionals, are preventing the Western Balkan countries from improving their rankings at the relevant international lists and indexes. At the World Justice Project 2020 Rule of Law Index, Western Balkans countries had score range from 0.54 to 0.50 out of 1.0[40] and they were

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(JPTC) of the two Entities – the Federation of Bosnia and Herzegovina and Republika Srpska, in line with laws establishing the training institutions in 2002. In Kosovo, the Judicial Institute was established in 2000 with the mandate to organize initial and continuous training for future and sitting judges and prosecutors. The Kosovo Judicial Institute was transformed in the Judicial Academy by law in 2017. In 1999, the Centre for Continuous Education for the organisation of professional training of judges and prosecutors was established in North Macedonia. In 2005, the Centre was transformed into academy for the training of judges and prosecutors. A similar situation was in Montenegro, where the Judicial Training Centre was established in 2000 and transformed in 2015 in the Centre for Training in Judiciary and State Prosecution Service.

[37] CCJE, Opinion No. 4 on appropriate initial and in-service training for judges at national and European level, 27.11.2003.

[38] In accordance with paragraph 2.3 of the European Charter on the Statute for Judges, any authority responsible for supervising the quality of training programme should be independent of the executive and the legislature and at least half of its members should be judges. The CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges recommends that the same authority should not be responsible for training and appointments, promotion and disciplinary proceedings against judges.

[39] Private bailiffs and notaries were introduced in Serbia in 2014; in Montenegro notaries were introduced in 2011 and private bailiffs in 2014; in North Macedonia notaries were introduced in 1997 and private bailiffs in 2006; in Albania notaries were introduced in 1994 and private bailiffs in 2010; in Kosovo notaries were introduced in 2011 and private bailiffs in 2014; in Bosnia and Herzegovina notaries were introduced in 2007, while the enforcement is conducted only by the court enforcement agents.

[40] 2020 data are available at: https://worldjusticeproject.org/rule-of-law-index/global/2020
The World Justice Project (WJP) Rule of Law Index is the world's leading source for original, independent

ranked in the second part of the list, from 54th to 78th position out of 128 countries. A similar situation is with other international rankings, such as Transparency International Global Corruption Index, or World Bank Worldwide Governance Indicator.

3. PERCEPTIONS AND EXPECTATIONS FROM JUDICIAL REFORMS

Although significant legislative and institutional changes were introduced over the two decades as a part of the EU accession process, citizens in all Western Balkans countries but Kosovo are not convinced that the previous reform efforts resulted in meaningful improvements in the judiciary.[41] However, businesses see the positive impact of the previous judicial reforms. In addition, many citizens and businesses are of the opinion that the previous reforms did not have an impact on the situation in the judiciary. Lawyers side with citizens and businesses, however, their overall assessment of the previous reforms is slightly better.

Judges and prosecutors in Western Balkan countries speak highly about the success of past reforms, except in North Macedonia and Serbia, where they are very critical and have negative opinion about the previous reform efforts. The negative perception of judges and prosecutors in Serbia could be explained by two significant reorganisations of the court network in 2010 and 2014, re-election of judges in 2009 when 30 per cent of judges and prosecutors were not re-elected, and many other actions that were not carefully planned and implemented (Rakić Vodinelić, Knežević Bojović, Reljanović, 2012: 96). In North Macedonia, judges and prosecutors' negative perception is a result of shortcomings and abuses of appointment process that was susceptible to the considerations of the affiliation of a candidate with the ruling parties, obstructions of the work of the Special Public Prosecutor's Office and abuse of the Constitutional Court (Ali, Ramić Mesihović, 2016: 111).[42]

Moving forward, citizens in all Western Balkan countries report low expectations concerning the impact of current and future reforms. In fact, there are more citizens in all countries, except in Serbia and Montenegro, who believe that the current reform is going in the wrong direction than those believing that it is moving in the right direction. Though slightly more positive in their overall assessment, great number of businesses are also not convinced that there will be any meaningful improvements in the court system in the future. In Albania, Kosovo and Montenegro, business sector representatives are significantly more positive than citizens. In Albania, the positive opinion might be

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data on the rule of law. Now covering 128 countries and jurisdictions, the Index relies on national surveys of more than 130,000 households and 4,000 legal practitioners and experts to measure how the rule of law is experienced and perceived around the world. Performance is assessed through 44 indicators organized around eight themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. Scoring is from 0 to 1, where 1 is for the best results.

[41] 2021 Regional Justice Survey Albania Country Report, Bosnia and Herzegovina Country Report, Kosovo, Country Report, Montenegro Country Report, North Macedonia Country Report, Serbia Country Report, World Bank.

[42] European Commission, Urgent Reform Priorities for the FYROM, 2015, available at: https://eeas.europa.eu/sites/default/files/urgent_reform_priorities_en.pdf

result of expectations from the vetting process. Among lawyers, those from Albania and Montenegro believe that current reforms will result in a positive change. Their peers from other Western Balkan countries are slightly more sceptical.

Judges and prosecutors in all Western Balkan countries are divided in their opinions. While judges in Albania, Kosovo and Montenegro support current reforms to a large extent, the majority of their colleagues in Bosnia and Herzegovina, North Macedonia and Serbia do not believe that reforms are going in the right direction. Prosecutors in Bosnia and Herzegovina by large are the most sceptical about the success of current reforms, probably due to challenges caused by lack of any adequate safeguards as well as by being exposed to pressure and interferences in the ongoing cases.[43]

Survey results clearly show differences in perception of citizens and businesses on one hand, and of judges and prosecutors, on the other. These discrepancies in perception might be explained by different information challenges and lack of communication of judiciary with the public.[44] While citizens and businesses are informed through informal means, such as TV, various portals and friends, judges and prosecutors are informed via formal means, such as official web pages and official correspondence.

In most Western Balkan countries, long court delays are common, and efforts to reduce time frames have been incorporated in reform strategies. To improve the efficiency of judiciary, all Western Balkan countries took numerous measures, including amendments to procedural laws, such as criminal procedure law, civil procedure law, bankruptcy law, law on administrative procedure, law on non–contentious proceedings, law on enforcement, etc. Furthermore, the introduction of an automatic case management system in all countries contributed to the improvement of performance monitoring and reporting, including monitoring of old cases and the introduction of an age list to have oversight of the age structure of cases. Some of the countries, like Serbia and Montenegro, introduced the Law on Protection of the Right to a Trial within a Reasonable Time,[45] however the substantial improvements are yet to be achieved (Nenezić, Vukčević, 2019: 33).

Despite all reforms, the length of court proceedings continues to exist as a common problem in most countries, especially in Bosnia and Herzegovina and Kosovo. Some of the reasons for the delays are poor management of cases by judges, especially in ensuring the presence of parties in the court,[46] complex procedures, limited use of new technologies, etc. World Bank Regional Justice Survey results confirm that almost half of the hearings did not contribute to the case resolution. Lawyers are the most critical, and in North Macedonia they stated that only 37 per cent of hearings contributed to the resolution of case compared to 60 per cent of their peers in Albania. This perception is confirmed by the time needed for case resolution. Moreover, the 2020 CEPEJ Report (2018 data) indicates that disposition time in civil and commercial litigations in first instance courts in Bosnia

[43] Expert Report on Rule of Law issues in Bosnia and Herzegovina (*Priebe Report*), December 2019, para 42-52, available at: http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf

[44] 2021 Regional Justice Survey, Country Reports, World Bank.

[45] In Montenegro, the Law was adopted in 2007, Official Gazette of Montenegro, No. 11/2007. In Serbia, the Law entered into force on January 1, 2016, Official Gazette of RS, No. 40/2015.

[46] OSCE, Trial Monitoring of Corruption Cases in BIH – Second Assessment, 2019.

and Herzegovina amounts to 483 days and is significantly higher than the European average of 201 days.[47] Similarly, in Kosovo citizens are facing a long duration of cases with 947 days for the first instance decision in civil and commercial litigations. Serbia's disposition time is closer to the European average with 225 days for the first instance decision in civil and commercial litigations, while in Montenegro is 229.

Some reforms were received positively by the public, while others were criticised and perceived as a burden for citizens. The introduction of notaries was received positively, except by lawyers in Serbia (Živković, Živković, 2013: 440), while controversies and challenges followed the establishment of private bailiffs.[48] While notaries and administrative court services are generally positively rated by citizens and the busines sector, bailiffs are rated negatively. A combination of several factors can explain this perception: the fact that laws that regulate the work of bailiffs are still with flaws, lousy implementation of normative acts related to the work of bailiffs, poor monitoring, scarce disciplinary reactions, and several affairs of former presidents of the Bailiffs' association.[49]

Despite the fact that many important reforms were conducted with the aim to increase court's efficiency, citizens, business and lawyers still believe that there is a need for improvement. Both citizens and businesses across all Western Balkan countries are generally not satisfied with the efficiency of courts in their respective countries. However, actual experience with courts positively impacts on both citizens and businesses, resulting in a significant increase of satisfaction shares in Albania, North Macedonia and Serbia.

In contrast, judges and prosecutors across Western Balkans are very satisfied with the courts' efficiency. Despite a high number of judges across all Western Balkan countries, except in Albania, judges and prosecutors supported further increasing of human resources as a measure to improve court efficiency. In the CEPEJ report of 2020 (2018 data), the average number of judges per 100,000 inhabitants was 21, while the Western Balkan countries average ranged from 24.6 in North Macedonia to 50 in Montenegro.[50] Notwithstanding judges' perception, increasing the efficiency of the Western Balkans judicial system is unlikely to be achieved by additional staffing, and the focus should be on other elements that can raise efficiency, such as processes, good practices, training, as suggested, for example, by lawyers (Dimitrova Grajzl, Grajzl, Sustersić, Zajc, 2012: 22). Further, judges point to improved working conditions through better court infrastructure to contribute to higher efficiency, whereas prosecutors name better cooperation with other government agencies as an important point.

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[47] European Judicial Systems CEPEJ Evaluation Report, 2020 Evaluation Cycle (2018 data), European Commission for the Efficiency of Justice.

[48] Since its introduction, the institute of bailiffs in Montenegro has been a constant issue with regards to adherence to professional standards, accountability, independence, and integrity. Two former presidents of the Chamber of Bailiffs were arrested, putting an additional doubt on the independence and *bona fidei* work of the Chamber and its members. See: https://m.cdm.me/hronika/uhapsen-javni-izvrsitelj-sinisa-mugosa/, https://m.cdm.me/hronika/falsifikovanim-presudama-stranke-zloupotrebljavaju-izvrsitelje/

[49] Javni izvrsitelji u Crnoj Gori, CEMI, Podgorica, 2017.

[50] European Judicial Systems – CEPEJ Evaluation Report, Council of Europe, 2020 available at: https://rm.coe.int/evaluation-report-part-1-english/16809fc058

In addition to improving efficiency, access to justice was also set as a priority in the reform strategies of Western Balkan countries. Access to justice encompasses all the elements needed to enable citizens to seek redress for their grievances and to demand that their rights are upheld regardless of their economic, social, political, migratory, racial, or ethnic status or their religious affiliation, gender identity, or sexual orientation (Lima, Gomez, 2020:1). Access to justice elements include the existence of a legal framework granting comprehensive and equal rights to all citizens in accordance with international human rights standards, availability of affordable and quality legal advice and representation and availability of accessible, affordable, timely and effective dispute resolution mechanisms. To advance access to justice, all Western Balkan countries took numerous measures aiming to improve access to information through establishing websites of all courts and prosecutors' offices, including the availability of relevant information online (addresses and phone numbers, navigation through the system, electronic versions of relevant legislation), the establishment of judicial portals to ease access to information on a specific case (*i.e.* e-board with information on date and time of the hearing) and affordability of judicial system (*i.e.* legal aid).

To understand the survey results, it is important to point to limited experience with the court system among citizens with shares around 20 per cent across Western Balkans, ranging from 19 per cent in Kosovo to 37 in Serbia. Among those citizens who have gone to court, most have either hired a private lawyer or opted for self-representation before the court. Despite limited experience with the court system, at least half of all citizens across the five countries perceive courts to be accessible, while in Albania satisfaction with accessibility is lower and only 37 per cent of citizens perceive courts as accessible. However, citizens assess the financial accessibility of courts as the least favourable dimension. That is in direct correlation with free legal aid availability. Despite the existence of free legal aid in all Western Balkan countries,[51] the awareness on free legal aid among citizens is still very low. Half of the citizens across Western Balkans do not know if free legal aid is available or not, while less than 10 per cent are familiar with details of free legal aid scheme. In addition to lack of awareness, it is important to mention that free legal legislation across Western Balkans needs to be improved. For example, in Bosnia and Herzegovina free legal aid is available only to the very limited category of judicial system users who are natural persons with the very low-income threshold. Thus, many individuals above the set income threshold, but still with low income, do not have access to the free legal aid. [52] Therefore, even if public awareness on the availability of legal aid is in place, the free legal aid system will still remain unavailable to individuals who do not fall under the threshold. Both Serbia and Montenegro are facing challenges regarding the type of procedures covered by legal aid, potential users and providers, and control of the quality of free legal aid (Palačković, Čanović, 2020: 73; Raonić, Radović, Vujičić, 2019: 57).

[51] Law on Free Legal Aid is applied in Albania since 2017, in Bosnia and Herzegovina since 2016, in Kosovo since 2012, in Montenegro since 2012, in North Macedonia since 2012 and the new Law since 2019, in Serbia since 2019.

[52] Amnesty International, Report on Bosnia and Herzegovina to the UN Human Rights Committee, 2017.

4. TRUST IN THE JUSTICE SYSTEM

An independent judiciary, as the rule of law requirement, implies protection of citizens against the arbitrary use of power by the state and that judges act freely and impartially without political pressure, influences and biases.[53] The independence of the judiciary need to be guaranteed, and the judges shall be able to decide matters before them impartially, based on facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[54]

The judicial systems of the Western Balkans are negatively affected by the politicisation of the judiciary and undue influences (Anastasi, 2018: 3). Although the establishment of an independent judiciary across Western Balkan has been part of the EU accession process, institutional and legislative changes, such as the establishment of judicial councils and academies without adequate internal reform, has led to the emergence of new channels of political interference (Fagan, 2016: 3). These conclusions are also confirmed through the World Bank Regional Justice Survey that identified integrity and independence as the major problems of the judicial systems of the Western Balkans. Citizens across Western Balkan countries have divided opinion on trust in the judiciary. In Albania, Bosnia and Herzegovina, and North Macedonia, citizens report low levels of trust, with the lowest expressed in Albania where less than one-fifth of citizens tells that they have trust in their judiciary. Citizens in Kosovo and Montenegro report the highest shares of trust, with around 60 per cent of general population having trust in the judiciary. In Serbia population is divided and 50 per cent of citizens express trust in the judiciary. Similarly, citizens in all Western Balkan countries have divided opinion on the independence of the judiciary in their countries. In contrast, the majority of judges believe that they and the court system are independent. Prosecutors are more critical, but a relatively high share of prosecutors believe that system is independent.

All six countries are ranked relatively low on Transparency International's Corruption Perceptions Index (CPI), ranging from Montenegro in 67th place to Kosovo and North Macedonia in 111th out of 179 countries.[55] The latest EC progress reports assessed each of the six Western Balkan countries' fight against corruption as being at some level of preparation. Also, corruption is reported by the majority of citizens across all countries to be present in the judiciary.[56] However, when asked if they have resorted to informal means and corruption to gain an advantage in their court case, the vast majority of citizens

[53] Venice Commission, CDL-AD (2010)004-e, Report on European Standards as Regards the Independence of the Judicial System: Part I, Venice, 12-13 March 2010), par. 6.

[54] Basic Principles on Independence of Judiciary, General Assembly Resolutions 40/32 of 29 November 1985 and 40/146, 13 December 1985, principle 2. Some common criteria to assess whether a court could be considered as independent are: 1) the manner of appointment of judges; 2) the duration of their term of office; 3) the existence of guarantees against outside pressure; and 4) whether the court presents an appearance of independence. See, e.g. *Campbell and Fell v. UK*, App. No. 7819/77; 787/77, ECtHR, 28 June 1984, para. 78.

[55] Transparency International, Corruption Perceptions Index 2020, available at: https://www.transparency.org/en/cpi/2020/index/mne

[56] 2021 Regional Justice Survey, Country Reports, World Bank.

reported that they had not had such experience. Judges also believe that corruption is present within their court system, however, the range significantly differs, from 67 per cent of judges in Albania to 13 per cent in Montenegro. It is important to highlight that most of judges report that pulling strings and influence on career are the most often forms of corruption they experienced.

Lack of independence and low trust in the justice system affects perception of the level of fairness. Most citizens in Albania, Bosnia and Herzegovina and North Macedonia believe that the judicial system in their country is not fair; only in Kosovo just above 60 per cent of citizens believe that the court system is fair. According to citizens, the main factor that contributes to a lack of fairness is a difference in economic status and party membership that can result in favourable treatment before the courts.

5. CONCLUSIONS

The assessment showed that although the legislative framework is closer to the EU requirements, the impact of reform in Western Balkans is still lacking. Newly established institutions did not meet expectations due to limited resources and lack of clear vision and strong leadership. In addition, the selection of senior members on key positions in the transitional societies is challenging since those with more experience are more likely to adhere to the old system and other values than those that the current reforms are trying to achieve, especially in relation to independence and integrity area (Bošković, 2015: 185).

More than two decades of reform of the justice sector have not resulted in an increased trust of citizens in the judiciary. On the contrary, citizens do not see the impact of previous reforms, nor they believe that current reforms are heading to the right direction.

Efficiency has improved in some countries and is closer to the Council of Europe average in the first instance cases, but citizens still perceive the judiciary as inefficient. A significant number of inefficient hearings might contribute to such perception of citizens, as well as remaining challenges in the enforcement of court decisions.

Independence remains the key challenge for judicial reform and alignment with the rule of law standards. Constitutional amendments and review of the regulatory framework have not led to the strengthening of independence and separation of powers but have resulted in the emergence of the new channels of political interference. To strengthen integrity and independence, it is important to change the culture among members of judiciary, but also among citizens.

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CHANGES OF PROSECUTORIAL LEGISLATION OF MONTENEGRO IN THE LIGHT OF EUROPEAN STANDARDS ON PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY

Following a historic regime change in Montenegro in late 2020, changes to prosecutorial legislation have been initiated in Montenegro in the first half of 2021. The proclaimed aim of the legislative interventions was to tackle the issue of prosecution service being a captured institution, impervious to substantial prosecutorial accountability and reluctant to tackle corruption cases. The paper sets out to examine the extent to which the adopted changes to the Montenegrin Law on the State Prosecution Service are contributing to increased independence of the Prosecutorial Council and accountability of the Prosecutor General in Montenegro, assessing them against the relevant European standards and jurisprudence of the European Court of Human Rights, taking also into account the opinions of the Venice Commission. Using the dogmatic, comparative, and exegetic method, the authors will critically analyse the normative solutions and provide recommendations for their further improvement.

Keywords: state prosecutors, European standards, prosecutorial independence, accountability.

1. INTRODUCTORY REMARKS

The fundamental elements of the rule of law, understood to include the essential elements as proposed by Bingham (Bingham, 2010, p. 8) include existence of an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts (VC, 2011, para. 57).

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The definition of the public prosecutor, and the core function of the prosecution service vary considerably across different countries (Ilić and Matic Boskovic, 2019: pp. 93-99). In recent years, however, it is notable that prosecutors do not act simply as intermediaries between the police and the courts when deciding on whether or not a case is to be prosecuted, but also have additional powers, including the negotiation of nature and severity of a criminal sanction. (Weigend, 2012). This is why prosecutors, along with judges, have come to be considered by some scholars as a part of a single value chain producing justice, where prosecutors collect information on a case and represent 'the public interest', while it is the task of the judges to question the reliability of the information provided by both suspect and prosecutor and reach a final decision based on that evidence (Voigt and Wulf, 2017). It is therefore argued that due to this interplay between prosecutors and judges, the establishment of a high level of *de facto* judicial independence is a necessary, but not a sufficient condition for ensuring that justice prevails in criminal cases - prosecutors also need to be independent. This shift from the discourse on prosecutorial autonomy to prosecutorial independence is notable in the recent years (Venice Commission 2010, CCPE, 2014, Principle 4, and IACHR, 2015, pp. 157-194), with a recent body of academic research investigating prosecutorial independence and institutional determinants for such independence (Voigt and Wulf, 2019).[57]

Both legal scholars and supranational institutions (Matic Boskovic, Ilic 2019: OECD 2020; Venice Commission, 2010, para. 26) analyse the differences between external independence of the prosecution service from other state powers, and also the individual prosecutors' ability to take decisions without undue influence within the prosecutorial system itself. This paper follows the view on the interrelation between the concept of external independence of prosecution services and individual independence of prosecutors, and that both are needed for the establishment of adequate prosecutorial system that is conducive to the rule of law. Taking as the starting point the literature encouraging "the general tendency to enhance the independence and effective autonomy of the prosecution services", and acknowledging that the independence of the prosecution services constitutes an "indispensable corollary to the independence of the judiciary" (CCPE, 2014, Principle 4), the paper will assess to which extent the fundamental change in prosecutorial legislation, effected in 2021, are in line with this tendency. The issue of prosecutorial independence is of key importance in Montenegro. The reasons for that are manifold.

Montenegro is a country that has implemented the South-European model of the judicial councils, with separate councils for judges and for prosecutors acting as key management bodies responsible for appointing and dismissing judges and prosecutors, respectively. However, the success of these two bodies in ensuring judicial independence has been

[57] A separate body of academic literature analyses the independence from a combined legal-economic standpoint, like Hayo and Voigt (2007) differentiate between two types of factors – those that are not open to policy intervention (e.g. legal tradition of a country, a country's political system) and factors that are open to policy intervention (e.g. degree of press freedom granted, regulations pertaining to prosecutorial authority, etc.), while Garoupa (2012) examines the relationship between institutional setup of the prosecution service and prosecutors' performance, showing that while the common European institutional model minimizes political dependence, it is still susceptible to possible capture by professional self-interests while at the same time struggling with designing incentives to promote performance and accountability.

limited thus far, as evidenced by the Judicial Framework and Independence rating within the Nations in Transit Freedom House Report, including a decline in 2020 from 3.75 to 3.50 out of 7.00. The 2020 EU Commission's Report assessed Montenegro as moderately prepared, with limited progress, whereas the composition of judicial and prosecutorial councils and appointment procedures are classified to be only broadly in line with European standards (European Commission, 2020, 20-21). In addition, the prosecution-led investigation which was introduced for all criminal offences in Montenegro in 2011 puts a strong emphasis on the need for both external and internal prosecutorial independence (World Bank, 2017. p. 30). Without prosecutorial independence, the effective investigation by prosecutors cannot be accomplished as one of its requirements pertaining to independent investigation is not fulfilled (Mowbray, 2002, p. 441).[58]

At the same time, Montenegro is a country that is struggling to effectively tackle corruption. The 2020 report states (European Commission, 2020, p. 26) that Montenegro made limited progress in the fight against corruption, with limited track record on repression and prevention of corruption. The Corruption Perception Index for 2020 places Montenegro, a frontrunner for EU accession, at the 67th place out of 180 countries, with a score of 45/100, outscoring only two EU member states: Bulgaria and Romania. What is more, in Montenegro, corruption is seen to be used by governing elite, not only to enrich itself but also, if not primarily, to prolong its stay in power. (Sotiropoulos, 2017, p 11).Dzankic and Keil (Dzankic and Keil, 2018) have pointed out that political elites in Montenegro feared an independent and well-functioning judiciary, as it threatened their position. Consequently, Montenegro has been categorized by some authors (e.g. Komar, 2020; Vachoudova 2019) as harshly as a captured state, with EU conditionality contributing to such capture.

It is unsurprising therefore that following a historic change of regime in Montenegro at the end of 2020, fight against corruption and related reinforcement of judicial and prosecutorial independence became a focal point of the new Government.[59] The effort can be supported by the findings of the recent academic literature, which shows significant correlations between prosecutorial independence and government accountability, i.e. with a higher probability that government officials suspected of a crime are prosecuted and punished (Gutmann and Voigt, 2019).

However, it should be kept in mind that in addition to legal reasons, there were immediate political reasons for the radical legislative interventions. It seems that such interventions have been motivated not only by the commitment to securing independence of the entire prosecutorial service, but also by conflicts between the ruling elite and the heads of the

[58] For more on the requirements of effective investigation see CCPE Opinion 12 (2017) on the Role of Prosecutors in the Relation to the Rights of Victims and Witnesses in Criminal Proceedings", para. 46. According to the said opinion and the caselaw of the ECtHR, the effective investigation has to be impartial, independent, thorough and sufficient, prompt and subjected to public scrutiny, and it is not *a priori* a question of result but of the means used.

[59] The Government has set Rule of Law and Equal Chances as its No. 1 Key priority in its 2021 Work Programme. This key priority includes, *inter alia*, strengthening independence and impartiality of the judiciary and fight against corruption (Government of Montenegro, 2021).

Special Prosecutor's Office and the Prosecutor General.[60] The underlying reasons for reform can also be interpreted as an attempt to effect a certain degree of discontinuity with the previous regime. Following two iterations of draft amendments aiming to address the said capture of the prosecutorial organization and foster prosecutorial independence and the related opinions of the Venice Commission, amendments to the Law on Prosecution Service were adopted in May 2021.[61]

Although this paper is primarily concerned with legal developments, political circumstances may also be taken into account when they throw a particular light on the causes or quality of undertaken legislative interventions.

The authors will try to address the question whether the change contributed to increased independence of the prosecutorial service or it was an attempt of a quick fix for quick wins that permeate a problematic approach of the legislative and executive powers towards prosecutorial independence. In assessing the prosecutorial independence and accountability the Montenegrin legislative framework, the authors will recourse to relevant European standards including among others the documents of the Venice Commission, of the CCPE and relevant case law of the European Court of Human Rights (ECtHR). On that road, the authors will offer a critical analysis of the new Montenegrin Law on State Prosecution Service (LSPS) using dogmatic, comparative and exegetic method/s and benchmark its solutions against the relevant European standards, focusing on the solutions governing the composition and method of appointment of the Prosecutorial Council, the termination of office of the previous composition of the Prosecutorial Council and the accountability of Prosecutor General.

In this paper, when presenting the relevant European standards, the authors will partly rely on the systematisation used in the Report on the independence and impartiality of the prosecution services in the Council of Europe Member States (2019) edition. While the given systematization is focused on the following three categories: organisational independence of the prosecution service from executive and legislative powers and other actors, functional independence, which entails appointment and security of tenure of prosecutors and Prosecutor General, and impartiality of prosecutors, concentrating on the aspect dealing with disciplinary measures, this paper will primarily deal with organizational independence of the prosecution service. That approach is selected as the recent legislative interventions are mostly set to tackle the issue of organizational independence. In addition, the question of the accountability of Prosecutor General will also be examined given that the new law contains certain improvements in this field. This is of additional relevance

[60] A more detailed account of the political background to the reform can be found in two opinions of the Venice Commission which are focused on reviewing draft amendments (VC, 2021a and VC, 2021b).

[61] The process of adoption of the amendments was criticised as not being sufficiently inclusive and lacking a substantial public debate, even though the Government, following criticism from the Venice Commission for the rushed draft, did organize an open debate on the issue. (HRA, 2021, Government of Montenegro, 2021). The Law on Amendments to the Law on State Prosecutors Service was adopted by the Parliament in April 2021, but were not promulgated by the President, Milo Djukanovic, who returned the Law to the Parliament, invoking the criticisms voiced by the Venice Commission. The Parliament adopted the same Law again, which, under Montenegrin Constitution (Article 94, paragraph 2), means that the President must promulgate it (National Assembly of Montenegro, 2021).

given that the Prosecutor General acts as a President of the Prosecutorial Council which is mandated with the key role in fostering the organizational independence of prosecutors.

2. COMPOSITION OF THE PROSECUTORIAL COUNCIL IN MONTENEGRO AND METHOD OF APPOINTMENT OF ITS MEMBERS

Assessment of the overall accomplishments of the most recent legal amendments of the LSPS requires a clear identification of points of departure as well as of constitutional obstacles which undermine further developments pertaining to the composition of the Prosecutorial Council and method of appointment of its members. Therefore, a short overview of the relevant legislative history and constitutional provisions will be provided. Subsequent to that, the most recent legislative interventions governing the composition of the Prosecutorial Council and method of appointment of its members will be examined and critically assessed.

2.1. Legal Solutions relevant for the Composition of the Prosecutorial Council and the Method for Appointing its Members before Legislative Amendments of 2021

It should be noted that Montenegro had recognised the institution of a judicial council as early as 1991 (Law on Regular Courts) with important competences in the field of human resource management in the courts (Knežević, 2003, p. 193). Following a strong push for the clear positioning of judicial power as an independent branch of power, Montenegro has introduced a judicial council, with a considerably changed composition and wider competences in 2002 (Law on Courts, 2002). This council was based on the South-European model, a choice that was common for the Western Balkan countries at the time. Following the referendum on Montenegro's independence in 2006, a new Montenegrin Constitution was adopted in 2007 and subsequently amended in 2013 within the larger framework of the EU accession process and the demands for securing more independence for the judiciary (judges and prosecutors alike). The 2013 constitutional amendments introduced a separate Prosecutorial Council followed by the relevant changes to the legal framework in 2015. Sturanovic criticised those reforms as not being sufficiently in line with the relevant *acquis* requirements (Sturanović, 2017). Also, the method of appointment of members of the Prosecutorial Council did not provide sufficient guarantees against undue influence. Despite those critical voices, the composition of the Prosecutorial Council even before the recent legislative interventions was assessed as mostly compatible with the key European requirement stating that prosecutors shall constitute the majority of members of Prosecutorial Council. However, it seems that adequate composition of the Prosecutorial Council cannot be seen as an isolated criterion from the method of appointment of members of the Prosecutorial Council, since the CCPE requires that such a majority should be elected "by their peers" (CCPE, 2018, para. 24).

More concretely, the solutions relating to the composition of the Prosecutorial Council in the 2015 LSPS resembled the solution envisaged for the Judicial Council but, somewhat strangely, the Prosecutorial Council had one member more (Article 18). It was comprised of

11 members, five of whom were prosecutors elected by their peers, four were distinguished lawyers elected by the Parliament, one member was delegated by the Minister of Justice, while the Prosecutor General was *ex officio* member of the Prosecutorial Council. While such a solution was broadly in line with the relevant European standards calling for at least a half of members of the prosecutorial council to be prosecutors (Matic Boskovic, 2017, p. 177), the requirement that such members should be elected by their peers was not fulfilled, given that the mandate of the Prosecutor General stems from this office, to which the PG is elected by the Parliament, by a 2/3 majority. Moreover, the method of appointment of distinguished lawyers to become members of the Prosecutorial Council was problematic for two key reasons. First, the process of their appointment did not provide sufficient guarantees against undue influence, as there were no restrictions in place with regard to political engagement of the distinguished lawyers who are members of the Prosecutorial Council. They were allowed to be deputies, or members and officials of political parties, even in the moment of the election (Network for Affirmation of Non-Governmental Sector, 2017, p. 13.). Second, the distinguished lawyers were appointed by the Parliament by a simple majority, thus ignoring arguments coming from the opposition parties. Given that the mandate of the Prosecutorial Council includes the appointment and dismissal of prosecutors, it is easy to see that the described solution provided ample room for political influence on the appointment of members of the Prosecutorial Council and consequently to the appointment of state prosecutors (HRA, 2019). The appointment procedure being one of cornerstones for ensuring prosecutorial independence, it was manifest the previous Montenegrin regulatory framework did not provide sufficient guarantees for such independence.

When it comes to the identifying the obstacles set by Constitutional text, the Prosecutorial Council is envisaged as a key prosecutorial self-governance body (Constitution of Montenegro, Article 136). The reference in the Montenegrin Constitution is set within the boundaries of prosecutorial autonomy, not prosecutorial independence, stressing the ties of the prosecutorial service with the executive, which are then reinforced in the provisions of the Law on Prosecutorial Service.

Unlike the case is with the Judicial Council, the composition of which is regulated by the Montenegro Constitution (Article 127), the Constitution leaves the composition, method of appointment, term of office of the Prosecutorial Council to be regulated by statute. This solution was not, and still is not in line with the requirement that the key matters relating to the status of prosecutors should be regulated on the highest level, particularly given that Matic Boskovic emphasises (Matic Boskovic, 2017, p. 177) that countries that have adopted the South-European model regulate the judicial councils in their constitutions.

Such a solution is perhaps indicative of the above-mentioned approach taken by the Montenegrin legislator when it comes to prosecutors – to guarantee their autonomy, not their independence.

On the other hand, the competences of the Prosecutorial Council are partly regulated by the Constitution and partly by the LSPS. The said competencies were not subject to the most recent legislative amendments, since they were already in line with the European standards. Those competence related provisions are important for achieving prosecutorial

independence as it may have real effects in practice only if the Prosecutorial Council is mandated with the adequate spectrum of competencies. According to the applicable legal framework, the Prosecutorial Council has a wide range of powers to carry out both "traditional" and "new" functions in line with the European standards. According to the European standards, "traditional" functions include competences for appointment of prosecutors and heads of its offices and other human resource management functions. The "new" functions are related to management and budget matters. The international standards encourages attributing both "traditional" and "new" functions to both Judicial and Prosecutorial Councils. Montenegro's legal framework includes all aspects of the "traditional" functions of the Prosecutorial Council in that sense, although its powers are somewhat weaker with respect to appointment and dismissal of the Prosecutor General. In a similar vein, the Prosecutorial Council in Montenegro also encompasses new functions in line with international standards.

2.2. Legal Interventions relevant for the Composition of the Prosecutorial Council and the Method of Appointment of its Members

The latest amendments of the LSPS attempt to decrease the influence of the political elites on the election of members of the Prosecutorial Council in several ways.

Firstly, they reduce the number of prosecutors in the Prosecutorial Council elected by their peers from five to four, which means that prosecutors would not constitute a majority in the Prosecutorial Council, even though the Prosecutor General remains an *ex officio* president of the Prosecutorial Council (Article 18, paragraphs 2 and 3 of the consolidated LSPS). The solution whereby the number of members elected from among prosecutors is thus reduced, was assessed as the Venice Commission as being in principle in line with relevant European standards.

Nevertheless, the solution of introducing the majority of lay members over prosecutors should not be easily praised, as it constitutes a departure from the standard set by the CCPE in its Opinion No. 13, 2018. (CCPE, 2018, para. 24) which clearly advocates in favour of composition of the Prosecutorial Council with the majority of prosecutors elected by their peers in order to achieve the independence of the said self-governance body. While the CCPE particularly recognizes the importance of such a composition for situations where the prosecutors are to be recognised as judicial authorities within the meaning of Article 5 of the European Convention on Human Rights (ECHR) (CCPE, 2018 para. 24), the ECtHR additionally emphasizes the importance of the respective composition of the judicial councils when they are in charge of discipline of prosecutors, such as the current case in Montenegro. (Oleksandr Volkov v. Ukraine, 2013, para. 109 and 199). The amendments implemented in Montenegro, supported by the Venice Commission, seem to have favoured a straightforward solution to the concrete problem in the concrete country than a position that would firmly support prosecutorial self-governance.

The Venice Commission further expressed the reasonable concern that the method of appointment of members of the Prosecutorial Council from among legal experts with a simple parliamentary majority would run the risk of politicisation (VC, 2021a, para. 39). It

seems that the Venice Commission has focused mainly on the procedure for appointment of members of the Prosecutorial Council with a view to reducing the dominance of the political majority, while somewhat neglecting the fact that the requirement of prosecutorial majority is based on the need for members of a body to have relevant and up to date knowledge about the functioning of the prosecutorial service in order to effect the relevant self-governance competences is a satisfactory manner . The request for having prosecutors as a majority in the Prosecutorial Council is equally motivated by the demands for independence and for professional competence – an aspect that seems to be overlooked in examinations of the power plays between different stakeholders.

Second, it is also indicative that in the adopted amendments the solution favouring hierarchy in the prosecutorial self-governance is maintained, even though some countries in the region sharing a common legal past, such as Slovenia and Croatia, have forgone it.[62] This comment should be particularly viewed in the light of the relatively broad competences that the Prosecutor General has with regards to other prosecutors, including the right to file an initiative for instituting disciplinary proceedings coupled with current exclusion of the of state prosecutors of the Supreme State Prosecutor's Office from the regular assessment (Articles 86 paragraph 1 and MANS, 2017, p. 13).-

What was also missed was an opportunity to add more validity to the selection of the candidates for the Prosecutorial Council from the ranks of state prosecutors. While from the standpoint of European standards, the candidacy process is not problematic, the solution whereby candidates are put forward by the collegiate sessions of the respective prosecution offices does not foster true self-governance. Adopting a solution present in comparative practice – where the candidates' nomination can also be supported or sponsored by a certain number of their peers, e.g., in Serbia would have added one more layer of legitimacy.[63] Such a solution would have been an important feature of a normative overhaul of the system aiming to reduce opportunities for capture and internal policy to dominate the process. Furthermore, since the law does not prescribe that a head of the state prosecutor's office cannot be a candidate for a member of the Prosecutorial Council, which is a solution present in regional comparative practice,[64] there is still room for replicating the power structures within the prosecutorial organisation in the composition of the Prosecutorial Council.

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[62] See more on this at: Slovenian Law on State Prosecution, Article 97 and the Law Article 5, and Croatian Law on State Prosecutorial Council, Article 5.

[63] For example, in Serbia, candidates for the State Prosecutorial Council from the ranks of public prosecutors or deputy public prosecutors can be nominated either by the college of all prosecutors of a given public prosecutor's office or by at least public prosecutors or deputy public prosecutors of the same rank (Article 23, paragraph 2 of the Serbian Law on State Prosecutorial Council). Similarly, in Slovenia, the candidacy of prosecutors for the Prosecutorial Council is carried out through application of the rules for the candidacy of judges for the judicial council, meaning that each judge or prosecutor nominated by at least three peers is entered into a candidates list (Article 99 of the Law on Prosecution Service of Slovenia and Article 20 of the Law on Judicial Council of Slovenia).

[64] For instance, in Slovenia, the Law on Prosecution Service explicitly prescribes in Article 97 that members of the Prosecutorial Council from the ranks of prosecutors are elected among those who do not hold managerial positions.

The next important intervention in the composition of the Prosecutorial Council lies in the changes related to its lay members. Namely, instead of the previous wording of the law, which envisaged five members of the Prosecutorial Council to be elected among prominent jurists, the new Law (Article 18 of the LSPS) refers only to four jurists, a solution which is on par with the number of prosecutors elected by their peers. In an attempt to answer to the concerns of the Venice Commission, expressed with regards to the version of the draft amendments of March 2021 - namely the fact that lay members are appointed by simple rather than qualified majority, which renders their election highly susceptible to politicisation – Montenegro has resorted to a solution whereby an additional lay member is elected from among reputable lawyers who are nominated by NGOs. This reputable lawyer is set to be as an expert in the field of rule of law, work of the public prosecution service or fight against organised crime and corruption. The amended Law further envisages that, following a public call, the candidates can only be nominated by NGOs who have been registered for at least 3 years, and which, according to their articles of incorporation, have the mentioned expertise listed as one of their key objectives, and have participated in projects in the said fields over the past three years. The candidate on whom the Parliament votes is the candidate supported by the largest number of NGOs. This solution closely resembles one that already exists in the Montenegrin legal system with regards to the appointment of members of the Anti-Corruption Agency Council from among of NGO representatives (Article 85 of the Law on Corruption Prevention). It was welcomed by the Venice Commission as a positive step forward (VC, 2021b, para. 35). The solution does indeed seem to foster pluralism in the composition of the Prosecutorial Council and through additional requirements related to specific expertise of the candidate nominated by NGOs to an extent mitigates the concern raised above with regards to insufficient grasp of the lay members of the particularities in the functioning of the state prosecution service.

Finally, the amendments introduce an important tool for depoliticising the Prosecutorial Council – incompatibility criteria for both lay members of the Prosecutorial Council and the members elected from among prosecutors. These criteria attempt at creating, as the Venice Commission notes (VC, 2021b, para. 29) "safety distance" between lay members and party politics, by prescribing that lay members cannot have spousal or family relations with MPs, Government ministers, the President of Montenegro or a person appointed by the Parliament, the Government or the President. Further, lay members of the Prosecutorial Council cannot be persons who were, within the last five years political party functionaries nor former elected or appointed central or local government officials, nor persons who were state prosecutors within the last eight years (Article 26 of the LSPS). When it comes to a similar safety distance between state prosecutors elected by their peers, on the one hand, and MPs, Government ministers or the country president, the law prescribes that spousal or family relations between them are incompatible with being a Prosecutorial Council's member (Article 18 of the LSPS).

The introduction of the said incompatibility criteria might seem like an overregulation, even though it is clearly introduced with a view to reducing the possible political influence on the Prosecutorial Council and, by extension, to the entire state prosecutorial service. Moreover, it is a solution not found in regional comparative practice burdened with similar

challenges *vis a vis* prosecutorial independence and undue influence. It should be noted, however, that prescribing of incompatibility criteria for members of the Prosecutorial Council from the ranks of prosecutors was a solution advocated for by a credible local NGO (HRA, 2017, 116). This indicates that the need for regulating such incompatibility stems clearly from the local circumstances and practices and does not constitute an excessive intervention on the part of the legislator. A closer look at the norm shows that it corresponds to the incompatibility requirements found in similar paragraphs regulating grounds for recusal prescribed in the Criminal Procedure Code (Article 38 of the Criminal Procedure Code) or with the notion of the related person in the Law on Corruption Prevention (Article 6). Therefore, it contributes to coherence of the overall national legal framework of Montenegro and as such should be welcomed.

3. TERMINATION OF MANDATE OF THE MEMBERS OF THE PROSECUTORIAL COUNCIL

One of the controversial issues envisaged in the amendments of the LSPS was the premature termination of the mandate for all the members of the Prosecutorial Council. The termination was envisaged in both versions of the draft amendments sponsored by the Parliament and the Government and analysed by the Venice Commission. The adopted solution is somewhat of an improvement from the versions analysed by the Venice Commission, but can still be considered divisive.

The draft amendments submitted to the Venice Commission in March 2021 envisaged the termination of office of the members of the Prosecutorial Council followed by election of the new members within 45 days from the day the amendments enter into force (Article 184a, paragraph 1 of the March amendments, VC, 2021a). This version of the draft amendments also envisaged a transitional mandate of the sitting Prosecutorial Council until the new members are elected. The revised draft amendments maintained a similar solution. The adopted amendments change the sequence for the termination of the mandate of the then sitting Prosecutorial Council in as much as they prescribe in detail the timeline for the election of new members of the Prosecutorial Council, the adopted amendments set out a similar time limit for election of new members, after which the mandate of the sitting Prosecutorial Council is terminated (Article 184b of the LSPS).

The Venice Commission objected to this solution, even though it did recognise that the political goal of the reform would not be achieved if the current members were allowed to serve until the end of their original mandate (VC, 2021a, para.48). Nonetheless, the Venice Commission clearly gave primacy to continuity, invoking its previous opinion on the draft amendments to Georgian legislation on the composition of the High Judicial Council (VC, 2013, para. 71-72) and reiterating that replacement of all members of the Prosecutorial Council could set a precedent whereby any incoming government or Parliament would make similar changes, which would not be conducive to the rule of law.

On the other hand, the Venice Commission was, in its March opinion, supportive of a solution whereby only some of the Prosecutorial Council members would be removed or the balance changed by adding one or two new members (VC, 2021a, para. 48) from among

lay members, suggesting they should be elected by a qualified majority. It should be noted that the version of the draft amendments the Venice Commission considered in March 2021 did not include the incompatibility clauses. It seems that it was due to them that the Venice Commission presented a different approach in its May opinion. In that opinion, the Venice Commission questions whether the extent of the proposed amendments can be considered as a sufficiently deep reform to justify the renewal of the entire composition of the Prosecutorial Council and the derogation of the principle of stability of tenure of its members, and was not convinced that was the case (VC, 2021b, paras. 47 and 48). It did, however, consider that the ineligibility criteria were an adequate and proportionate mechanism and that its application, to current members of the Prosecutorial Council on a case-to-case basis was justified (VC, 2021b, para. 49), provided that relevant procedural requirements are envisaged and observed.

Through this position, the Venice Commission sanctioned a *de facto* replacement of all members of the Prosecutorial Council, should they prove not to meet the relevant incompatibility criteria. Montenegrin legislator nevertheless did not clearly link the termination of the Prosecutorial Council mandate and the examination of the existence of incompatibility – while the incompatibility may *de facto* present *vis-a-vis* a considerable number of the members of the Prosecutorial Council at the time of the adoption of the amendments (as indicated in the VC, 2021a, para. 12), the amendments of the LSPS stipulating premature termination of office of the Prosecutorial Council did not refer to the incompatibility clauses directly in the legislative text. The link can, however, be seen in the reasoning of the amendments does indicate that the strict new rules aimed at depoliticising the composition of the Prosecutorial Council do not justify the continuation of the mandate of the current members (National Assembly of Montenegro, 2021, p. 14).

It is therefore worth examining in closer detail whether this solution is in line with relevant European standards. An obvious parallel that comes to mind is with the facts in the case *Baka v. Hungary*, when the mandate of the Hungarian President of the Supreme Court was prematurely terminated through constitutional and legislative reform in Hungary and the case of *Kövesi v. Romania*, concerning the premature termination of the mandate of the chief prosecutor of the National Anticorruption Directorate in Romania.

In both cases, the ECtHR found that the rights of the applicants were violated, given they were unable to effectively challenge the decisions on their premature mandates.

In the Baka case, the ECtHR found that Baka's right to access to court under Article 6 para. 1 of the ECHR was violated. Namely, the ECtHR held that "the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful" (*Baka v. Hungary,* 2016, paragraph 121). ECtHR further stated that "in the light of the domestic legislative framework in force at the time of his election and during his mandate, the applicant could arguably claim to have had an entitlement under Hungarian law to protection against removal from his office as President of the Supreme Court during that period."

In the Kövesi case, ECtHR similarly found that although access to the function of the chief prosecutor, which was performed by the applicant, does in principle constitute a privilege and cannot be legally enforced, this was not the case regarding the termination of an employment relationship, which was at issue in the given case. ECtHR thus found that the applicant had a standing under the civil limb of Article 6, paragraph 1 of the ECHR (*Kövesi v. Romania*, 2020 para.124). Invoking the reasoning in the Baka case, ECtHR took the position that the applicant could arguably claim to have had an entitlement under Romanian law to protection against alleged unlawful removal from her position as chief prosecutor of the DNA (*Kövesi v. Romania*, 2020, para 121.), and found that the applicant could not exercise such a right. ECtHR thus concluded that there was a violation of Article 6 para.1 of the ECHR. Also similar to the Baka case, in the Kövesi case ECtHR found that the main reasons for the applicant's removal from her position as a chief prosecutor of the DNA were connected to her right to freedom of expression, which includes the freedom to communicate opinions and information and constituted an interference with the exercise of her right to freedom of expression, as guaranteed by Article 10 of the ECHR.

It could be claimed that in these two seminal decisions, as duly pointed out in the Joint concurring opinion of judges Pinto de Albuquerque and Dedov to the judgment in Baka case (para. 6), the ECtHR, invokes the soft law of the Council of Europe and other international organisations "as a legal basis not only to sustain the principle of the independence of the judiciary *in abstracto*, but also to assert *in concreto* the existence of the applicant's individual civil right to irremovability and of access to a court to protect that right". Moreover, as recently pointed out by Jelic and Kapetanakis (2021, p. 51), the ECtHR not only extended its previous jurisprudence set out in the Vilho Eskelinen judgment (*Vilho Eskelinen and others v. Finland*, 2007) to disputes concerning the career of judges and prosecutors, but also set an additional implicit criterion, whereby the national legislation excluding access to a court needs to be compatible with the rule of law.

The situation in the case of Montenegrin law is arguably different, and therefore it cannot be claimed to be in manifest violation of the established jurisprudence of the ECtHR. Below the authors provide a birds' eye view on this issue.

Namely, in both Baka and Kövesi cases, the applicants were removed from their offices as heads of the court, that is, of a prosecutorial office. In the Baka case, this also resulted in the termination of his mandate in the National Council of the Judiciary, to which he held *ex officio* by virtue of his position of the Supreme court president. It is precisely due to the fact that the function of the president of the Supreme court was intrinsically linked to the performance of judicial office, or, in the case of Kövesi to employment and her personal and professional situation in the given prosecutorial department, that the court clearly found that their mandate was a civil right protected under the civil limb of Article 6, paragraph 1.

The situation with the members of the Montenegro Prosecutorial Council is largely different. First of all, despite the pivotal role that the Prosecutorial Council has within the prosecutorial system, its function cannot be claimed to be intrinsically linked to the exercise of prosecutorial office, even with regards to the members from the ranks of prosecutors. Moreover, when it comes to lay members of the Prosecutorial Council, they are also not subject to the guarantees of prosecutorial independence attached to the

prosecutorial office. In this case, as Rakic-Vodinelic points out, a public office – and the office of a member of the Prosecutorial Council can clearly be defined as such – is not an acquired right (Rakic-Vodinelic, 2019, p. 11). It could further be argued that the right to completion of the mandate of the member of the Prosecutorial Council is not "civil" within the autonomous meaning of Article 6 paragraph 1, in the light of the criteria developed in the Vilho Eskelinen judgment. When it comes to the first criterion from the said case, as to whether the national law has expressly excluded access to a court for the post in question, a closer look into the pre-existing relevant provisions of the Montenegrin LSPS governing the premature termination of the mandate of the Prosecutorial Council member, it could be helpful to establish whether such a right was guaranteed before the adoption of the amendments. In general, the LSPS distinguishes between termination and dismissal.[65] In the first case, when the prescribed conditions for termination are met, the Prosecutorial Council only notes the termination of office of one of its members and informs the body that elected him/her thereof – these are the National Assembly for the lay member of the Prosecutorial Council and the Conference of Prosecutors for members from the ranks of state prosecutors. This means that the termination, in this case, takes place *ex lege* and that no legal remedy is envisaged in national law. In the second case, the Prosecutorial Council submits the proposal for the dismissal to the body that elected the member – the National Assembly and the Conference of State Prosecutors. There is no explicit legal remedy for such a decision. In fact, it would be difficult to argue that any of the existing remedies in the legal system of Montenegro could be resorted to. It seems evident that the state, in this case, Montenegro has excluded access to a court for the post in question even before passing the said controversial amendment of the LSPS. Such exclusion seems to stem from and be justified additionally from the following:

a) the position of a member of the Prosecutorial Council is undoubtedly not only a public office, but one that implies the exercise of public powers, or in order words, it seems manifest that the members of the Prosecutorial Council are "holders of posts involving responsibilities in the general interest or participation in the exercise of powers conferred by public law wielded a portion of the State's sovereign power in terms of the Pellegrin case (*Pellegrin v. France*, 1999, para 65.)

b) the very procedure of appointment and dismissal of members of the Prosecutorial Council is intrinsically linked with the level of trust clearly within the bounds of "a special bond of trust and loyalty" of the Prosecutorial Council members and the state (*Pellegrin v. France,* 1999, para. 65);

c) none of the members of the Prosecutorial Council enters into an employment relationship within the Council. The LSPS only states (Article 33) that Prosecutorial

[65] When it comes to termination, Article 29 foresees that it takes place in the following cases: 1) termination of the office that was the basis for his/her election to the Prosecutorial Council: 2) resignation; 3) conviction and imposition of an unconditional prison sentence. When it comes to dismissal, the grounds for dismissal envisaged in Article 30 are: 1) unconscientious and unprofessional discharge of Prosecutorial Council member's duties, meaning conduct that is contrary to his/her powers defined in the law, and the failure to meet the duties defined in the law; 2) conviction of an offence that renders one unworthy of discharging duties of a Prosecutorial Council member, meaning a criminal offence prosecuted ex officio and punishable by imprisonment, and 3) with regards to state prosecutors, if a disciplinary sanction was imposed on the state prosecutor.

Council members who are employed are be entitled to absence from work in order to discharge their duties in the Prosecutorial Council, and further underlines that during such absence those members whose salaries are secured from the budget shall receive salaries and other emoluments based on the employment in the authority they are employed in. While the LSPS does envisage the right to emoluments to the Prosecutorial Council members, the wording of the law clearly indicates that the Labour Law does not apply to such emoluments.[66] This again underscores the conclusion that, unlike in the cases of *Baka* and *Kövesi*, the functions of the member of the Prosecutorial Council are not linked to the exercise of the relevant judicial office, and is hence out of the scope of protection awarded to judges and prosecutors in these two cases.

Thus, it seems that the premature termination of the mandate of a Prosecutorial Council member through statutory provisions does not constitute a significant departure from the existing norms of Montenegro legislation when it comes to the right to legal remedy, from a strictly legal point of view.

According to the criteria set in the Vilho Eskelinen case, the burden of proof that the exclusion of the rights under Article 6 for the civil servant is justified is on the Government. Further, Baka and Kovesi show that such norms of national law need to comply with the rule of law.

It could be argued that, if the provisions of the law were challenged before the ECtHR, Montenegro could show that the exclusion of the rights under Article 6 in the case of premature termination of mandate by way of statutory provisions is justified and is in line with the general legal regime, which continues to be applicable to the termination of office and dismissal of the members of the Prosecutorial Council. Further, it could be argued the exclusion in principle stems from the very procedure of appointment of the Prosecutorial Council members, which implies the existence of trust between the body that has elected the member and the member itself, which was evidently missing with regards to the members of the Prosecutorial Council from the ranks of lay members of the Prosecutorial Council and the new composition of the Parliament at the time the amendments were adopted.

The one criterion where Montenegro could arguably have difficulties justifying the amendments is the one set in the Baka and Kövesi case, namely that the exclusion is compatible with the rule of law. It is noteworthy to recall that in the Baka case, the Venice Commission had previously found the regulatory measures whereby Baka's office was prematurely terminated as contrary to the rule of law (VC, 2012, para.113), as they were directed towards one specific person. In the case of Montenegro legislation, the Venice Commission did not expressly assess any of the measures investigated in its May opinion as being contrary to the rule of law, although it raises concerns with regards to their adoption.

However, the overall social and political background need to be taken into account when examining this issue. The decisions in the Baka and Kövesi cases were intrinsically linked with the exercise of freedom of expression – more to the point, ECtHR found that

[66] Montenegrin Labour Law, Official Gazette No. 74/2019 and 8/2021 refers to salaries and compensation of salary in cases such as sick leave, holiday and the like (Articles 94-103).

there were evident causal links between their exercise of his freedom of expression and the termination of their mandate (paragraph 148), which in Baka's case had a "chilling effect" (*Baka*, 2016, para. 160).

Conversely, the underlying causes of the Montenegrin reforms are motivated by reasonably demonstrated deficiencies in the work of the entire prosecutorial service in tackling corruption and by the existing close ties between the members of the Prosecutorial Council and the former Montenegrin political elites, which was duly recognised by the Venice Commission. It could therefore be argued that the underlying reasons for reform in Montenegro were aimed at fostering, not undermining the rule of law. It therefore seems that it would be difficult to claim that the provisions of the amendments to the Montenegrin LSPS are contrary to the recent jurisprudence of the ECtHR. This, however, does not render them fully compliant with relevant European rule of law standards.

While the general determination of the legislator to institute substantive reforms in the Montenegrin prosecutorial service is understandable, a more nuanced approach to the sensitive issue of termination of mandate of the entire Prosecutorial Council would have been more appropriate and less likely to be, in hindsight and without a clear current context, open to being challenged from the standpoint of their compatibility with relevant European standards.

4. ACCOUNTABILITY OF THE PROSECUTOR GENERAL

The independence of the Prosecutorial Council requires that the Prosecutor General as a President of that Council is both independent and accountable. The CCPE sheds light on the interrelation between the independence of prosecutors and judicial independence. In that context, the CCPE states that the independence of public prosecutors constitutes a guarantee that the full benefits of judicial independence will be realised as well as of the fairness and effectiveness of the overall justice system. (CCJE and CCPE, 2009, paras. 3, 8 and 27). In addition, the relationship between the independence of prosecutors and their accountability is clearly established by the CCPE, which states that clear mechanisms related to instituting prosecution or disciplinary proceedings against prosecutors are needed as to ensure their independence (CCPE, 2018, para. 25). Moreover, the CCPE and OECD in their documents recommend that prosecutors should not benefit from a general immunity but from functional one which is limited to actions carried in good faith in pursuance of their duties. (CCPE, 2014, para. 10, OECD, 2020, p. 115). In those respects, neither CCPE opinions nor other international documents include specific rules governing the immunity of Prosecutors Generals, thus treating them equally to other prosecutors. Finally, CCPE underlines that not only the manner in which the Prosecutor General is appointed, but also the manner in which he or she is dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office. (CCPE, 2014, para. 55).[67]

[67] In doing so, CCPE refers back to Venice Commission, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service (VC, 2011, paras. 34-35).

Unlike the European standards, the LSPS does not establish the said mechanisms for instituting disciplinary proceedings against the Prosecutor General. That legal solution is conditioned by the Montenegro Constitution, which stipulates that Prosecutor General benefits from a general immunity and therefore cannot be held liable for both disciplinary and criminal offences. The relevant provisions of the LSPS pertaining to accountability of Prosecutor General which depart from the aforementioned European standards on disciplinary liability and functional immunity were somehow fully overlooked by both Venice Commission opinions on the draft amendments to the Montenegrin LSPS of 2021. This could be arguably explained by the fact that those matters were not covered by the draft amendments. It is worth remembering that the issue of dismissal of the Prosecutor General were raised in the previous Venice Commission opinions related to the draft Constitutional amendments of 2013 (VC, 2013), and the draft LSPS of 2014 (VC, 2014). In them the Venice Commission commended the draft amendments for ensuring that the amended Article 135 of the Constitution and the law envisages clear grounds for dismissal of the Prosecutor General (see: Venice Commission, 2013,). However, this solution has not been promulgated in 2013, and the grounds for the dismissal of Prosecutor General remained unregulated in the Constitution and vaguely and narrowly regulated in the statute.

While the Venice Commission in its Opinion of March 2021 rightly criticized the proposed new grounds for disciplinary liability of prosecutors as an overly broad formula,[68] it failed to deal with the clear lack of disciplinary liability of Prosecutor General. The Venice Commission welcomed the subsequent efforts of the Montenegrin authorities to follow its March recommendations, whereby the previously proposed disciplinary offences were abandoned in the revised version of draft amendments to the LSPS (Article 108). Finally, the amended LSPS introduced only one additional ground for disciplinary liability of prosecutors amounting to "committing a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office" (Article 108). The introduced disciplinary offence reflects the approach recommended by the Venice Commission, according to which a disciplinary liability should be imposed on the prosecutor only for gross misbehaviour and not simply for an incorrect application of the law. (VC, 2021b, para. 16, p. 5). This approach is also in line with CCPE opinion No. 13, para. 47, point 2. The new disciplinary offence is even more important for the status, accountability and independence of the Prosecutor General, as it also constitutes a new ground for his or her dismissal. Arguable, the prescribed general immunity of Prosecutor General from disciplinary proceedings tried to be initially overcome and mitigated by introducing new rules extending the ground for the dismissal of Prosecutor General in case when conditions for prescribed disciplinary offence are met.

However, the legislative intervention was not sufficiently comprehensive and coherent, as it did not sufficiently clarify the ground for dismissal of Prosecutor General. Consequently, the legislative amendments did not meet the aforementioned CCPE standard according to which adequate dismissal regime is needed at to ensure the correct functioning of

[68] The initially proposed new disciplinary offence was worded as "5) acts contrary to legally prescribed competences, as well as when he/she does not fulfil legally prescribed obligations".

the prosecutor's office (CCPE, 2014, para. 55). The Law envisages an unprofessional and negligent performance of function of Prosecutor General as a sole ground for his dismissal, without providing any further clarification of that ground (Article 110). The amendments did not bring any improvements in that regard. On the other hand, the unprofessional and negligent performance of function is also prescribed within the same law as grounds for the disciplinary offence for prosecutors and its meaning is clearly elaborated within the disciplinary provisions (Articles 108 and 109). It seems strange that the legislator missed the opportunity to clarify the meaning of the undefined ground for dismissal of Prosecutor General at least by referring to the adequately defined disciplinary offence of the unprofessional and negligent performance of function. That omission is arguably attributable to the legislative applied technique commonly applied in Montenegro, and therefore the meaning of the said ground for dismissal of Prosecutor General will be interpreted by relying on the meaning of the respective disciplinary offence.

As mentioned before, the amended LSPS is important for prosecutors as it extended the scope of the disciplinary offence of unprofessional and negligent performance of function by stipulating that the commission of a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office will also fall under its umbrella. The said provision of the amended law should be also assessed as a positive step towards extending the grounds for dismissal of Prosecutor General. Such a positive step cannot be considered as sufficient means for fully addressing the problem of the lack of disciplinary accountability of Prosecutor General since that problem is rooted in the Constitution.

It is noteworthy that even before the CCPE adopted its opinions with regard to functional immunity and accountability of prosecutors, the ECtHR developed the standards in that respect in the case *Kolevi v. Bulgaria.* The judgment in the case *Kolevi v. Bulgaria* is particularly important since it specifically deals with the immunity of Prosecutor General. In *Kolevi v. Bulgaria*, the ECtHR found, among other, the violation of procedural limb of Article 2 since the investigation into the death of Mr. Kolevi was not independent, objective or effective (*Kolevi v. Bulgaria*, 2009, paras. 214 and 215). The ECtHR identified the *de facto* impunity of the General Prosecutor in Bulgaria given that until September 2003 it was legally impossible in Bulgaria to bring criminal charges against the Prosecutor General without his consent. (Vassileva, 2020). However, a brief comparison between the circumstances of Kolevi case and current legal solutions of Montenegro shows that *Kolevi* is not applicable to current Montenegrin scenario.

Namely, until September 2003 it was not legally possible to bring criminal charges against the Prosecutor General without his consent in Bulgaria. The same is not the case with Montenegro, where general immunity is to be lifted by the Parliament without the prior consent of the Prosecutor General. (*Kolevi v. Bulgaria*, 2009, paras. 204, Constitution of Montenegro and Article 82 of Constitution of Montenegro). Also, under the Bulgarian law of that time, the conviction was a prerequisite for the termination/dismissal of a term of office of the Prosecutor General (*Kolevi v. Bulgaria*, 2009, para. 204). On the contrary, the criminal conviction is not the prerequisite for the dismissal of the Prosecutor General in Montenegro as a ground for dismissal amounts to unprofessional and negligent performance of functions which includes commission of specified disciplinary offences.

Nevertheless, when some of those flagrant deficiencies were eventually remedied in 2003 (*Kolevi v. Bulgaria*, 2009, para. 205), the ECtHR found that even the mere power of the Prosecutor General and high-ranking prosecutors to set aside any decision taken by a subordinate prosecutor or investigator will hinder any prosecutor from bringing charges against the Prosecutor General. Finally, unlike Bulgarian framework where the Prosecutor General can only be removed from office by decision of the Supreme Judicial Council, Montenegrin legal framework mandates the Parliament to decide in that respect. (*Kolevi v. Bulgaria*, 2009, para. 207).

Apparently, it cannot be claimed that the Montenegrin legal framework is in violation of the judgment in the case Kolevi. However, Kolevi case still can serve as a useful reminder that the ECtHR applies rather strict test when assessing whether the independence of investigation into someone's death was met. Therefore, it remains questionable how would ECtHR qualify the existing scope of immunity of the Prosecutor General under the Montenegrin legal framework. In the absence of applicable case law of the ECtHR it would be of key importance for Montenegrin national authorities to more closely stick to the CCPE opinions in part recommending the functional immunity, as well as introduction of criminal and disciplinary liability for each and every prosecutor, including the Prosecutor General. The extension of the grounds for dismissal of Prosecutor General apparently constitutes a positive step, but further reforms are needed in order to introduce the accountability of the Prosecutor General within the limits of functional immunity. In order to be effective and comprehensive, those reforms should be directed towards amending both the Constitution and the LSPS. Otherwise, Montenegrin legal framework would risk going against the CCPE standards according to which an exercise of control over the decisions of the subordinate prosecutors should be subject to proper safeguards for the rights of individual prosecutors (CCPE, 2014, para, 42). Those proper safeguards cannot be provided in the absence of accountability mechanisms of the Prosecutor General.

5. CONCLUDING REMARKS

Prosecutorial independence is one of the fundamental elements of the rule of law, and an indispensable corollary of judicial independence. The general tendency towards enhancing independence of prosecution services and its importance for the judicial independence, has been recognised and fostered by various Council of Europe consultative bodies, such as the CCPE and the Venice Commission through their opinions and reports. The ECtHR also played an important role in developing the standards of prosecutorial independance, setting the groundwork for the adoption of the said soft-law instruments.

Academic literature became increasingly focused on investigating prosecutorial independence and institutional determinants for such independence (Voigt and Wulf, 2019, Gutmann and Voigt, 2019). The findings of some authors also show significant correlations between prosecutorial independence and government accountability (Gutmann and Voigt, 2019).

It is unsurprising therefore that the prosecutorial independence became a focal point of the new Montenegrin Government following a historic change of political regime at the end of 2020 – a regime which was assessed by scholars as a captured state. This was done

through amendments of the LSPS aiming to further foster prosecutorial independence and give additional momentum to fight against corruption. While Montenegrin regulatory framework regarding the organisation of the prosecutorial service did not *prima faciae* depart significantly from the relevant European standards, it was still susceptible to influences from political elites and presented a limited track record in prosecuting corruption, particularly high-level corruption.

The attempt of the new Montenegrin political elites to tackle this problem through amendments to the LSPS can arguably also be interpreted as an effort aiming at effecting a certain degree of discontinuity with the previous regime and the power structures it had instituted. Following two iterations, the Amendments to the LSPS were adopted in May 2021.

While the underlying political goals of the reform can seem understandable, it remains questionable to what extent was the purported goal of the implemented reform achieved and whether the change does indeed contribute to increased independence of the prosecutorial service. The amendments were focused with reforming the composition, requirements and method for election of members of the Prosecutorial Council, a key prosecutorial self-governance body, while at the same time strengthening the norms dealing with accountability of prosecutors. They also prescribe premature termination of the mandate of the Prosecutor Council elected under the previous regime.

The solutions, formulated in iterations, as mentioned above, were closely scrutinised by the Venice Commission, which raised sound recommendations and concerns and in doing so, significantly improved the content of the final text of the amendments. This too an extent corroborates the positive potential of external conditionality in fostering the rule of law. However, the overall outcome is still burdened with a number of limitations embedded in the constitutional text, most markedly with regards to the regulation of accountability of the Prosecutor General, a key figure in the prosecutorial system.

When it comes to the composition of the Prosecutorial Council and the method of appointments of its members, it seems that Montenegrin reform has achieved mixed results. Firstly, the balance between the members of the Prosecutorial Council was shifted from majority of them being prosecutors elected by their peers, to majority of them being lay members. This solution was supported by the Venice Commission, even though it departs from the standards set by the CCPE. By taking this stance, the Venice Commission clearly favoured a straightforward solution to the concrete problem in the concrete country than a position that would firmly support prosecutorial self-governance and thus missed a chance to improve the existing legal framework.

Further, the legislator failed to give up, in the amendments, the existing strict hierarchy in the prosecutorial self-governance which can be particularly problematic when coupled with the relatively broad competences that the Prosecutor General has with regards to other prosecutors, including the right to file an initiative for instituting disciplinary proceedings (Article 110 of the LSPS).

On the other hand, the second important intervention in the composition of the Prosecutorial Council relating to lay members can be assessed as a positive step forward. The solution at hand is one whereby, to an extent inspired by the opinion of the Venice Commission and relying on existing national practice, whereby one lay member is elected

from among reputable lawyers who are nominated by NGOs. The solution was rightly welcomed by the Venice Commission as a positive step forward as it fosters pluralism in the composition of the Prosecutorial Council and through additional requirements related to specific expertise of the candidate nominated by NGOs to some extent mitigates the concern that could be raised with regards to insufficient grasp of the lay members of the particularities in the functioning of the state prosecution service.

Furthermore, the amendments brought the improvements to the prosecutorial independence by introducing an important tool for depoliticising the Prosecutor Council – incompatibility criteria for both lay members of the Prosecutor Council and the members elected from among prosecutors. Although that solution is not found in regional comparative practice burdened with similar challenges *vis a vis* prosecutorial independence and undue influence, the need for regulating such incompatibility stems clearly from the local circumstances and practices.

One of the most controversial solutions of the amendments is surely the one envisaging premature termination of the mandate for all the members of the Prosecutorial Council, which was recognised by the Venice Commission as instrumental in substantially effecting the reform. Based on the conducted brief examination of the ECtHR judgments in the cases of Baka, Kövesi, and its previous jurisprudence, it would be difficult to claim that provisions of the amendments to the Montenegrin LSPS are manifestly contrary to the recent jurisprudence of the ECtHR. While the adopted solution is perhaps the clearest indication of the underlying desire for discontinuity, it remains divisive. It is evident that a more nuanced approach to the sensitive issue of termination of mandate of the entire Prosecutorial Council would have been more appropriate and less likely to be open to being challenged from the standpoint of their compatibility to relevant European standards. Moreover, they are a practice that should not be further encouraged.

When it comes to accountability, the key intervention of the reform is extending the scope of the disciplinary accountability to include unprofessional and negligent performance of function by stipulating that the commission of a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office will also fall under its umbrella. The said provision of the amended law also constitutes a positive step towards extending the grounds for dismissal of Prosecutor General. Such a positive step cannot be considered as a sufficient avenue for fully addressing the problem of the lack of disciplinary accountability of Prosecutor General since the issue problem is rooted in the Constitution. Without eliminating the general immunity of Prosecutor General, who also acts as a President of the Prosecutor Council, proper safeguards against undue influence within the hierarchical prosecutorial systems cannot be effectively established.

In sum, the adopted amendments to the LSPS show some improvements aimed at fostering prosecutorial independence and accountability. However, a closer inspection does confirm the suspicion that the exercise was indeed a quick fix for quick wins. The reform fails to address some issues of key importance, which remain embedded in the constitution (the general immunity for the Prosecutor General) and seems more set to effect discontinuity than to provide a substantive overhaul of all the aspects of the prosecutorial system which have shown to be deficient in practice. While frequent changes

to the fundamental rules governing organisational independence, functional independence and impartiality of prosecutors cannot be advocated for, it seems evident that on its path towards ensuring the existence of independent prosecution service as per relevant European standards, Montenegro has a number of hurdles to overcome and improved regulatory solutions to adopt.

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PROTECTION OF THE RULE OF LAW THROUGH WHISTLEBLOWING

The EU Whistleblowing Directive is the first binding European instrument that explicitly recognizes the protection of whistleblowers as a necessary mechanism to improve the application of EU law. Strong whistleblower`s protection is seen as one of the preconditions for the rule of law especially in the context of the fight against corruption, free media reporting, and freedom of expression in democratic societies. The term whistleblower is generally understood as a person who has disclosed information about a threat to or violation of the public interest. The determination of the public interest traditionally belongs to the domain of state sovereignty. Even before the adoption of this Directive, "acting in the public interest" was the main criterion for the protection of whistleblowers in many European instruments, such as the Council of Europe Resolutions 1729(2010), 2060(2015), 2171(2017) and especially the Recommendation 7 (2014) which even states that it is up to each member state to determine which information is in the public interest and to which disclosure should be given special protection. However, categories such as national public interest, higher national interest, and the like often depend on the structures of powers that be and daily political events. A striking example of this situation is the "Luxleak" case, in which, in the midst of the criminal prosecution of the whistleblower Antoine Deltour in Luxembourg, the EU awarded him the "European Citizens' Prize" award because of the same whistleblowing acts that led to criminal proceedings in his country. To overcome such obstacles, the author argues that the Whistleblowing Directive introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. Thus, in the event of a conflict between the national public interest of a Member State and the community public interest of the EU, the judicial authorities will be obliged to protect the latter as the predominant one.

Keywords: whistleblowing, EU Directive 2019/1937, public interest, rule of law, supremacy.

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1. INTRODUCTION

The Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report infringements of European Union law was adopted in December 2019, and the period for its transposition into the national legislation of the Member States is December 17th, 2021 (hereinafter: Whistleblowing Directive -WD).[69] The primary reason for the adoption of the WD was the improvement of the implementation of European Union (EU) sectoral policies, protection of freedom of expression, and contribution to the adequate functioning of the single market.[70]. Article 1 of the WD states that the purpose is to enhance the enforcement of the Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.

Nevertheless, under the veil of ensuring equal application of the basic principles of its functioning, the EU has recognized the importance of whistleblowers for the rule of law, especially in the fight against corruption, freedom of media, and in the expression of civil rights protest in democratic societies. Their balanced and efficient protection has become one of the priorities since persons working in the public or private sector or associated with these organizations based on their professional and business activities are at the forefront of the rule of law by warning about endangering or violating the public interest.

"Acting in the public interest" is the main criterion for the protection of whistleblowers in many European instruments, such as the Council of Europe (CoE) Recommendation 7(2014), its Resolutions 2060/2015 and 2171 (2017), as well as the European Parliament Resolution from March 12th, 2014. However, all these international instruments have traditionally determined that the public interest belongs to the domain of state sovereignty, which is why the notion of whistleblowing as the detection of a violation of the public interest inevitably varies in relation to the definition of the state public interest. Moreover, the Resolution 1729 (2010) and the Recommendation 7(2014) of the CoE state that it is up to each member state to determine which information is in the public interest and to which disclosure should be given the special protection.

However, categories such as national public interest, higher national interest, and the like often depend on the structures of powers that be and daily political events, which is

[69] This step was taken after an intensive campaign of the professional and general public to protect whistleblowers in the EU. („The EU must take action to protect whistleblowers" https://edri.org/eu-must-take-action-protect-whistleblowers/, 31.05.2017; „Protecting whistleblowers – protecting democracy", https://edri.org/protecting-whistleblowers-protecting-democracy/, 25.01.2017.). The impact analysis accompanying the Proposal for Directive 2019/1937 found that the existing regulation of whistleblower protection in EU instruments is fragmentary, as certain provisions were introduced as an urgent response to the financial crisis and other scandals that actually revealed serious inconsistencies in transposition and application of EU instruments in national Member States' systems. (Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law SWD/2018/116 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:116:FIN).

[70] COM 2018. Communication from the Commision to the European Parliament, the Council and the European Economic and Social Committee Strenghening Whistleblower Protection at EU Level COM/2018/214 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0214.

why we believe that the WD represents a significant turn by introducing the concept of whistleblowers as protectors of the community public interest, i.e., the interests of the EU. Thus, in the event of a conflict between the national public interest of a member state and the public interest of the EU, judicial authorities will be obliged to protect the latter as the predominant one.

In this article, the author examines the hypothesis that the WD introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for the material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. In testing the hypothesis, the author will use the doctrinal method to determine the theoretical definition of the term whistleblower, which will be compared with the personal scope of the WD. A comparative analysis of the material scope of disclosed information that qualifies for whistleblower`s protection should prove the author's opinion that whistleblower`s protection inevitably depends on the question of national interest. Further analysis is conducted to determine the extent of those minimum standards of national public interest outlined in the WD, which the author argues to construe the notion of whistleblowing in international, i.e. common public interest.

2. THEORETICAL DEFINITION OF WHISTLEBLOWER AND PERSONAL SCOPE OF THE WHISTLEBLOWING DIRECTIVE

The term "whistle-blower"[71] means a person who has disclosed information about a threat to or violation of the public interest. The doctrine mainly perceives this term through the prism of labor law and the legal protection of whistleblowers from termination of employment. Still, the necessity of their protection is increasingly emphasized in criminal law, media law and in the field of fight against corruption. In parallel, there is a great variety of national normative solutions with a common absence or insufficient recognition of this concept.

Definitions of whistleblowing can be classified into three groups: 1. those that define this concept as a real, factual existing phenomenon; 2. those who view it as a legal phenomenon, as a relationship between different legal rights of different legal entities; 3. those who observe the whistleblowing through its function which it has for the rule of law and democracy in society (Jubb, 1999, pp. 77–94; Mijatović, 2016, pp. 265–287; Miceli & Near, 1992, pp. 1–332).

Thus, for the purpose of this article, a whistleblower will be defined as a person who has disclosed information about a threat or violation of the public interest, which he/she learned due to his/her privileged position (Martić, 2016, pp. 201-214). Thus, it is the tripartite definition, since it encompasses three constitutive elements: 1. the privileged

[71] The discussion of the terminological determinant of the term whistleblower inevitably begins with the mention of Ralph Nader, a well-known American lawyer and activist who significantly influenced the improvement of whistleblower protection in America. He coined the term "whistleblower" to change the negative perception of society carried by terms such as informer or rat, snitch. (Nader *et al.* 1972, 1-302; Macey, 8/2007, pp. 1910, ft. 53.) Ralph Nader's activism is directly credited with the adoption of certain crucial laws, especially in the field of whistleblower protection, including the "Whistleblower Protection Act" of 1989. (https://en.wikipedia.org/wiki/Ralph_Nader, 15.11.2017)

position of the whistleblower, 2. the whistleblowing, i.e., the act of disclosing information, and 3. the content of the whistleblowing, i.e., the information on endangering or violating the public interest (Martić, 2020, pp. 7 -10).

The personal scope of application of the WD is defined in Article 4. It falls under the first theoretical element and includes a wide range of persons who, in the context of their work engagement, learn about the content of whistleblowing information.

Examples include employees and civil servants; persons who have the status of entrepreneurs; shareholders and members of the administration, management, or supervisory body of the company, including their staff; volunteers, paid or unpaid trainees; any person working under the supervision and instruction of a contractor, subcontractor or supplier.

Persons whose employment was terminated after reporting the violation, as well as applicants in the process of employment or negotiation for the purpose of establishing employment who report the violation in connection with that process, are also protected.

The protection provided for in the WD will, in addition to the above-mentioned persons who report violations of EU law (whistleblowers), also apply to: facilitators, third parties related to whistleblowers, and those who may therefore be harmed in terms of employment such as colleagues or relatives of whistleblowers; a legal entity whose owner is a whistleblower or in which he/she works or with whom he/she is otherwise connected in the context of employment.[72]

3. THE MATERIAL SCOPE OF DISCLOSED INFORMATION THAT QUALIFIES FOR WHISTLEBLOWER`S PROTECTION IN THE WHISTLEBLOWING DIRECTIVE

When it comes to the definition of whistleblowing, the *prima facie* conclusion is that it is about protecting general social benefit and not pursuing personal interest or benefit. If someone discloses information that concerns only him/her or tries to influence the outcome of the procedure that personally affects him/her, such a person could not be a whistleblower, i.e., it would not be information of public interest. However, if this information alleges the violation of basic human rights or more people suffers the same consequences that have a greater social significance, it could be argued that this information may still be relevant to the public interest.[73]

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[72] The personal scope of application of Directive 2019/1937 coincides with the scope of application of the Serbian Law on Protection of Whistleblowers ("Official Gazette", No. 128/2014), and in that sense, we hold the opinion that there is no need for harmonization, except that it may be explicitly stated that facilitators (persons providing confidential assistance to whistleblowers in reporting - Article 5, paragraph 1, item 8 of this Directive) are protected if they suffer retaliation.

[73] In the case of Heinisch v. Germany (ECHR No. 28274/08), the applicant, Brigita Heinisch, pointed out that due to the insufficient number of employees she had too many work obligations which affected her health and caused frequent absences from work. However, although Ms. Heinisch complained about her personal position, the ECtHR found that such information was still of public importance because it could not otherwise be established that the users of the geriatric home (where she worked) were medically and possibly vital endangered due to inadequate care caused by insufficient number of employees. This example describes a

The common denominator of almost all definitions of whistleblowing is the content of information that mainly refers to illegal acts or omissions, regardless of whether they violate the law or other regulations. In addition, the literature often points out that the information could also contain data on illegitimate, unethical, and immoral practices (Miceli & Near, 1-322; Brink *et al.*, 87-104), which all fall within the commonly used general term "wrongdoing."

Whistleblowing can also exist in the case when the legal regulation regarding a particular issue is not adequate (e.g., when specific standards in health care are inadequate, outdated in relation to recent research), and then it is seen as a form of activism, i.e., as a way to initiate a public debate and put pressure on the state to amend existing regulations and adapt them to particular needs of society, new requirements for maintaining health and safety, etc. (Leiter, p. 435).

In addition to the content of the information, its significance is also relevant, so it is generally stated that it should be of public importance. The term primarily used in theory and practice to denote both characteristics of information (content and significance) is "information about endangering or violating the public interest." Myers points out that a distinction should be made between the information of public interest and information that may be of interest to the public, between which there does not always have to be a sign of equality (Myers, 2013).

Some authors advocate an approach according to which only "significant" or "non-trivial" threats or violations of the public interest (P. B. Jubb 1999, 77–94.; Miceli & Near, 1–322) should be included because all the effort and sacrifice of whistleblowers do not make sense if they reveal trivial issues. It could be argued that this attitude is not justified, especially bearing in mind that disclosed wrongdoing may be objectively trivial but have a high value for the whistleblower or the group of people. Moreover, whistleblowing is considered as part of the fundamental human right to freedom of expression that exists regardless of the "triviality" of the information being disclosed. The protection of whistleblowers can be seen as the absence of restrictions or obstacles to freedom of expression as one of the fundamental human rights.

Given that whistleblowing falls within the realm of the fundamental human right to freedom of expression, the European Convention on Human Rights (ECHR)[74] in every case assesses whether there was an interference by the public authorities with freedom of expression, whether it was prescribed by law, and whether it served a legitimate purpose, i.e., preventing the disclosure of confidential information. However, in the event of interference, the ECHR established in its jurisprudence the following principles which determine

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situation in which the court assessed facts that may not have been the focus of the whistleblower, and which created a complete picture that indicated that it was information of public importance. On the other hand, there are legal systems in which the argument is made that when determining the public interest, the content, form, as well as the context of the information of the whistleblower should be assessed from his point of view, and not only from the factual aspect. In this way, the public interest is determined in the USA, i.e. the balance of freedom of expression and business efficiency, the so-called Pickering test. (J. H. Conway, 797–798.)

[74] Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, Službeni list SCG – Međunarodni ugovori, br. 9/03, 5/05 i 7/05.

whether such an interference was necessary for a democratic society: 1. whether there were alternative channels for the disclosure of information; 2. whether there is a public interest in disclosing information; 3. authenticity of published information; 4. damage caused by disclosure of information; 5. whether the disclosure was in good faith; and 6. the seriousness of the sanction for disclosing the information.[75]

It follows from the above that notion of whistleblowing encourages dynamic discussion in the literature but even so, there is no single concept, nor are there universal international standards (Thüsing & Forst, 2016, pp. 3-30). Achieving a unique and universal definition of the term whistleblower is an unattainable goal because it depends on the public interest of each individual state, which is usually covered by an imprecise general legal standard and is variable depending on political and economic factors (Martić, 2020, p. 7).

In any case, it is advisable to determine as precisely as possible in legal systems what information of endangering or violating the public interest can be regarded as relevant because otherwise, there would be a place for discretionary decision-making and arbitrary action, which would have a discouraging effect on whistleblowing. Certain guidelines can be found in the United Nations (UN) Convention for the fight against corruption[76], and the CoE Criminal Law Convention[77]. Both conventions consider relevant information in the context of whistleblowing when related to the scope of their regulation, i.e., criminal offenses. The broadest range of pertinent information in the framework of whistleblowing is contained in the CoE Resolution 1729 (2010) and its Recommendation 7 (2014), thus covering various types of misconduct, including all serious human rights violations that threaten or endanger the life, health, liberty or any other legitimate interest of a public entity, administration or taxpayer, or owner of capital, employee or user of private companies.[78]

The WD streamlined this general standard by prescribing a list of information that can fall within the realm of its application. The first criterion prescribed in Article 2 of the WD states that revealed information should relate to a violation of EU law. The second criterion is that reported violations fall within the scope of the precisely prescribed areas of EU law covered by the WD. These are: public procurement; financial services, products and markets and the prevention of money laundering and terrorist financing; product safety, and in particular human nutrition; traffic safety; protection of the environment, fauna and flora, and public health; radiation protection and nuclear safety; public health protection; consumer protection; protection of privacy and personal data; security of network and information systems; state aid and the protection of the EU single market and market competition, and in particular the protection of competition; protection of

[75] Guja v. Moldova (ECtHR No. 14277/04, 12.12.2008.); Guja v. Moldova (ECtHR No. 1085/10, 27.02.2018.) Heinisch v. Germany (ECtHR No. 28274/08, 21.07.2011.) Also: European Court of Human Rights, Research Division, National Security and European case-law, 2013. www.echr.coe.int

[76] UNODC, „State of Implementation of the United Nations Convention against Corruption - Criminalization, Law Enforcement and International Cooperation", Vienna, 2015, 133.

[77] CoE Criminal Law Convention and Additional Protocol to the Criminal Law Convention on Corruption, CoE, No. 191, Strasbourg, 15.05.2003.

[78] 6.1.1. Paragraph 6 Resolution. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en,

the EU's financial interests, and the member states may, within the framework of national law, extend this protection of Union law to other areas and activities.

The material scope of application of the WD covers both the public and private sectors and not only in violation of EU instruments but also in their misuse. The WD did not repeal provisions on the protection of whistleblowers listed in EU specific sectoral instruments, which were fragmented and diverse. This is the reason why Article 3, paragraph 1 of the WD prescribes that it will apply unless otherwise provided by these sectoral instruments, which are still in force. From the above, it can be noticed that the WD regulates only the content of information and that it does not mention its significance anywhere.

4. CONCEPT OF WHISTLEBLOWING IN COMMON PUBLIC INTEREST AND THE SCOPE OF ITS PROTECTION

Considering the legal nature of directives and their sistematization in Union law, their provisions don't have direct effect on individuals in national legal system but on member states, which should take national measures for its transposition. The legal rights and obligations of individuals, therefore, are regulated in national laws that implement directives (Knežević-Predić et al., 2009, 146).

The guiding principle of the EU is the idea that it "should not encroach further upon the member state's prerogatives than is necessary to attain its objectives "(Zwiers, 2011, 10). Article 6 of the Treaty on European Union (Treaty of Lisbon – TEU) states that "the Union shall respect the national identities of its Member States."

In that regard, the WD's purpose is in line with the principle of subsidiarity and proportionality of EU law, because it stipulates minimum standards for the high protection of reporting persons in the breach of the explicitly listed areas of EU policies. Namely, Article 1 states that "the purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law." Nevertheless, whistleblowing is by its definition inseparably linked to the national public interest, which covers the area of national security, protection of classified information, and other areas that traditionally fall within the national sovereignty of a member state.

One could argue that the WD remains outside this line of national sovereignty in Article 3 which governs the relationship with other EU acts and national provisions. Paragraph 2 of this article of the WD stipulates that "This Directive shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests". In particular, it shall not apply to reports of breaches of the procurement rules involving defense or security aspects unless they are covered by the relevant acts of the EU. Moreover, paragraph 3 of said article of the WD states that: "This Directive shall not affect the application of Union or national law relating to any of the following: (a) the protection of classified information; (b) the protection of legal and medical professional privilege; (c) the secrecy of judicial deliberations; (d) rules on criminal procedure."

On the contrary, it can be argued that the WD has made a significant impact in "unifying" or "setting minimum standards" of substantive national criminal law, even though it falls

into the area of freedom, security, and justice where the EU has competencies to approximate and not to unify national legal systems by setting minimum common standards.[79]

Article 4 of the Treaty on the Functioning of the Union (TFEU) which states that the EU "shall respect their essential State functions, including (...) maintaining law and order (...), and Article 67 of the TFEU that states that "the Union shall constitute an area of freedom, security, and justice with respect for fundamental rights and the different legal systems and traditions of the Member States", should be recalled.

It seems that the WD surpasses the proclaimed goals and intentions defined in its Article 1 through the provisions of protection of reporting persons from criminal liability in the course of reporting or publicly disclosing information of breaching EU law, i.e. information in the interest of the EU, and not necessarily in the national public interest. Thus, the WD directly interferes in the sovereignty of Member States to define the public interest in a certain way for the purposes of criminal law protection of whistleblowers. In that regard, Article 21, paragraph 2 states: "Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur a liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive."[80] It may be concluded from this paragraph read in conjunction with Article 3 paragraphs 2 and

[79] Exept for instances like criminal offences against financial interest of the EU or protection of environment.

[80] Paragraph 3 of the cited article stipulates also that reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law. This is related to the means of acquiring of the disclosed information by the whistleblower. In this regard, author points out that whistleblowing encompasses two phases, acquiring information on wrongdoing and latter phase, reporting or publicly disclosing that information. By definition, whistleblower is a person that acquired information legally, in the context of his/her work-related relationship with the organization that is a source of information, but had no authority to disclose it to unauthorized person or public.(Martić, 2020, 5-20) This is to differentiate with "reporting persons" that has acquired information illegally and disclosed it also illegally. Therefore, cited Paragraph 3 of Article 3 WD regulates criminal liability to those reporting persons that acquired disclosed information illegally, which cannot be qualified as whistleblowers. This is also explained in recital 92 of the WD Preamble which states: "Preambula 92. Where reporting persons lawfully acquire or obtain access to the information on breaches reported or the documents containing that information, they should enjoy immunity from liability. This should apply both in cases where reporting persons reveal the content of documents to which they have lawful access as well as in cases where they make copies of such documents or remove them from the premises of the organisation where they are employed, in breach of contractual or other clauses stipulating that the relevant documents are the property of the organisation. The reporting persons should also enjoy immunity from liability in cases where the acquisition of or access to the relevant information or documents raises an issue of civil, administrative or labour related liability. Examples would be cases where the reporting persons acquired the information by accessing the emails of a co-worker or files which they normally do not use within the scope of their work, by taking pictures of the premises of the organisation or by accessing locations they do not usually have access to. Where the reporting persons acquired or obtained access to the relevant information or documents by committing a criminal offence, such as physical trespassing or hacking, their criminal liability should remain governed by the applicable national law, without prejudice to the protection granted under Article 21(7) of this Directive. Similarly, any other possible liability of the reporting persons arising from acts or omissions which are unrelated to the reporting

3, that the application of the WD is exempted in case of criminal procedure, but not when it comes to criminal substantive law itself. With that respect, recital 28 of the Preambule of the WD, which states: "While this Directive should provide, under certain conditions, for a limited exemption from liability, including criminal liability, in the event of a breach of confidentiality, it should not affect national rules on criminal procedure, particularly those aiming at safeguarding the integrity of the investigations and proceedings or the rights of defense of persons concerned."

The application of the WD is also exempted in case of classified information, but not in the event of disclosing other confidential information, such as trade secrets. With that regard, recital 91 of the Preamble of the WD states: "It should not be possible to rely on individuals' legal or contractual obligations, such as loyalty clauses in contracts or confidentiality or non-disclosure agreements, so as to preclude reporting, to deny protection or to penalize reporting persons for having reported information on breaches or made a public disclosure where providing the information falling within the scope of such clauses and agreements is necessary for revealing the breach. Where those conditions are met, reporting persons should not incur any liability, be it civil, criminal, administrative, or employment-related. It is appropriate that there be protection from liability for the reporting or public disclosure under this Directive of information in respect of which the reporting person had reasonable grounds to believe that reporting or public disclosure was necessary to reveal a breach pursuant to this Directive. Such protection should not extend to superfluous information that the person revealed without having such reasonable grounds." To put it in short terms, the WD has narrowed national public interest to national security or power of member states to protect their essential security, defense, and military interests.

Reporting or publicly discovering covered information of member states, or companies in the member states, especially in so-called tax havens states, that can damage, underline, or in any way circumvent EU single market rules, definitely falls within the scope of application of the WD.[81]

In that case, we are of the opinion that member states should not be able to invoke the protection of national sovereignty, national public interest, or national market as an excuse to retaliate against the whistleblower to deter future alike whistleblowers who may jeopardize the national economic and other public interest, which is contrary to the community public interest of ensuring the proper functioning of the EU single market.

In that regard, recital 3 of the Preamble of the WD is relevant stating that "In certain policy areas, breaches of Union law, regardless of whether they are categorized under national law as administrative, criminal or other types of breaches, may cause serious harm

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or are not necessary for revealing a breach pursuant to this Directive should remain governed by theapplicable Union or national law. In those cases, it should be for the national courts to assess the liability of the reporting persons in the light of all relevant factual information and taking into account the individual circumstances of the case, including the necessity and proportionality of the act or omission in relation to the report or public disclosure."

[81] For example, a study on the financial implications of the lack of an adequate framework for reporting irregularities and protecting whistleblowers, conducted in 2017, estimated that the EU is potentially losing, especially in the area of public procurement, between 5.8 and 9.6 billion euros per year. (Milieu, 2017).

to the public interest, in that they create significant risks for the welfare of society. Where weaknesses of enforcement have been identified in those areas, and whistleblowers are usually in a privileged position to disclose breaches, it is necessary to enhance enforcement by introducing effective, confidential, and secure reporting channels and by ensuring that whistleblowers are protected effectively against retaliation."

A possible conflict of national public interest with the "EU public interest" lies in the area of reporting or publicly disclosing information of acts or omissions that "defeat the object or the purpose of the rules in the Union acts and areas falling within the material scope referred to in Article 2." (Article 5, Paragraph 1, Point 1 of the WD). As an example of such conflict, it can be recalled the context in which the WD was adopted. The protection of whistleblowing in "community public interest" proved necessary in cases like "Luxleaks"[82] and "Panama Papers"[83] - which showed the consequences of distorted competition in the field of taxation which damaged the national and EU budget; the "Dieselgate" case[84], which showed that a lack of whistleblower protection could have far-reaching consequences in the other member states, given that there was an internal report of harmful diesel car emissions that had not been dealt with; the case of a French company that made industrial silicone breast implants, which endangered the health and caused medical problems in 300,000 women in 65 countries;[85] the case of "Cambridge Analytica"[86] which revealed the massive misuse of personal data, etc.

A striking example that the WD goes beyond the proclaimed goals of better implementation of sectoral policies (Article 1) is the provision of Article 21 of the WD, which directly introduces a defense from criminal liability of the whistleblower for disclosing information, which is a question of national criminal substantive law that falls within the realm of national sovereignty and national public interest. Paragraph 7 of Article 21 stipulates: "In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labor law, persons referred to in Article 4 (reporting persons – author added) shall not incur the liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive. Where a person reports or publicly discloses

[82] BBC News, "LuxLeaks scandal: Luxembourg tax whistleblowers convicted", published 29 June 2016, https://www.bbc.com/news/world-europe-36662636, 14.10.2021.

[83] Suddeutsche Zeitung, Panama Papers The secrets of dirty money", https://panamapapers.sueddeutsche.de/en/, 14.10.2021.

[84] PhysOrg: 5,000 'Dieselgate' deaths in Europe per year: study, 2017. https://phys.org/news/2017-09-dieselgate-deaths-europe-year.html#jCp, 02.03.2019.

[85] BBC News: Q&A: PIP breast implants health scare, 2013. http://www.bbc.com/news/health-16391522, 02.03.2019.

[86] The New York Times, Cambridge Analytica and Facebook: The Scandal and the Fallout So Far, By Nicholas Confessore
April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html, 14.10.2021.

information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3 paragraph 2 of the Directive (EU) 2016/943."

Summarizing all cited provisions, it can be argued that under the veil of the proclaimed purpose of better implementation of the EU instrument in specific sectoral policies stipulated in Article 1, the WD sets community (single market) public interest as prevailing to the national interest in order to prevent undue advantage for member state under state aid or any other specific sectoral instrument.

Moreover, by setting the common minimum standard for whistleblowers protection, the WD is also addressing cross-border whistleblowing since the application of national legal provisions is limited to one state jurisdiction. In the Impact Assessment accompanying the WD, the European Commission states that: "Uneven protection may thus dissuade reporting and can result in gaps in the protection of whistleblowers who work for foreign-based companies or in another Member State than the one whose law governs their employment relationship and who risk "falling through the cracks".[87]

Even though one may argue for the possibilities to improve provisions of the WD, it can be stated that such regulation undoubtedly presents a significant step in the protection of whistleblowers, but also points to the possible new trend in the interpretation of subsidiarity and proportionality principle, especially in criminal substantive law.

Nevertheless, the transposition period expires on 17.12.2021. Therefore it is yet to be analyzed the adequacy of national implementation measures and the question of state liability for failing to adopt or improper adoption of its provisions. In that context, it should be emphasized that in the event that a member state violates its obligation to implement the WD or fails to adopt implementation measures or adopt improper implementation measures within the prescribed time frame, individuals will have the right to invoke directly the provisions of the WD in the proceedings against the state before the national court, and the national court will be obliged to protect the rights arising from them for individuals. The court shall directly apply the provisions of the directive, which means that they will have a direct effect."(Knežević-Predić et al., 2009, 146).[88]

5. WHISTLEBLOWER'S PROTECTION AS A TOOL FOR ENHANCING THE RULE OF LAW IN THE EUROPEAN UNION

According to Kant's moral ethics, "the act of lying is never allowed" - so telling the truth, that is, whistleblowing, could be considered obligatory. On the other hand, according to Roger Crisp, the role of truth affects our autonomy, or that the truth enables an informed

[87] Paragraph B1 of the Commission staff working document impact assessment cccompanying the document Proposal for a Directive of the European Parliament and of the Counci on the protection of persons reporting on breaches of Union law SWD/2018/116 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018SC0116), 14.10.2021.

[88] The first case in which the ECJ accepted the direct effect of the directive was Van Duyn v. Homme Office (Case 47/74, 1974, ECR1337 – according to: Knežević-Predić, et al., 2009, p. 146).

decision, and according to Foucault, the truth enables criticism, which is a necessary condition for democracy (F. Mijatović, 2016, pp. 271–272).

If whistleblowing is comprehended as Foucault's ethic of true speech (Foucault, *1982. –1983.*, p. 65, in: F. Mijatović, 2016, pp. 271–272), its protection is undoubtedly in the interest of the whole society because the truth is a precondition for criticism, informed decision-making, and democracy. However, the valuation of whistleblowing as a virtue in modern society is variable from different understandings of the role that truth should play in society.

In the literature, there are views that protection should be provided to the whistleblowing that is morally justified, whereby this moral ethics is viewed from different aspects and with the influence of opposing interests of the state and individuals. Kovacevic also points out that the values that the whistleblower defends are more important than loyalty to the employer, which is the foundation of protection (Kovačević, 2013, 104–106). Delmas even links the question of the moral justification of whistleblowing to the form of government, thus emphasizing that the moral justification of whistleblowing can be set in "democratic societies where the rule of law is a matter of respecting democratically enacted acts," while whistleblowing in "non-democratic societies or other does not require any special justification"(Delmas, pp. 77–105).

In addition to the academic discussion on the moral justification of whistleblowing as a tool for enhancing the rule of law in a legally regulated state, the literature also states that whistleblowing is a social lever for change, i.e., improvement of the existing legal order. Leiter also believes that "soft whistleblowing" should be protected, which differs from "traditional" whistleblowing in that it does not refer to illegal, unethical behavior (malfeasance) but to the expression of disagreement with public policy course (Leiter, 2014, p. 433).

These attitudes illustrate the trend that in assessing the justification of whistleblowing (understood as telling the truth), the role of truth is more predominant than the truth itself. Due to that, whistleblowers are at the forefront of the rule of law and transparency by disclosing information in the international (community) public interest.

6. CONCLUSION

The WD is the first binding European instrument that explicitly recognizes the protection of whistleblowers as a necessary mechanism to improve the application of EU law. Apart from the indisputably great importance of this Directive for the protection of whistleblowers, it also urges member states for conditioned protection of whistleblowers who disclosed information of abuse or breach of EU instruments in explicitly listed policy areas. In this way, the WD circumvents usage of a general standard of public interest whose definition traditionally belongs to the domain of state sovereignty.

In this paper, the author verified the hypothesis that the WD introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. Thus, in the

event of a conflict between the national public interest of a member state and the community public interest of the EU, the judicial authorities will be obliged to protect the latter as the predominant one.

Through its provisions, the WD introduces strong protection for reporting persons that are at the forefront of the rule of law by disclosing information of international (community) public interest. In a given way, the EU can enhance basic principles of the rule of law in democratic societies such as equal treatment before the law and accountability of states for adequate law enforcement.

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A GLOBAL PANDEMIC TREATY: INTERNATIONAL COMMUNITY'S RESPONSE TO CONTEMPORARY SECURITY THREATS

Assuming that the security issue has gained additional complexity and importance due to the COVID-19 disease that pandemically marked our time, the basic goal of this paper is to emphasise the benefits of establishing an adequate international treaty regime on pandemic preparedness as a response to this ongoing health and safety challenge of global proportions. The establishment of an international pandemic treaty framework under the auspices of the World Health Organization could enable individual countries to improve their capacity to act more productively in terms of preparedness and responsiveness to new security threats. The results of this research will show that the adoption of such a universal legal instrument would contribute to the greater transparency and accountability of the international response to security threats of this kind, as well as to more coordinated action of the international community in terms of early detection, warning and response to future pandemics.

Keywords: international community, pandemics, security, World Health Organization (WHO), international pandemic treaty.

1. INTRODUCTORY REMARKS

An *epidemic* is a sudden outbreak of a disease that is new to an area or a sudden increase in the number of new cases of previously endemic disease (Youngerman, 2008, p. 5). The difference between epidemic and pandemic is a matter of degree. When an epidemic rapidly spreads around the world, or over a large part of the world, and strikes a large part of the population, it is called a pandemic (*Ibid*., p. 6). The COVID-19 pandemic has been an unprecedented catastrophe and challenge for the global community that has tested our national political systems and laws when it comes to making urgent solutions for emergency situations.

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According to Duff *et al*., pandemics, which by definition „span international borders", present „a threat to the health and wellbeing of societies". They also underline that „the COVID-19 pandemic has made collective action to achieve optimal prevention, preparedness, and response to these events a global imperative" (Duff *et al*., 2021, p. 428). The main goal of this paper is to point out the need and advantages of establishing an adequate international treaty regime on pandemic preparedness as a response to the health and safety challenges of global proportions. The adoption of an international treaty mechanism on pandemic prevention and preparedness could strengthen our national, regional and global capacities and resilience to future pandemics, other major health emergencies and, perhaps, even worse threats that may come afterwards. This paper will try to present the activities of the World Health Organization and the European Council, which are aimed at the creation of an international treaty regime on pandemic preparedness and response.

2. ACTIONS OF THE WORLD HEALTH ORGANIZATION IN THE CONTEXT OF THE COVID - 19 PANDEMIC

The World Health Organization (WHO) plays a key role among all intergovernmental organizations involved in tackling pandemics, and it is the only source of legal authority in this field (Kuznetsova, 2020, p. 2). With its 194 member states, the WHO directs and coordinates health-related activities within the UN system (Zamfir & Fardel, 2020, p. 25). The Constitution of the WHO was signed in New York on 22 July 1946. It entered into force on 7 April 1948, when the 26th of the 61 Member States deposited its ratification. World Health Day is celebrated each year on 7 April (Beigbeder *et al.*, 1998, p. 12). The WHO was established as a specialized health agency of the United Nations (Charter of the United Nations, Article 57). The *Constitution* of the *WHO* defines the objective of the Organisation in Article 1: "The objective of the WHO shall be the attainment by all peoples of the highest possible level of health". Article 2 grants the WHO extensive normative powers to carry out its mission, authorizing the World Health Assembly (WHA) to adopt "conventions, agreements and regulations and make recommendations with respect to international health matters" (Gostin *et al*., 2015, p. 2). The Constitution of the WHO is specific in terms of the scope and breadth of the agenda it sets for the Organisation itself. Actually, the Constitution sets out 22 tasks for the Organisation, which cover almost every conceivable activity linked to the promotion of health (Clift, 2013, p.7).

The Constitution of the WHO created an institution with extraordinary powers (Gostin *et al.*, 2015, p. 2). The Organisation contributes to international public health through the activities aimed at disease prevention and control, promotion of good health, by addressing disease outbreaks, through the initiatives to eliminate diseases (e.g., vaccination programs) and development of treatment and prevention standards (Yadav, 2017, p. 27). The WHO is responsible for providing leadership on global matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends (Zamfir & Fardel, 2020, p. 25). As Kuznetsova pointed out (2020, p. 2), the core functions of the WHO related to pandemics prevention and control include the following: "supporting Member States

in developing national capacity to respond to pandemics, supporting training programs, coordinating Member States for pandemic and seasonal influenza preparedness and response, developing guidelines, and strengthening biosafety and biosecurity".

The Independent Panel for Pandemic Preparedness and Response (IPPR) was established by the WHO Director-General in response to the WHA resolution 73.1.[89] The primary mission of the Independent Panel is "to provide an evidence-based path for the future, based on the lessons of the present and the past, to ensure countries and global institutions, including particularly WHO, effectively address health threats".[90] The Panel held its first meeting on 17 September 2020 and agreed to focus on three main themes of enquiry. The first research topic relates to the analysis and vision for a strengthened international system that would be ideally equipped for pandemic preparedness and response. Another research topic focuses on providing a review of the response to the COVID-19 pandemic from its initial phase to the present one, including the review of global warnings, the spread of a pandemic, country responses and its impact on society. Under the third theme, an attempt is to be made to present lessons learned on why SARS-CoV-2 spread globally and had such devastating impact, including an understanding of the characteristics of the virus and governmental and institutional responses at all levels.[91]

The Independent Panel began its impartial, independent and comprehensive review in September 2020, and presented its final report at the 74th World Health Assembly on 25 May 2021[92], which we will discuss in the third part of this paper devoted to the activities of the EU and the WHO towards the adoption of an international treaty on improving pandemic preparedness and response.

The resumed 73rd World Health Assembly (WHA) took place virtually from 9 until 14 November 2020. The WHA adopted Resolution EB146.R10 to strengthen preparedness for health emergencies. The resolution renews the commitment to better prepare for health emergencies such as COVID-19 through "full compliance" with the International Health Regulations (2005).[93] The COVID-19 pandemic has underscored the importance of investing

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[89] According to WHA Resolution 73.1, the Independent Panel review experiences gained and lessons learned from the WHO-coordinated international health response to COVID-19, which includes: (i) the effectiveness of the mechanisms at WHO's disposal; (ii) the functioning of the International Health Regulations(2005) and the status of implementation of the relevant recommendations of previous IHR ReviewCommittees; (iii) WHO's contribution to United Nations-wide efforts; and (iv) the actions of WHO and their timelines pertaining to the COVID-19 pandemic - and to make recommendations to improve capacity for global pandemic prevention, preparedness, and response, including through strengthening, as appropriate, the WHO Health Emergencies Programme. See: World Health Assembly resolution 73.1., COVID- 19 response, WHA 73.1, 19 May 2020. Available at: https://apps.who.int/gb/e/e_wha73.html (23 August 2021)

[90] About the Independent Panel see: https://theindependentpanel.org/about-the-independent-panel/ (25 August 2021)

[91] Listings of WHO's response to COVID-19. World Health Organization. Available at: https://www.who.int/news/item/29-06-2020-covidtimeline (15.07.2021.)

[92] See: https://theindependentpanel.org/about-the-independent-panel/ (25 August 2021.)

[93] The first-ever International Day of Epidemic Preparedness, being held on 27 December 2020, was called for by the United Nations General Assembly to advocate the importance of the prevention of, preparedness for andpartnership against epidemics. See: https://www.who.int/news/item/29-06-2020-covidtimeline (15 July 2021). Resolution EB146.R10 is available at: https://apps.who.int/gb/ebwha/pdf_files/EB146/B146_R10-en.pdf

in systems to prevent, detect and respond to infectious disease outbreaks.[94]

The COVID-19 Strategic Preparedness and Response Plan (SPRP) for 2021 was issued by the WHO on 24 February 2021. SPRP (2021) aims to direct coordinated action at the national, regional and global levels to overcome the ongoing challenges in response to COVID-19, address inequities and plot a course out of the pandemic.[95] As stated by Smith (2015, pp. 130-147), COVID-19 and previous pandemics have tested the leadership of the WHO and revealed a number of problems in its activities.[96] If we take into account the level of uncertainty and lack of knowledge about COVID-19 that is still present, we must recognise that the WHO has taken appropriate steps in the initial response to the pandemic that were in accordance with its basic functions and mandate. The point is that the existing measures adopted by the WHO fall within its scope and are limited, as we have pointed out, primarily by its mandate. It is quite clear that the lessons learned from the response to the COVID-19 pandemic should be further analysed and used as a basis for adopting future measures in relation to the COVID-19 virus pandemic, while the existing emergency mechanisms should be improved. We must agree with the widespread opinions of experts when it comes to the need to provide more resources for the WHO and also to expand its mandate, which will enable WHO to undertake broader actions in crisis situations. All in all, the WHO should play a greater role in the field of leadership and coordination in the future.

3. THE BASIC ROLE AND SIGNIFICANCE OF THE EUROPEAN UNION IN THE FRAMEWORK OF THE GLOBAL HEALTH SECURITY STRENGTHENING PROCESS

When it comes to the EU's status within the WHO, it should be emphasized that the Union has the status of an *unofficial observer*. Such status of the EU was established by an exchange of letters, which was published on 4 January 2001 in the Official Journal.[97] The EU has observer status in the governing bodies of the WHO. Union representatives can attend

[94] It is important to emphasize that WHO works closely with the governments to support their efforts to build strong emergency and epidemic preparedness systems, as part of an overall approach to advance universal health coverage and strengthen the primary health care system. Available at: https://www.who.int/news-room/events/detail/2020/12/27/default-calendar/international-day-of-epidemic-preparedness (15 July 2021)

[95] Actually, SPRP (2021) builds on what we have learned about the virus and our collective response during 2020 turning that knowledge into strategic actions. See: COVID-19 Strategic Preparedness and Response Plan (SPRP 2021). World Health Organization. Available at: https://www.who.int/publications/i/item/WHO-WHE-2021.02 (16 July 2021)

[96] The WHO response to both the 2009 influenza pandemic and theCOVID-19 pandemic has been extensively criticized. The main points related to the WHO pandemic prevention and control activities that have come under criticism are as follows: a) over/underestimation of threat; b) conflict of interest and political bias; c) problems related to the IHR implementation; d) slow response; e) lack of financial resources; f) the WHO is seen as a more political and less technical organization; g) the WHO pandemic preparedness plans are ill-equipped to foresee and solve unique ethical challenges that may arise during different infectious disease outbreaks (Smith, 2015, pp. 130-147).

[97] The exchange contained a ''Memorandum concerning the framework and arrangements for cooperation between the WHO and the Commission of the European Communities". All member states of the Union are

the WHA, the Executive Board, and the EURO regional committee meetings but can only speak after all members have spoken. This collaboration was set up through an exchange of letters, the most recent dating from 2001. A formal programmatic partnership was established between the WHO Regional Office for Europe and the European Commission in 2010 and renewed in 2015 (Zamfir & Fardel, 2020, p. 25). It is important to know that the Treaty on the Functioning of the European Union (TFEU) allows the EU to adopt legislative acts in the field of health, which ensues from the two of its provisions. Firstly, an explicit basis is to be found in Article 168 of the TFEU, which underlines that "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".[98] Secondly, an indirect legal basis lays in Article 114 of the TFEU. According to Article 114, Union is competent to harmonize national legislation with the aim of completing the internal market, particularly in the field of health.[99] When it comes to the WHO financial support, the EU and its Member States are the WHO's largest financial donors, accounting for one-third of the organisation's income. As stated by Zamfir & Fardel, the negotiation of the international health regulations in which the EU participates have also strengthened relations between the Union and the WHO. It is also important to say that the EU supports the work of the WHO on strengthening health systems in developing countries, both politically and financially. The EU is also actively involved in the WHO emergency programmes and was among the driving forces behind the WHO reform launched in 2012 to increase coherence in global health activities by improving its programmes and its financial and governing structures (Zamfir & Fardel, 2020, p. 25).

The Council of the EU is composed of the representatives of the Member States at the ministerial level (Misita, 2014, p. 111). The Council is an essential EU decision-maker. Actually, when we talk about the competence of the Council, it should be emphasized that the Council is the EU's principal legislative and policy-making institution and that it is formally charged with decision-making across virtually all areas of the Union's activities. In fulfilling its decision-making functions, the Council as a body represents and attempts to aggregate the interests of all the member states' governments (Hayes-Renshaw, 2012, p. 76). The European Council acts as an institutionalized practice of occasional gathering of heads of state and governments of the member states of the EU. It is a practice the origins of which are linked to the early '70s of the last century. The European Council entered the constitutional text on the basis of the Single European Act while gaining the formal status of an institution through the Treaty of Lisbon (Misita, 2014, p. 108). The monitoring of activities in the field of external action indicates a significant effort of the European Council to form a visible profile in the international system. Its performance shows the high frequency and intensity of its activities (Wessels, 2016, p. 240). The function of the President of the European Council is mentioned for the first time in the Treaty of Lisbon

also members of the WHO. See: EXCHANGE OF LETTERS between the World Health Organization and the Commission of the European Communities concerning the consolidation and intensification of cooperation, Official Journal of the European Communities, (2001/C 1/04). 4.1.2001.

[98] Article 168 of Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012.

[99] *Ibid*, Article 114.

and is reflected, *inter alia*, in the representation of the Union at the international level (Misita, 2014, p. 108). Heads of state or government have turned the European Council into "the constitutional architect of the Union and the ultimate decision-maker" (Wessels, 2016, p. 240). The President of the European Council speaks on behalf of the EU in the United Nations General Assembly. A further way of representing the Union is at the G7, G8 and G20 summits, where, in addition to the leaders of the largest member states, the Union is again represented by two presidents (*Ibid*., p. 223).

When it comes to the role of the EU in strengthening the WHO, the Council of the EU and the representatives of the governments of the Member States in the Draft Conclusions from 27 October 2020 acknowledged that "based on its mandate, the WHO has a central role to play as the leading and coordinating authority in addressing global health challenges, including preparedness for, prevention and detection of, and response to outbreaks".[100] On 6 November 2020, the Council and the representatives of the governments of the member states approved conclusions from 27 October 2020 on the role of the EU in strengthening the WHO. The conclusions recognize the central role of the WHO as the leading and coordinating body in addressing global health challenges while recalling that during many pandemics the expectations placed before the WHO have often exceeded its capacity and ability to support its member states in developing strong and resilient health systems.[101] On 18 December 2020, the Council of the EU approved conclusions which draw on the lessons from the current pandemic and cover four important areas. When it comes to four important areas, the emphasis is on improving the EU crisis management, ensuring the supply of medical products, improving access to and sharing health data and strengthening the EU's role in global health programmes.[102] In the Council's conclusions on COVID-19 lessons learned on health, it is stated that "the year 2020 has been a year of unprecedented challenges for Member States, the EU and the entire world", and that "the COVID-19 pandemic is a health crisis that has an unprecedented detrimental impact on our societies and economies".[103] At the meeting of deputy permanent representatives to the EU, that was

[100] Council of the European Union Draft Conclusions, 2020. Draft Conclusions of the Council and the Representatives of the Governments of the Member States of 27 October 2020 on the role of the EU in strengthening the World Health Organization. No. doc: 12276/20 SAN 378 DEVGEN 144 ONU 61, 27.10.2020, pp. 5-6.

[101] The Council and the representatives of the governments of the member states expressed their commitment to take a coordinating, proactive and leading role in an inclusive process to strengthen global health security and the WHO, in particular its capacity for preparedness and response in health emergencies. See: PRESS RELEASE – Council of the European Union, 6 November 2020. Available at: https://www.consilium.europa.eu/hr/press/press-releases/2020/11/06/strengthening-the-world-health-organization-the-eu-is-ready-to-take-the-leading-role/ (10 August 2021)

[102] PRESS RELEASE – Council of the European Union, 18 December 2020. Available at: https://www.consilium.europa.eu/en/press/press-releases/2020/12/18/covid-19-lessons-learned-in-health-the-council-approves-conclusions/ (11.08.2021)

[103] It is also stated that "the challenges which we currently face can only be effectively tackled together", which requires "closecollaboration and coordination between Member States, the institutions of the EU, civil society and the entire global community". See: Council of the European Union Conclusions, 2020. Council conclusions of 18 December 2020 on COVID-19 lessons learned in health. No.doc: 14196/20 SAN 485 PHARM 74 MI 587 IPCR 51 COVID 19, 18.12.2020, p. 2.

held on 23 July 2021, the Council of the European Union has reached an agreement on draft proposals to bolster the role of the European Centre for Disease Prevention and Control (ECDC) and to amend the EU law on cross-border threats to health.[104] The ECDC is an EU agency, and according to Article 3 of the Regulation (EC) No 851/2004, its mission is to "identify, assess and communicate current and emerging threats to human health posed by communicable diseases".[105]

During the COVID-19 pandemic, the EU was given the opportunity to further strengthen its role as a global health actor and thus directly influence the improvement of health worldwide. Previous analysis has shown that the EU is trying to be a part of the process of legal reform within the WHO, which refers to possible changes in the shortcomings of the International Health Regulations (IHR 2005), as a legally binding instrument, and also in the process of adopting the international treaty on improving pandemic preparedness and response. The EU's involvement in all significant processes and discussions concerning global health, as well as significant cooperation with the WHO during the COVID-19 pandemic, can certainly lead to an improvement of its current *observer status* within the WHO. Previous analysis has also shown that the EU and the WHO have had long-standing cooperation which is based on an exchange of letters since 2001. Over time, the EU has become a reliable partner of the WHO when it comes to improving health globally, especially given that the Union and its Member States represent the WHO's most significant financial donors.

4. ACTION OF THE EUROPEAN UNION AND THE WORLD HEALTH ORGANIZATION TOWARDS THE ADOPTION OF THE INTERNATIONAL TREATY ON IMPROVING PANDEMIC PREPAREDNESS AND RESPONSE

The limitations of the current global health governance have become evident (Velásquez & Syam, 2021, p. 6). As some authors rightly noted, "improving health and addressing health inequalities and externalities requires effective international action on health that entails essential *global* health functions beyond what individual nation-states can accomplish, even with external assistance" (Ruger & Yach, 2009, p. 2). In the final report of the Independent Panel for Pandemic Preparedness and Response (IPPR), it is stated that pandemic preparedness planning is not only the responsibility of the health sector but is a core function of governments and the international system and that it must be overseen at the highest level.[106] The proposal for an international treaty on pandemics was firstly announced by the President of the European Council, Charles Michel, at the Paris Peace Forum in November 2020. At a virtual

[104] PRESS RELEASE – European Centre for Disease Prevention and Control and cross-border threats to health: Council agrees negotiating position. Council of the European Union, 23 July 2021. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/07/23/european-centre-for-disease-prevention-and-control-and-cross-border-threats-to-health-council-agrees-negotiating-position/

[105] Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control, *OJ L 142, 30.4.2004, pp. 1–11.*

[106] Report of the Independent Panel for Pandemic Preparedness and Response (IPPR). 2021. *COVID-19: Make it the Last Pandemic*, p. 20. Available at: https://recommendations.theindependentpanel.org/main-report/ (27 August 2021)

summit hosted by Saudi Arabia on 21-22 November 2020, the G20[107] leaders expressed their strong commitment to coordinated global action, solidarity, and multilateral cooperation. In this context, the President of the European Council proposed an initiative to ensure a better global response to future pandemics, and stated that an international treaty on pandemics could help us respond more quickly and in a more coordinated manner when pandemics occur.[108] At the meeting that was held on 19 February 2021, the leaders of the G7 group[109] emphasised that the COVID-19 pandemic has shown that "the world needs stronger defence against future risks to global health security", and that they "will work with the WHO, G20 and others, in particular through the Global Health Summit in Rome, to strengthen the global health and health security architecture for pandemic preparedness", including through "health financing and rapid response mechanisms, by strengthening the 'One Health' approach and Universal Health Coverage, and exploring the potential value of a global health treaty".[110] At the European Council meeting that was held on 25 February 2021, EU leaders underlined the need for global multilateral cooperation to address current and future health threats and agreed to work on an international treaty on pandemics within the WHO framework and to advance global health security. On 30 March 2021, leaders from all around the world joined the President of the European Council, Charles Michel, and the Director-General of the WHO, Dr. Tedros Adhanom Ghebreyesus, in an open call for an international treaty on pandemics.[111] One of the remarks made by President Michel during a joint press conference, was that COVID-19 pandemic is much more than "just a health" issue, and that it requires "a global approach and a collective commitment at the highest political level".[112] When it comes to the action of the European Council aimed at the adoption of an international treaty on pandemics, it is important to emphasize that on 20 May 2021 the Council adopted a

[107] The G20 is an international forum that brings together the world's major economies. The members of the G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, Italy, India, Indonesia, Japan, Mexico, the Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union. Spain is a regular guest.

[108] He also stated that "the treaty should be negotiated with all United Nations organisations and agencies, in particular the WHO", because "the WHO must remain the cornerstone of global coordination against health emergencies". See: Main results of G20 summit, 21-22 November 2020. Available at: https://www.consilium.europa.eu/en/meetings/international-summit/2020/11/21-22/ (12 August 2020)

[109] The G7 is an informal grouping of seven of the world's advanced economies: Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the European Union. See more at: Canada and the GZ, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/g7/index.aspx?lang=eng (12 August 2020.)

[110] STATEMENTS AND REMARKS - G7 Leaders' statement. European Council, 19 February 2021. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/02/19/g7-february-leaders-statement/ (12 August 2020.)

[111] PRESS RELEASE – EU supports start of WHO process for establishment of Pandemic Treaty: Council decision. Council of the European Union, 20 May 2020. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/05/20/eu-supports-start-of-who-process-for-establishment-of-pandemic-treaty-council-decision/ (12 August 2021.)

[112] STATEMENTS AND REMARKS - Remarks by President Charles Michel during a joint press conference with WHO Director-General Tedros Adhanom Ghebreyesus. European Council, 30 March 2021. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/03/30/remarks-by-president-charles-michel-during-a-joint-press-conference-with-who-director-general-tedros-adhanom-ghebreyesus/ (13 August 2021.)

decision to support the launch of negotiations over an international treaty on the fight against pandemics.[113] The 74th World Health Assembly (WHA) commenced on 24 May 2021 and concluded its sessions on 31 May 2021. At the 74th WHA, the 194 members of the WHO have adopted the decision to discuss a new international treaty on pandemics at a special session that will be held in November 2021.[114]

As we stated above, the Independent Panel was established by the WHO Director-General in response to the WHA resolution 73.1. The Panel began its impartial, independent and comprehensive review in September 2020, and presented its final report at the 74th WHA on 25 May 2021.[115] The final report is actually the culmination of eight months of work. The Independent Panel systematically, rigorously and comprehensively examined why COVID-19 became global health and socio-economic crisis.[116] The members of the Independent Panel have spent eight months examining the state of pandemic preparedness before COVID-19, the circumstances of the identification of SARS-CoV-2 and the disease it causes, and responses globally, regionally, and nationally, particularly in the early months of the pandemic. The Panel has also analysed the wide-ranging impacts of the pandemic on health and health systems and the social and economic crises that it has precipitated (Sirleaf & Clark, 2021, p. 101). When we talk about the recommendations made by the Panel in the Report, it is important to say that the Panel's recommendations "flow from the diagnosis made of what went wrong at each stage of the pandemic in preparedness, surveillance and alert, and early and sustained response" (*Ibid*., 2021, p. 103). The Panel's recommendations have two objectives. As the authors say, "first objective is to end the pandemic, and second is to prevent a future disease outbreak from becoming a pandemic" (*Ibid*). The European Council met on 24 and 25 June 2021 in Brussels and welcomed the decision adopted by the 74th World Health Assembly to set up a special session in November 2021 to discuss a Framework Convention on Pandemic Preparedness and Response. On that occasion, it was emphasized that the European Union "will continue working towards an international treaty on pandemics".[117] The conclusions adopted by the European Council at this meeting which particularly refer to COVID-19, contain a statement that "the European Council reaffirms the EU's commitment to international solidarity in response to the pandemic" and that the Council "discussed the initial lessons that can be learned from the pandemic

[113] The objective of the Council decision was to assure the participation of the EU in the negotiations addressing matters falling within Union competence, in view of the Union's possible accession to the treaty. The proposal to conclude a treaty on pandemics was discussed in the context of international efforts to reinforce global health security, in particular on preparedness and response to health emergencies, in light of lessons learnt from the pandemic. See more about the topic EU supports WHO process for a treaty on pandemics, at: https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/ (15 August 2021.)

[114] Available at: https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/(15.08.2021.)

[115] See: https://theindependentpanel.org/about-the-independent-panel/ and World Health Assembly resolution 73.1., COVID- 19 response, WHA 73.1, 19 May 2020. Available at: https://apps.who.int/gb/e/e_wha73.html (23 August 2021)

[116] Report of the Independent Panel for Pandemic Preparedness and Response, available at: https://recommendations.theindependentpanel.org/main-report/ (27.08.2021.)

[117] Main results of the two-day summit of European Council that was held On 24-25 June 2021. Available at: https://www.consilium.europa.eu/en/meetings/european-council/2021/06/24-25/ (15 August 2021)

on the basis of the report by the Commission".[118] During the COVID-19 pandemic, the EU was given the opportunity to further strengthen its role as a global health actor, and thus directly influence the improvement of health worldwide. Previous analysis has shown that the EU is trying to be a part of the process of legal reform within the WHO, which refers to possible changes in the shortcomings of the International Health Regulations (IHR 2005) as a legally binding instrument, and also in the process of adopting the international treaty on improving pandemic preparedness and response. The EU's involvement in all significant processes and discussions concerning global health, as well as its significant cooperation with the WHO during the COVID-19 pandemic, can certainly lead to an improvement of its observer status within the WHO. Previous analysis has also shown that the EU and the WHO have had a long-standing cooperation which is based on an exchange of letters since 2001. Over time, the EU has become a reliable partner of WHO when it comes to improving health globally, especially given that the Union and its member states represent the WHO's largest financial donors.

4.1 The International Health Regulations (IHR 2005) as a legally binding instrument

According to Velásquez & Syam (2021, p. 4), one of the important steps that needs to be taken before the adoption of the international treaty on improving pandemic preparedness and response is "to inform the Member States about the legal instruments and mechanisms for pandemic preparedness and response that exist in WHO".[119] When it comes to current legal regulation, it is important to say that the International Health Regulations (IHR 2005), as "the principal normative instrument that WHO currently has in order to respond to health emergencies", were adopted by Twenty-second WHA on 25 July 1969 (Velásquez & Syam, 2021, p. 2). The IHR (2005) are a legally binding instrument "for protection against the international spread of disease". This key global health instrument was updated in 2005, following the Severe Acute Respiratory Syndrome (SARS) epidemic in the early 2000s, to strengthen global capacity to quickly control and curb the spread of diseases.[120] It is also important to say that the revised Regulations were adopted by the WHO Member States at the 58th World Health Assembly on 23 May 2005 and, in accordance with the Constitution of WHO, they entered into force on 15 June 2007.[121] The purpose and scope of the IHR (2005) are very broad, and according to article 2 of the IHR (2005),

[118] It is also stated that „the European Council invites the incoming Presidency to take work forward in the Council to enhance our collective preparedness,response capability and resilience to future crises and to protect the functioning of the internal market". See: European Council Conclusions, 2021. European Council meeting conclusions of 24 and 25 June 2021 on COVID-19. No.doc: EUCO 7/21 CO EUR 4 CONCL 4, 25.6.2021, p. 1.

[119] This implies cognition about „what are the deficiencies in such instruments and mechanisms and what are the possible alternatives to address them; what would be the relationship of a new treaty with the IHR (2005) and other international agreements; and how a treaty could ensure effective circulation and access to needed goods, services and technologies during a pandemic". See also: Velásquez & Syam, 2021, p. 4.

[120] Faouzi Mehdi, *et al*. 2021. An international treaty for pandemic preparedness and response is an urgent necessity, *Blog: The MJB opinion*. Available at: https://blogs.bmj.com/bmj/2021/05/23/an-international-treaty-for-pandemic-preparedness-and-response-is-an-urgent-necessity/ (20 August 2021)

[121] World Health Organization. 2009. *The International Health Regulations (2005) - Toolkit for implementation*

are as follows: "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade".[122] Achieving IHR core capacities by all states remains an indisputable baseline for global health security (Gostin & Katz, 2016, p. 276). While disease outbreaks and other acute public health risks are often unpredictable and require a range of responses, the IHR provide an overarching legal framework that defines countries' rights and obligations in handling public health events and emergencies that have the potential to cross borders. The IHR are an instrument of international law that is legally binding on 196 countries, including the 194 WHO Member States.[123] That means that all WHO Member States are states parties to the IHR and none have opted out of the instrument.

However, in the face of a global pandemic caused by the new coronavirus, SARS-CoV-2, the IHR have proved to be a less effective tool.[124] As some authors say, "finding the resources to support health system capacity building has been challenging" (Gostin & Katz, 2016, p. 276). Although states parties have committed to providing domestic funding for core capacity building, "national budgets often neglect this fundamental commitment under the IHR" (*Ibid*). The point is that "many countries with limited resources have had little bandwidth to prioritize building systems for unknown threats as they have struggled to meet the everyday health needs of their populations" (*Ibid*., pp. 276-277). According to the Independent Panel for Pandemic Preparedness and Response (IPPR) final report, "the legally binding IHR (2005) are a conservative instrument as currently constructed and serve to constrain rather than facilitate rapid action".[125] As Gostin & Katz (2016, p. 281) pointed out, "the WHO is the agency charged with overseeing the IHR". In fact, "without effective leadership, the IHR's security framework breaks down". In other words, "a strong treaty text is insufficient without a well-funded and robust operational response" (Ibid).

In accordance with the above, the most important question we have to ask is the following: *How could an international treaty contribute to greater pandemic preparedness and response?* Faouzi Mehdi *et al.* presented interesting views and explained that firstly, it should aim to mobilize political and financial commitments from the highest levels of government, something urgently needed as the COVID-19 pandemic has shown. Secondly, it should provide a legally binding framework for the establishment of the principles, priorities

in national legislation: Questions and answers, legislative reference and assessment tool and examples of national legislation. Geneva: World Health Organization (WHO), WHO/HSE/IHR/2009.3, p. 6.

[122] World Health Organization. 2016. *International health regulations (2005)*. Third edition. Geneva: World Health Organization (WHO), ISBN 978 92 4 158049 6, p. 10.

[123] World Health Organization, International Health Regulations (IHR). Available at: https://www.who.int/health-topics/international-health-regulations#tab=tab_1 (1 September 2021)

[124] Several of the failures of the global response to the ongoing pandemic are rooted in either poor compliance with the IHR (2005) or are beyond the domain of the IHR (2005), including inadequate political leadership, governance, and financing. See: Faouzi Mehdi, *et al*. 2021. *op.cit.* (20 August 2021)

[125] Report of the Independent Panel for Pandemic Preparedness and Response (IPPR). 2021. *COVID-19: Make it the Last Pandemic*, p. 26. Available at: https://recommendations.theindependentpanel.org/main-report/ (27 August 2021.)

and targets. Thirdly, it should address some of the key gaps that have been identified in the course of the COVID-19 pandemic that are beyond the purview of the IHR (2005).[126] States parties, in particular, have undermined the IHR's effectiveness by falling to fully comply with their international obligations (Gostin & Katz, 2016, p. 276). When it comes to the implementation of the IHR, it is important to underline that, despite clear legal obligations outlined in the IHR, most states parties do not comply with all requirements. Although countries might not adhere to the IHR for various reasons, a primary barrier to global achievement of IHR goals lies in its unenforceability (Duff *et al*., 2021, p. 428). The issue of non-compliance with the legal obligations outlined in the IHR (2005) has been further raised in recent months precisely because of the identified need to adopt a new pandemic agreement. Namely, starting from the fact that many states parties do not comply with the obligations that are set out in the IHR, efforts are being made in order to determine the fundamental reasons for such behaviour of state parties.[127] Gostin & Katz noted rightly (2016, p. 291) that "meeting IHR core capacities requires mutual responsibility and accountability". It starts with governments dedicating resources to build and sustain health systems. Every state party should undergo an independent, rigorous review of its implementation of IHR core capacities, using measurable metrics and targets.[128]

The main role of existing global health regulations, especially the IHR (2005), as a legally binding instrument, would be to underpin a treaty and provide a foundation on which the global community can base its activities in order to enact an international instrument rooted in the constitution of the WHO. The treaty is expected to strengthen the implementation of the IHR and provide a framework for greater international solidarity.

4.2. The adoption of international treaty on pandemic prevention and preparedness as a way to strengthen national, regional and global capacities and resilience to future pandemics

In order to avoid the mistakes of the past, it is very important to say that "any discussion on a future framework in WHO on pandemic preparedness and response should be informed by the experience of past initiatives and reforms undertaken in the WHO" (Velásquez & Syam, 2021, p. 3). The COVID-19 pandemic clearly exposed how the existing global health infrastructure failed the world when it was needed most, with devastating

[126] Faouzi Mehdi, *et al*. 2021. *op.cit.* (20 August 2021)

[127] If we take a closer look at the content of the IHR, we can see that they do not contain an adequate penalty for non-compliance of the state parties with IHR rules. The point is that the World Health Organization has not been given the appropriate explicit powers under the IHR to impose sanctions on those Member States that do not comply with the IHR rules. Regardless of the legal obligation to respect IHR rules, in practice, it is not uncommon for Member States to fail to comply with their commitments, which results in frequent views, especially when it comes to media presentation, of the WHO's inadequacy as an organization to deal with important issues related to managing pandemics globally. It follows from the above that the WHO does not currently have the necessary powers to effectively implement the IHR, which should certainly change with the adoption of a new pandemic treaty.

[128] The authors stated that we must keep in mind that shared responsibilities also require technical assistance and international financing to close capacity gaps and that collective security is assured only by "fulfilling these mutual obligations to sustainably build, measure, and finance health systems". See: Gostin & Katz, 2016, p. 291.

human and economic consequences (Duff *et al*., 2021, p. 432). As Balkhair *et al.* point out, the current COVID-19 pandemic is an "emerging beast" and "once-in-a-lifetime pandemic". Humanity is witnessing moments of extreme uncertainty and unprecedented global health crisis. Although it is impossible to foresee where this pandemic is heading, certainly, a new chapter in the history of infectious diseases has just begun (Balkhair *et al.*, 2020, p. 123). In the final report of the Independent Panel for Pandemic Preparedness and Response (IPPR), when it comes to the Panel's recommendations, it is stated that there is a need for "stronger leadership and better coordination at the national, regional and international level, including a more focused and independent WHO, a Pandemic Treaty, and a senior Global Health Threats Council".[129] The political, economic, and societal challenges resulting from the COVID-19 pandemic and its control provide an opportunity to create an ambitious and progressive mechanism, with the mandate and requisite powers fit for purpose (Lehtimaki *et al*., 2021, p. 14.). The High Level Independent Panel was asked by the G20 in January 2021 to propose how finance can be organised, systematically and sustainably, to reduce the world's vulnerability to future pandemics. In the Report of the G20 High Level Independent Panel on Financing the Global Commons for Pandemic Preparedness and Response (June 2021) is stated that "the world does not lack the capacity to limit pandemic risks and to respond much more effectively than it has responded to COVID-19" and that "we have the ideas, the scientific and technological resources, the corporate and civil society capabilities, and the finances needed".[130]

During the most recent Seventh plenary meeting of the World Health Assembly, held on 31 May 2021, countries agreed to convene a special session in November to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response.[131] At the closing of the 74th WHA on 1st of June 2021, the WHO's Director-General remarked:

> "One day, hopefully soon, the pandemic will be behind us, but we will still face the same vulnerabilities that allowed a small outbreak to become a global pandemic […]. That's why the one recommendation that I believe will do most

[129] In the Report is also noted that "the Panel believes the international system requires fundamental transformation in order to prevent a future pandemic", and that it calls on political decision-makers at every level to uphold major change and to make resources available to make it effective. See: Report of the Independent Panel for Pandemic Preparedness and Response (IPPR). 2021. *COVID-19: Make it the Last Pandemic*, p. 45. Available at: https://recommendations.theindependentpanel.org/main-report/ (27 August 2021.)

[130] However, as stated in the Report, "our collective task must be to better mobilize and deploy these resources to sharply reduce the risk of future pandemics, and the human and economic damage they bring", so this will require involvement of the whole government and the whole society, and not only of health authorities and medical scientists. See: Report of the G20 High Level Independent Panel on Financing the Global Commons for Pandemic Preparedness and Response. 2021. *A Global Deal for Our Pandemic Age*. p. 1. Available at: https://www.g20.org/wp-content/uploads/2021/07/G20-HLIP-Report.pdf (22.08.2021.)

[131] World Health Organization, Special session of the World Health Assembly to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response, Seventy-fourth World Health Assembly, Agenda item 17.3, WHA74(16), 31 May 2021. Available at: https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74(16)-en.pdf

to strengthen both WHO and global health security is the recommendation for a treaty on pandemic preparedness and response".[132]

Concretely, the 74th WHA decided to hold a special session from 29 November 2021 to 1 December 2021 at WHO headquarters, and to include on the agenda only one item dedicated to "considering the benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and response with a view towards the establishment of an intergovernmental process to draft and negotiate such a convention".[133] When it comes to the procedure of adopting the treaty, in accordance with Article 19 of the Constitution of the WHO: "The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization". As stated in Article 19, "[f]or the adoption of such conventions or agreements, two-thirds vote of the Health Assembly shall be required, which shall come into force for each Member when accepted by it in accordance with its constitutional processes". It follows from the above that the treaty on pandemics would be adopted by the WHO member states gathered at the WHA.[134] Lehtimaki *et al*. (2021, p. 14) think that "there is no single global mechanism that could serve as a model for reviewing and investigating pandemics preparedness, control, and response", but, however, "there is potential to combine aspects of what already exists to develop a robust treaty to prevent or rapidly control future pandemics".

For some authors, the success of the proposed treaty on preparedness lays in its specificity.[135] Velásquez & Syam (2021, p. 4) think that "a pandemic treaty should not create new parallel agencies or mechanisms outside the effective control of WHO and its Member States, leading to further fragmentation of the multilateral health governance structure and the consequent further marginalization of WHO". The authors emphasize that "there seems to be a recognition of the failure of the existing global system of health

[132] Behrendt, S. and Müller, A. 2021. Why the rush? A call for critical reflection on the legal and human rights implications of a potential new international treaty on pandemics, *EJIL: Talk: Blog of the European Journal of International Law*. Available at: https://www.ejiltalk.org/why-the-rush-a-call-for-critical-reflection-on-the-legal-and-human-rights-implications-of-a-potential-new-international-treaty-on-pandemics/ (19.08.2021.)

[133] World Health Organization, Special session of the World Health Assembly to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response, Seventy-fourth World Health Assembly, Agenda item 17.3, WHA74(16), 31 May 2021. Available at: https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74(16)-en.pdf

[134] It is important to say that once adopted at the international level by the Health Assembly, the treaty would have to be ratified by a requisite number of countries in order to come into force. That means that it would only become legally binding for those countries that ratify it at the national level. Also, the existing global health instruments, especially the IHR, would underpin such a treaty, "ensuring a firm and tested foundation to build upon'. See: An international treaty on pandemic prevention and preparedness, https://www.consilium.europa.eu/hr/policies/coronavirus/pandemic-treaty/ (27 August 2021)

[135] They think that the overall objectives of such a treaty, ideally rooted in the WHO constitution, can be summarized as: to strengthen national, regional, and global capacities and resilience to future pandemics by adopting an all-of-government and all-of-society approach; to prevent poor collaboration and unwillingness to share information that can obstruct future pandemic responses; and being accountable or our actions which can either secure or threaten global health security. Ultimately, as they stated, "in a pandemic no one is safe, until everyone is safe". See: Faouzi Mehdi, *et al*. 2021. *op.cit.* (20 August 2021.)

governance", and that "WHO has not been able to play the role it was expected to perform" (*Ibid*). We must agree with the authors that the COVID-19 pandemic has highlighted the need for a strong and independent global health governing body that will be capable of managing a global health crisis.

Some authors say that the treaty needs to be based on several core principles: "compliance to encourage state adherence to the agreement; accountability to trigger a high political response in cases of concern; independence to reduce financial and political dependencies; transparency and data sharing to ensure prompt access to information; speed to activate an investigation; assessment of capabilities including political factors and leadership; and incentives to motivate states to comply" (Lehtimaki, Allotey & Schwalbe, 2021, p. 115). We must have in our minds that identification of the main principles on which the treaty is to be based is only the first step. It will certainly be very important to establish the specific operational structures that will actualise these principles and put them into practice.

According to Velásquez & Syam (2021, p. 3) treaty on pandemic prevention and preparedness, as a new binding instrument, "should help to address some of those weaknesses and contribute to establish a stronger international health framework, with WHO as the governing authority for global health not only *de facto* but *de jure*". The authors also state correctly that "it would be important to ensure an adequate balance of legal rights and obligations of countries at different levels of development", and "effective participation of all countries in the negotiations" (*Ibid*).

5. CONCLUSION

The results of this research have shown that the adoption of such a universal instrument, with the fulfilment of all the above conditions necessary for the adoption of an international agreement, would contribute to the establishment of greater transparency and accountability in the international system, as well as to a more coordinated action of the international community in terms of early detection, warning and response to future pandemics. The COVID-19 virus pandemic is a challenge of global proportions, which requires an adequate response at the global level, and which, among other things, is reflected in the adoption of an international agreement on improving preparedness and response to pandemics. The international community has a significant task ahead of it. A significant task is reflected in need for joint action aimed at working together towards a new international treaty for pandemic preparedness and response in order to protect future generations. Given the experience so far when it comes to the COVID-19 pandemic, it is quite certain that pandemics and other major health emergencies will occur in the future, so we must be better prepared to predict, prevent, detect, assess and effectively respond to pandemics and we will have to do that in a highly coordinated way. Only if we act in this way we will be able to strengthen our national, regional and global capacities and resilience to a future pandemic and other major health emergencies that may come afterwards. Adoption of such a new international instrument as it is the treaty for pandemic preparedness and response would show that we can work and cooperate as a global community, guided by the principle of health for all in order to establish a more robust and permanent global

health architecture that will protect the future generations. The role of existing global health regulations, especially the IHR (2005) as a legally binding instrument, would be to underpin the treaty and provide the foundation on which the global community can undertake further actions in order to enact an international instrument rooted in the constitution of the WHO. The activities carried out under the auspices of the European Council indicate the readiness of the EU and its member states to make significant efforts at the global level when it comes not only to fight the pandemic but also to combat its negative consequences. When it comes to recommendations, in order to improve the WHO capacity to prevent and control pandemics, it is important that the ongoing reform of the WHO continues in the future, which primarily implies the adoption of the treaty for pandemic preparedness and response. Also, the WHO should work on improving its credibility, which was damaged during the COVID-19 pandemic, precisely because of problems with IHR implementation and because of the prevailing views that the WHO is just one more political organisation. One thing is sure, the adoption of an international treaty mechanism on pandemic prevention and preparedness will strengthen our national, regional and global capacities and resilience to the future pandemics and other major health emergencies that may come afterwards. One such universal instrument could establish better international cooperation in the fight against pandemics, but also within all phases that are of priority importance and are reflected in an adequate monitoring, warning and response to pandemics. Ultimately, an international agreement to improve pandemic preparedness and response could restore confidence in the international health system.

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CIVIL SERVICE SALARY SYSTEM IN BIH INSTITUTIONS – IN COMPLIANCE WITH INTERNATIONAL STANDARDS?

The objective of this paper is to analyse the legal framework of the civil service salary system in the BiH institutions and to assess its compliance with international standards, in particular the SIGMA Principles of Public Administration. After a detailed assessment, the author concludes that the salary system of civil servants in the BiH institutions is to a moderate degree aligned with international standards. The principle of equal pay for equal work has still not been consistently introduced throughout the civil service, which undermines the fairness of the system. The existence of certain salary allowances (i.e. allowance for performing the work of another job), also poses a risk to ensuring the legality, fairness and transparency of the salary system. The performance related pay scheme envisaged by the Law on Salaries and Benefits of BiH institutions is in line with the SIGMA principles, but its effectiveness in practice has still not been properly assessed. In order to enhance the overall quality of the system, the author proposes that additional efforts be invested in carrying out job evaluation and increasing the transparency of the system, through publishing regular salary reports. Furthermore, the author proposes introduction of regular motivation surveys in the BiH institutions, which would assess the effectiveness of the analysed legal framework on the motivation of employees and ensure that the salary system has the capacity to attract and retain qualified staff.

Keywords: salary system, international standards, BiH institutions

1. INTRODUCTION

Civil service remuneration systems have always attracted the attention of both practitioners and legal theorists. Hegel argued that civil servants should be adequately paid for their work, in order to be sufficiently motivated to carry out their work impartially and neutrally in the public interest (Hegel & Knox 1957: 294). Bentham, on the other hand, in accordance with the utilitarian philosophy of the state and law, cared more

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about the costs of public administration, emphasized the importance of honorary work and considered ways to minimize the costs set aside for salaries in public administration (Bentham, 1962). Discussions about the salary systems continue to this day, reflecting the views of the two great philosophers. Despite the importance of the topic, there is a scarcity of the academic legal research regarding the civil service salaries in general, especially from the legal point of view.

The aim of this paper is to shed a light on the salary system of the civil servants at the state level of BiH, which would be assessed against the European principles set out in the SIGMA/OECD Principles of Public Administration (2014) and best practices outlined in the short literature review on civil service salaries. For this reason, the paper shall first briefly analyse the literature on the civil service salaries. This will be followed by a review of the principle 5 on public servants' salaries of the chapter on Human Resources Management and Public Service of the SIGMA/OECD principles. The central part of the paper shall examine the level of alignment of the BiH salary system with the SIGMA principles. Finally, the concluding part of the paper shall summarise the discussion and provide general recommendations for further development of the civil service remuneration system in BiH institutions.

2. LITERATURE REVIEW ON CIVIL SERVANTS' SALARIES

One of the most valuable research on the topic salaries in the public sector in Europe and North America was conducted in 2012 (Brans and Peters, 2012). This research is a "continuation" of an earlier study on the salaries of officials, which was conducted in 1994 (Hood & Peters, 1994). Both studies focus on the salaries of high public officials, but do not analyse mid-level management and lower civil service positions.

Over the past decade, two comparative studies on human resources management in the Central and Eastern Europe (and the Western Balkan countries), including the salary management, were carried out under the auspices of SIGMA (Mayer - Sahling, 2009; Mayer – Sahling, 2012). The studies assessed the degree of alignment of civil service systems with the European principles of public administration, including the area of civil service salaries. One of the findings of this comprehensive research was that during the reform of the salary systems in Western Balkan countries, transparency and predictability have been achieved at the expense of providing performance incentives in the salary systems. For this reason, civil servants appear to show growing support for performance-related salary management, opening the door for de-regulatory reforms in the future (Meyer-Sahling, 2012, p.76).

Most recent available comparative legal research on civil service salaries was conducted by Vukasinovic Radojicic (2013) and Rabrenovic (2019), who analysed civil service salaries of selected European countries from a legal point of view. One of the key findings of these research efforts is that legal regulation of the salary systems in European countries largely depends on the nature of the legal system itself (Rabrenovic, 2019, p.131). It is also emphasised that, in order to be effective, the pay system has to be properly linked to civil servants' career advancement and the overall process of human resource management,

which has a substantial impact on the quality of the staff to be attracted and retained (Rabrenovic, 2019, p.133).

Key issues of civil service pay have also been analysed in depth by international organisations, especially by the World Bank and OECD. A seminal paper of the World Bank team of Schiavo-Campo at al stresses that the classic problem in wage policy is how to value the labour that produces the output of civil servants, given that such output is generally not marketable (Schiavo-Campo at al, 1997, p. xi). The authors see the solution to the problem in making compensation comparable (but not equal) to private sector pay. They also point out additional key objectives of public compensation policy which are rarely met in practice: equal pay for equal work under the same conditions; and the need for the levels of government compensation to be periodically reviewed and systematically revised to assure the continued validity of the compensation plan (Schiavo-Campo at al, 1997, p. xii). The authors further caution about "performance related pay". They argue that it is intuitively appealing to link bonuses to yearly performance in terms of specific output measures. However, the facts show that bonus schemes have been only marginally effective in improving performance, even in the private sector and especially in the public sector, where outputs are difficult to quantify. Performance pay schemes may also introduce an element of political control over a career civil service and especially in multi-ethnic societies (Schiavo-Campo at al, 1997, p. xi). Many studies and staff surveys indicate that it is not performance related pay that motivates: instead satisfying job content and career development prospects have been found to be the best incentives for public employees (OECD, 2005).

In his paper prepared for the World Development Report of 1988, Lindauer stresses the link between the government pay and government performance (Lindauer, 1998). He argues that inadequate pay levels (and especially their reduction) lead to reduction of staff morale and their work effort, and increase chances of moonlighting, petty corruption and the pursuit of non-government work during official government hours (Lidanuer, 1998, p. 11).

SIGMA (OECD) has recently also paid particular attention to setting up principles and standards related to human resources management in the civil service, including the issues of civil service remuneration. SIGMA Public Administration Principles (SIGMA, 2014) will be analysed in more detail in the following section.

3. SIGMA/OECD PRINCIPLES OF PUBLIC ADMINISTRATION - PUBLIC SERVANTS' SALARIES AND REPORTS

Due to national specificities, the area of human resource management, which includes public servants' salaries, is normally excluded from the scope of international conventions or the EU acquis communautaire. It may, however, be argued that this area is governed by soft acquis, comprising shared standards of the EU member states and affecting indirectly the development of the national law (Keune, 2009). Though not legally binding, these standards also have significant practical effects on the aspiring countries, given that the European Commission assesses their progress against such standards.

In order to elaborate in more detail the requirements of the European Commission in the field of human resources management for countries wishing to become members of the EU, SIGMA / OECD program developed the document Principles of Public Administration, which was published in 2014. A significant place in this document is dedicated to the area of Civil Service and Human Resources Management, which contains standards related to the successful management of human resources in the civil service.

The area of salaries of civil servants is elaborated in detail through principle No. 5 of this area and its "sub-principles". Principle 5 emphasises the need for the salary system to be based on job classification, for all elements of the salary to be determined by law, as well as for the system to be fair and transparent. Fairness and transparency should be ensured by limiting the discretion of the manager in determining the variable part of the salary. The salary system should also provide a good basis for attracting and retaining civil servants with appropriate competencies. A detailed overview of principle number 5 and its sub-principles is presented in table No. 1 below.

Table No. 1. SIGMA Principle 5 of the area of the Public Service and Human Resources Management: The salary system is based on job classification; it is fair and transparent

1. The principles of remuneration, including the salary classification based on the job classification system, the complete list of variable elements of salary and the relation between the fixed and variable salary, are established in law to ensure the coherence, fairness and transparency of the whole public service. The detailed remuneration regulations are established in secondary legislation. The remuneration provisions are applied in practice.
2. Allowances and benefits in addition to the salary (e.g. family, rent, education, language allowance, benefits in case of sickness, maternity or work accident) are established in law to ensure the coherence of the whole public service and applied in practice.
3. Managerial discretion in assigning different elements of salary, allowances and benefits to individual public servants is limited to ensure fairness, transparency and consistency of the total pay.
4. The remuneration system of public servants provides reasonable conditions for recruiting, motivating and retaining public servants with the required competencies.

SIGMA has also developed a number of indicators to measure whether the countries being evaluated have achieved fairness and competitiveness in the civil service pay system. Detailed indicators have been developed in the Methodological Framework for Principles of Public Administration, which was published in 2017 and subsequently revised in 2019.[136]

The basic indicator for evaluating the salary system is fairness and competitiveness. This indicator shows the extent to which the legislative framework and its application support the

[136] SIGMA/OECD, *Methodological Framework for the Principles of Public Administration*, OECD publishing, Paris 2019.

principles of fairness and transparency.[137] Within this indicator, SIGMA developed several sub-indicators, which are grouped into two parts: 1) the legal framework and structure of the salary system and 2) the efficiency and fairness of the salary system in practice. The description of indicators for the salary system is provided in Table No. 2.

Table No. 2. Indicator 3.5.1: Fairness and competitiveness of the civil service salary system - Methodological framework of the Sigma Principles of Public Administration

Sub-indicators		Maximum points
Legal framework and organisation of the salary structure		
1.	Legal obligation to base salaries on job classification	2
2.	Comprehensiveness, clarity and transparency in legal definitions of salary, criteria and procedures for allocation	2
3.	Availability of salary information	3
Fairness and efficiency of the salary system in practice		
4.	Fairness in allocation of basic salaries in the job classification system	4
5.	Base salary compression ratio	2
6.	Managerial discretion in allocation of bonuses	2
7.	Motivational character of the bonuses (%)	2
8.	Competitiveness of civil servants' salaries (%)	3

Source: SIGMA / OECD, Methodological Framework for Public Administration Principles, 2019.

The table clearly shows that three areas are of special concern to SIGMA: fairness of the allocation of basic salaries in the job classification system – i.e. a respect of the principle equal pay for equal work (maximum of 4 points); availability of salary information (maximum of 3 points) and competitiveness of civil servants salaries (maximum of 3 points). All other criteria have been assigned with a maximum of 2 points.

Since the adoption of the Principles of Public Administration in 2014, SIGMA has assessed the BiH salary system on two occasions: in its baseline report of 2015 (SIGMA, 2015) and in its monitoring report of 2017 (SIGMA, 2017), which address only some basic issues related to civil service remuneration, without a comprehensive analysis. The 2015 Monitoring report notes that although the salary is based on the job classification system of the civil service, there is a lack of a fair and objective job evaluation. It further stresses the fact that in 2012 the level of civil service salaries at the state level of BiH were reduced and some salary allowances were cut (e.g. for accommodation, transport, food, holidays) in order to ensure that fiscal situation is in line with the IMF requirements (SIGMA, 2015: 58). The 2017 report also stresses the absence of a job evaluation methodology and notes the overall trend to abolish some of the supplements (e.g. membership of managing and supervisory boards where civil servants are appointed, the supplement for the so-called extended labour

[137] *Ibid*, 93.

relationship, in the case of the expiry of a mandate to a public office) (SIGMA, 2017: 91).[138] It is further emphasized that the attractiveness of the civil service could not be determined by means of comparable data on salaries, since no relevant statistical data was available or provided by any level of administration (SIGMA, 2017: 92).

4. DETAILED ASSESSMENT OF THE BIH CIVIL SERVICE SALARY SYSTEM AGAINST THE SIGMA STANDARDS

4.1. Legal and institutional framework

The legal position of civil servants at the state level of BiH is regulated by the Law on Civil Service in the Institutions of BiH from 2002,[139] and the 2008 Law on Salaries and Supplements in BiH Institutions.[140] The status and rights of support staff - employees are regulated by the Law on Work in BiH Institutions.[141]

The salary system of BiH civil servants is regulated by law and based on job classification, which is in line with SIGMA principles. The classification of positions in the civil service of BiH is determined by the Law on Civil Service. This classification is used also in the Law on Salaries and Compensations in the Institutions of BiH, which is in accordance with the Sigma principles.

All salary elements, such as basic salary, salary supplements and bonuses (awards), are also determined by law, which is in line with the SIGMA standards. The basic salary is determined by multiplying the base for calculating the salary and the determined coefficient for each job. Salary grid for different categories of civil servants is determined by the Law, while the salary base is determined by the Council of Ministers of Bosnia and Herzegovina by secondary legislation.[142] Salary grid with coefficients of civil servants in the Presidency and the Council of Ministers of BiH, together with the calculation of the level of their basic salaries, is presented in table 3 below. The table also shows the salary base determined by the Decision of the Council of Ministers for 2020 [143], with compensation for meals during work and holiday pay, and zero step levels of the basic salary, with the mentioned allowances, but without the allowance for years of service.

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[138] SIGMA/OECD, Monitoring Report: The Principles of Public Administration, Bosnia and Herzegovina 2017, SIGMA/OECD, 91-92.

[139] Law on Civil Service in BiH Institutions, Official Gazette of BiH, Nos. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12 and 93 / 17, hereinafter: the Law on Civil Service in the Institutions of BiH.

[140] Law on Salaries and Supplements in the Institutions of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 50/2008, 35/2009, 75/2009, 32/2012, 42/2012, 50/2012, 32/2013, 87/2013, 75/2015, 88/2015, 16/2016, 94/2016 and 25 / 2018, hereinafter the Law on Salaries and Supplements in BiH Institutions.

[141] Law on Labour in BiH Institutions, Official Gazette of BiH, no. 26/2004, 7/2005, 48/2005 and 60/2010.

[142] Art. 7 of the Law on Salaries and Supplements stipulates that the salary base may not be less than 50 percent of the average monthly net salary in Bosnia and Herzegovina expressed annually for the calendar year preceding two fiscal years in the year in which the base will be applied.

[143] Council of Ministers of BiH, Decision on the amount of the base for calculating the salary of employees in the institutions of BiH for 2020, CoM, no. 184/20 of 2 September 2020.

Table 3. Salary grid and calculation of the civil servants' salaries for 2020.

Pay grade	Work position	Coefficients and pay steps							Salary base for 2020	The zero step amount of the salary	Basic net salary (zero step) with food and holiday allowance in KM **
		Zero	1	2	3	4	5	6			
B1	Associate	2,10	2,17	2,20	2,25	2,28	2,33	2,37	475,69	999	1 200
B2	Senior associate	2,35	2,40	2,45	2,50	2,53	2,60	2,70	475,69	1118	1 319
B3	Expert advisor	2,73	2,80	2,90	3,00	3,10	3,20	3,28	475,69	1299	1 500
B4	Head of department, head of group in the Indirect Taxation Authority	3,25	3,35	3,50	3,70	3,90	4,10	4,25	475,69	1546	1 747
B5	Assistant head of the administrative organization, Secretary of the administrative organization, Head of dept. of Indirect Tax. Auth.	3,55	3,67	3,79	3,91	4,04	4,18	4,31	475,69	1689	1 890
B6	Assistant minister	4,20	4,35	4,50	4,65	4,80	4,95	5,05	475,69	1998	2 199
B7	Secretary of the ministry, Deputy head of the administrative organization, Secretary on a special assignment, Secretary in the Presidency	4,50	4,65	4,80	4,96	5,11	5,30	5,46	475,69	2141	2 342
B8	Director of administrative organisation, assistant director of the Indirect Taxation Authority	5,51	5,69	5,88	6,07	6,28	6,48	6,70	475,69	2621	2 822
B9	General Secretary of the Presidency of BiH	6,50							475,69	3092	3 293

Source: The Law on Salaries and Supplements in the Institutions of Bosnia and Herzegovina; Council of Ministers of BiH, Decision on the amount of the base for calculating the salary of employees in the

institutions of BiH for 2020. The amount of basic salary: calculation of the author.
* The food allowance in 2020 is 8 KM per working day. On a monthly basis, on average, it amounts to 176 (8*22=176)
** The holiday pay for 2020 is 300 KM, which expressed on a monthly basis is 25 KM.

The salary grid shows that the salaries of senior civil servants and heads of internal organizational units in the Indirect Taxation Authority are higher than the salaries of their colleagues in other administrative bodies, which is not a unique case in comparative practice. Similar situation can also be found in Serbia and other countries in the region. The salary coefficients of lower jobs in the Indirect Taxation Authority (such as, for example, an expert associate, a senior expert associate and an expert advisor), on the other hand, they are the same as in other administrative bodies.

The amount of basic pay is also a subject of additional allowances, some of which are given to all civil servants, and others, which are reserved for special categories of staff. All civil servants are entitled to the allowance for years of service, which amounts to 0.5 percent of the basic salary for each started year of work, and can amount to a maximum of 20 percent of the basic salary of civil servants.[144] The law also provides for an allowance for special working conditions, which is paid to certain groups of employees, such as persons assigned to positions with special authorizations in the Indirect Taxation Authority of BiH, individually up to 30 percent of the basic salary;[145] veterinary, phytosanitary and other inspectors performing work at border crossings, up to 15 percent of the basic salary;[146] and employees with higher education who perform complex IT and application tasks for maintenance and development of management applications in BiH institutions, up to 50 percent of the basic salary.[147]

In addition to these "usual allowances", there is also an allowance for performing the work of another's job, which is a peculiarity of the BiH remuneration system. The right to this compensation is exercised by a civil servant when he temporarily performs the work of another civil servant, in the amount of up to 35 percent of his basic net salary. However, this right is also subject to certain restrictions so as not to be abused in practice. Namely, the Law stipulates that the compensation for the temporary performance of the duties of another civil servant can be approved only when a competition has been announced for filling a specific job, and can be paid for a maximum of three months. In exceptional cases, the allowance may be paid for more than three months if it is a matter of performing another job due to illness or maternity leave of a civil servant. The right to this compensation is obtained by issuing an appropriate decision, with the prior consent of the BiH Civil Service Agency.[148]

In practice, however, allowance for performing the work of another's job is given in some BiH institutions to civil servants for a longer period of time, and for performing jobs of positions that have not been filled for several years (BiH Audit Office, 2020), which is

[144] Art. 26, para. 1, point 1 of the Law on Salaries and Supplements in BiH Institutions.

[145] Art. 26, para. 1, point b2 of the Law on Salaries and Supplements in BiH Institutions.

[146] Art. 26, para. 1, point b3 of the Law on Salaries and Compensations in BiH Institutions.

[147] Art. 26, para. 1, point b8 of the Law on Salaries and Compensations in BiH Institutions.

[148] Art. 38 of the Law on Salaries and Supplements in BiH Institutions.

not in accordance with the existing regulations and best international practices. In this way, civil servants who continuously receive this compensation are placed in a privileged position compared to other civil servants. On the other hand, the work capacities of the ministries that use this practice are significantly reduced, because no officials are hired to perform the vacant jobs.

Civil servants of the state level of BiH are also entitled to the compensation for transport to and from work, which, however, does not appear to be applied in an efficient and effective manner. The Council of Ministers of BiH and the Ministry of Finance and Treasury of BiH adopted bylaws for the reimbursement of transportation costs in 2009 and 2017, aimed at establishing efficient, economical and rational spending of budget funds for these purposes, as well as at harmonizing the application of these bylaws at the level of BiH institutions. The findings of the Audit Office Report from 2019, however, indicate that despite the efforts made, at the level of BiH institutions there is still no uniform, transparent procedure for exercising the right to reimbursement of transportation costs, which would eliminate errors in a timely manner, prevent the possibility of abuse and ensure economical and rational spending of public funds (BiH Audit Office, 2020).

Although the Law on Salaries was adopted more than a decade ago (in 2008), the salary grid, which envisages horizontal progression through salary steps, started to be implemented only at the end of 2020. The criteria for the horizontal progression of employees within the pay grade were first determined by the Methodology for the assignment of employees within the pay grade, which was adopted by the Council of Ministers in 2011[149], but which, due to chosen public policies, has not been applied over the past decade. The Council of Ministers adopted amendments to this methodology only in October 2020. Based on the amendments to the Methodology, the year from which the fulfilment of the employee's conditions for horizontal progression to a higher salary step will start is 2016. The criteria for promotion are the following: performance appraisal;[150] duration of positively assessed length of service in the same job; and acquisition of professional and scientific titles in the field that falls under the core business of the BiH institution.[151]

Introduction of horizontal progression at the end of 2020, based on the performance appraisal results from 2016-2019, is not, however, in line with the principle of legal certainty, and has encountered implementation problems due to the fact that many managers have not assessed the performance of their employees in the previous years. Namely, since the horizontal progression system was not expected to be activated in 2020 (although the pressure from the unions was constantly increasing), many managers did not carry out performance

[149] Council of Ministers of BiH, Methodology for assignment of employees within the pay grade, CoM No. 235/11, 26.9.2011.

[150] In accordance with Article 4 of the Methodology, the employee is promoted to a higher internal salary grade in the following cases: when in the last two evaluated calendar years, he / she continuously receives the grade "particularly successful"; when in the last four evaluated calendar years, he / she has continuously received at least a grade of "successful"; when he/she is returned or when he/she returns to work after a period of at least four years spent in a public, advisory or similar position at the level of the institutions of Bosnia and Herzegovina, provided that his/her work for the specified period is positively evaluated. Promotion is made in relation to the salary grade in which the employee was before the appointment to any of the above positions.

[151] Art. 54, para. 5 of the Law on Salaries and Supplements in BiH Institutions.

appraisal of their employees, although they are required to do it by the law. This is confirmed by the report of the Audit Office of BiH for 2019, which states that a significant number of BiH institutions do not conduct the performance appraisal of civil servants and employees, or do so only partially (BiH Audit Office, 2020). Therefore, it is not clear on which grounds the horizontal progression of individual employees whose performance was not assessed over the past few years have taken place in practice.

Another problem which the BiH institutions' employees are facing are different salary levels, depending on the place of their residence, due to different tax policies of the entities (FBiH and RS) and Brcko District. Given that the tax policy is the responsibility of the entities and Brcko District, existing differences in this area lead to civil servants performing the same tasks in BiH institutions having different levels of net salaries, only depending on their place of residence (BiH Audit Office, 2019).

4.2. Assessment of fairness and efficiency of the salary system

In 2013, a system of job evaluation based on the job classification method was introduced at the state level in BiH, providing a basis for the fairness of the salary system. Job evaluation was introduced by the Decision on Classification of Jobs and Criteria for Job Description in the Institutions of Bosnia and Herzegovina.[152] The Decision introduced general job descriptions and established the criteria for classifying the jobs of other civil servants. Criteria for job classification include: complexity of work, independence in work, time to do work, comprehensiveness, business communication and teamwork.[153] Job evaluation exercise is required to be undertaken, however, only for the lowest official posts, such as the posts of expert associate, senior associate and expert advisor.

The practice of job evaluation, however, does not ensure the respect of the principle of equal pay for equal work. Instead of analysing each job to determine its actual complexity, comprehensiveness, level of business communication, etc, job descriptions are usually prepared in order to reflect the title and rank of the job which already exists, regardless of what actual job tasks are being performed at a given date and workplace.[154] In this way, the spirit of the job evaluation exercise is not respect and fairness of the system is undermined.

The fairness of the salary system should also be ensured by an appropriate difference between the highest and lowest wages (decompression factor). The decompression factor at the state level of BiH is 1: 3.1, which is not a high level, although it is in line with the principles of SIGMA. Such a decompression level should be able to provide a sufficient degree of motivation for civil servants to want to advance in the service and take on a higher degree of responsibility, for which they will have a correspondingly higher remuneration.

Finally, although ensuring the fairness of the wage system should be achieved through

[152] Decision on Classification of Jobs and Criteria for Job Description in Institutions of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina, no. 30/2013*.

[153] Art. 17 Decisions on job classification and criteria for job descriptions in the institutions of Bosnia and Herzegovina.

[154] Interviews with representatives of human resources management units conducted in 2015 within the project "Modernization of human resources management in the civil service", funded by the EU.

regular monitoring of wage levels through statistical reports, such a practice does not exist, primarily due to the lack of a functional human resources management information system. This is not in line with SIGMA standards, which require the keeping of statistics on the salaries of civil servants and the regular preparation of reports on average salary levels and differences in salaries by level, which should be publicly available and not older than two years.

The BiH institutions salary system recognises the possibility of rewarding employees with a bonus payment, which is defined as an incentive that can be paid for outstanding performance.[155] The individual annual incentive to an employee can reach a maximum of 20 percent of his/her annual basic salary, which is in line with SIGMA standards. It is interesting to note that the reward fund is reported as a separate budget item.[156] The Council of Ministers, in consultation with an independent inter-ministerial working body, determines the framework criteria for remuneration by a special bylaw, while the head of the BiH institution adopts an internal act which regulates in more detail the criteria, performance measures and procedure for obtaining bonus rewards.[157] So far, however, no research has been done to assess the implementation of the bonus rewards in practice and their impact on the work morale of the civil servants.

The principle of competitiveness of salaries in the state administration in relation to the private sector is not recognized as a special value in the BiH institutions. The Council of Minister's Wage and Compensation Policy for the 2019-2022 period[158] emphasizes the need to determine the internal fairness of the salary system by ensuring balanced relative pay ratios of employees in the judiciary, legislature and executive, as well as the need to analyse existing relative payroll ratios of elected and appointed persons based on objective evaluation criteria and comparative analysis of similar jobs, in order to suggest possible coefficient corrections. However, ensuring competitiveness with the private sector is not mentioned at all.

Lack of the respect of the principle of competitiveness of salaries may negatively affect the civil service morale and the possibilities to retain high quality staff. In the Law on Salaries, it is determined that the salary base cannot be less than 50 percent of the average monthly net salary in BiH expressed on an annual basis for the calendar year that precedes the year in which the base will be applied.[159] In practice, the base, which was set in 2008 at 498 KM, was increased in 2009 to 520 KM, but was very quickly reduced again to 498 KM in the same year. In 2012, there was an additional reduction of the base to 475.69 KM, and that amount of the base has not changed until today. Although an increase was planned for 2021, i.e. a return to the base amount of 498 KM, this increase was abandoned due to the epidemic of COVID 19. Therefore, salary levels in the previous decade were not harmonized with the average salary, or even with the growth of the costs of living. This

[155] Art. 27, para. 1 of the Law on Salaries and Supplements in BiH Institutions.

[156] Art. 27, para. 4 of the Law on Salaries and Supplements in BiH Institutions.

[157] Art. 27, para. 5 of the Law on Salaries and Supplements in BiH Institutions.

[158] Official Gazette BiH, No. 60/2018.

[159] Art. 7, para. 1 of the Law on Salaries and Supplements in BiH Institutions.

adversely affects the ability of BiH institutions to attract and retain quality staff, especially in the field of information technology, but also with regards to other occupations that are in short supply in the labour market.

5. CONCLUDING REMARKS

The outlined analysis of the salary system of civil servants in the BiH institutions shows a moderate degree of compliance with the SIGMA standards when it comes to the legal regulation of the salary system. Job classification is the basis for the salary system, and all basic salary elements are regulated by the law. This ensures the stability and predictability of the salary system, which is an important basis for other elements of the human resource management system.

However, the existence of certain salary allowances, such as, for example, an allowance for performing the work of another job, poses a risk to ensuring the legality, fairness and transparency of the salary system. For this reason, it is necessary to either ensure strict implementation of this allowance or to revise the need for this its existence, in order to prevent possible abuses. This would also be in line with the overall trend of reducing the number of allowances to the basic pay, which occurred over the past decade at the BiH state level on several occasions due to IMF fiscal requirements (SIGMA, 2015; SIGMA 2017). It is also advisable to consider the possibility of including food allowance and holiday pay in the basic salary (which has already been done on other administrative levels in BiH – Republic of Srpska and Brčko District) and introduce transparent procedure for reimbursement of transportation costs.

The observance of the principle of equal pay for equal work and civil service competitiveness with the private sector has still not been ensured across the BiH institutions, which is not in line with the SIGMA principles and undermines the fairness of the salary system. These findings, however, do confirm the arguments of Schiavo-Campo at al, that key objectives of public compensation policy which are rarely met in practice are exactly those that are the hardest to be implemented: equal pay for equal work under the same conditions; and the need for the levels of government compensation to be periodically reviewed and systematically revised to assure the continued validity of the compensation plan (Schiavo-Campo at al, 1997: xi).

The transparency of the pay system is also hampered by the lack of statistical reports on salary levels for different job categories. This is largely due to the lack of a functional human resources management information system, which would contain the given data. This is not in line with SIGMA standards, which require the keeping of statistics on the salaries of civil servants and the regular preparation of reports on average salary levels and differences in salaries by level, which should be publicly available and not older than two years (SIGMA, 2019).

The existence of a system of performance related pay in the BiH institutions, both by a horizontal progression on a salary grid (which was revived at the end of 2020) and in a form of a performance bonus, is in line with the SIGMA standards. The existence of these performance related schemes has also shown the validity of the findings of Meyer Sahling's

led research (Meyer Sahling, 2012), which demonstrated an obvious civil servants' support for performance-related salary management in the countries of the Western Balkans, including the BiH.

What, however, is still not known is the real effect of this performance related pay on the working morale of civil servants in BiH, which has not been the subject of research so far. For this reason, it would be very useful to introduce regular motivation surveys in the BiH institutions, which would assess the effect of the performance pay on motivation of employees and ensure that this scheme is not used as an element of political control over a career civil service, especially in in multi-ethnic societies, as this has been the case in other countries (Schiavo-Campo at al, 1997: xi). The survey would also be a useful tool to assess to which extent performance related pay motivates staff, and to which extent motivation is linked to satisfying job content and career development prospects, which have been found to be the best incentives for public employees in OECD countries (OECD, 2005).

Finally, as pointed out at the beginning of this paper, in order to be successful, the pay system needs to be properly linked to civil servants' career advancement and overall process of human resource management, which has a substantial impact on the quality of the staff to be attracted and retained. To the extent that the human resources management is perceived as too slow, too inflexible, or based on factors other than merit, the most talented and ambitious civil servants or candidates will most likely find alternative employment. Therefore, it seems that BiH institutions and civil service systems in the region need to create not only proper monetary incentives for enhancing civil service performance but at the same time work on a creation of an environment of trust, participation, shared values and objectives, in which performance and talent will be able to be fully recognized and appreciated.

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WHEN THE ADMINISTRATION PROMISES: PROTECTION OF LEGITIMATE EXPECTATIONS IN SERBIAN ADMINISTRATIVE PROCEDURE

Although the principle of legitimate expectations appeared in earlier drafts of the newest Serbian law on general administrative procedure, it was eventually downplayed to the level of guaranteeing predictability in administrative practice. The inclusion of the new principle was justified by harmonization of Serbian legislation with the principles of a common European Administrative Space. The contribution explores the notion of legitimate expectations in comparative law – ranging from so-called procedural to substantive expectations, with the possibility of contra legem effect of the principle. European administrative law scholars have long ago posed questions relating to the tension between the law and legal certainty and satisfying individual parties' (legitimate) expectations. Parties to administrative proceedings should, in line with the request for legal certainty, be aware of what type of action they can expect from the administration. On the other hand, life often necessitates changes in legislation and, even on occasions before that, adaptations to administrative behaviour. In comparative analysis, particular attention shall be paid to legislation and caselaw of the former Yugoslav states, since they share a history of common administrative legislation. The author aims to situate the Serbian version of this legal institute within the given range and, with an optimistic view to existent caselaw of the Constitutional Court, to point towards possibilities for its future implementation in the caselaw of the Administrative Court and in administrative practice.

Keywords: administrative procedure, legitimate expectations, predictability, legal certainty, good administration.

1. INTRODUCTION

The current Serbian Law on General Administrative Procedure (LGAP 2016) introduced the principle of predictability among its general principles (Article 5 para. 3), thus obliging

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the administration to respects its previous practice in identical or similar cases. It was envisaged as a corollary to the principle of legality (Davinić & Cucić, 2021, p. 171). Does it, on the other hand, also provide a protection of legitimate expectations of parties to administrative proceedings created by such practice?

The notion of legitimate expectations first appeared in Serbian administrative-law circles in 2010, in the Ombudsman's Code of Good Practice (Zaštitnik građana, 2010), modeled on the European Code of Good Administrative Behavior. As a non-binding document, it appealed to civil servants "to respect the legitimate and reasonable expectations of citizens, in particular in the light of their previous caselaw". Also, they should refrain from creating "unrealistic and incorrect expectations […] among conscientious citizens".[160]

In parallel, the term legitimate expectations appeared in 2011 and 2013 drafts of the LGAP (for genesis of the current LGAP, through four subsequent drafts, see Davinić & Cucić, 2021). Both drafts proposed the protection of legitimate expectations of parties to administrative procedure as a new principle. According to them "the competent body [would be] obliged to act according to its earlier decisions in same or similar matters, unless it is justified and based on the law to act differently, which is to be specifically reasoned".[161] It should be pointed out that the term *legitimate expectations* appeared here only in the article's rubrum.

The introduction of such a principle was justified by improvements to legal certainty and certainty of the parties, i.e. to settle and harmonize administrative practice, "with a dose of necessary and justified elasticity".[162] The principle was also mentioned in the context of European principles of good administration, together with proportionality principle which was also defined by the proposed draft, as well as the later adopted LGAP 2016.

Finally, the adopted text of the LGAP 2016 settled for predictability as its principle, not explicitly mentioning legitimate expectations even in the provision's rubrum. It demands of authorities when acting in administrative matters to "take into account previous decisions made in the same or similar administrative matters" (Article 5 paragraph 3). Additionally, it requires of the authorities to provide a justification when they depart from their previous decisions in the same or similar matter (Article 141 paragraph 4).

2. LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW OF EUROPEAN COUNTRIES

Administrative law scholars have long ago started to analyze the tension between legal certainty and satisfying (legitimate) expectation of parties. The available literature in English is ample and rich.

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[160] Rule 9 of the Code (Consistency and respect for justified expectations – Doslednost i poštovanje opravdanih očekivanja), similar to Article 10 of the European Code.

[161] Article 5 of the Draft LGAP from 2013, available in Serbian on the website of the then Ministry of Justice and Public Administration – titled "Nacrt zakona o opštem upravnom postupku – radna verzija" http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php (8.9.2021).

[162] Rationale of the Draft LGAP also available at http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php (4.11.2013.) under the title "Nacrt zakona o opštem upravnom postupku – obrazloženje".

Legal certainty demands that parties know what kind of treatment they can expect in a specific administrative proceeding, or to quote Craig & de Burca it is "a basic tenet of the rule of law that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions" (Craig & de Burca, 2003, p. 380). In similar vein, Brown (2017, pp. 437-438) seeks to base the very idea of expectations in Bentham's doctrine of security. On the other hand, there are those who claim that constructing theories of legitimate expectation might not even be necessary, but that the focus should be transferred to "constructing an empirical account of the conditions and effects of legitimate expectations" (Tomlinson, 2020).

Nowadays, the principle exists in administrative laws of most European countries, but its content varies. In some jurisdictions, this discussion also encompasses the question whether it is possible to satisfy the parties' expectations based on administrative action which would, in the aim of passing a just decision, be contrary to current legal rules - the so-called *contra legem* effect of legitimate expectations, which truncates the once absolute supremacy of the legality principle, viewed in its narrow sense. However, there are also views that the administration actually creates by its actions a "non-legal, goal-dependent" rule, which legitimizes the generation of expectations in that way (Perry & Ahmed, 2014).

Even though there are competing positions on the best justification for the principle of legitimate expectations (Craig, 2015, p. 142), in general, as defined by scholars, it demands that administrative authorities *if that is all possible*, fulfil the legitimate expectations created by them (Berge & Widdershoven, 1998, pp. 423-424).

Besides administrative action in individual cases, legitimate expectations can be created by general legal acts, laws and other regulations, which raises questions about retroactive application of laws and withdrawal of individual decisions. The principle of legitimate expectations is thus in an unbreakable bond with the principle of legal certainty and is often presented as one of its aspects or emergent forms (Berge & Widdershoven, 1998, p. 424).

The German Constitutional Court, which considers legal certainty as a general principle of law, also made this deduction (Koopmans, 2003, p. 66). The citizens should know what their legal position is, but also to be able to rely on expectations created according to statements and actions of the executive. If the authorities have created an impression that they will follow a certain policy, they cannot decide otherwise, damaging the citizen who had good reason to believe that his or her case would be decided according to earlier practice.

Further on, the principle has a procedural and a substantive aspect. When first recognized in some jurisdictions, it was viewed solely as a procedural guarantee (e.g. in the context of natural justice in the United Kingdom (UK), see Forsyth, 1988, p. 240). Nowadays, the legitimate expectations created give rise not only to a procedural guarantee of some form (such as, right to a hearing), but can lead to a substantial decision, obliging the administrative authority to act in a particular direction. Additionally, some commentators see a possible third aspect – the so-called compensational protection of legitimate expectations, whereas the party received compensation of expenses incurred due to expectations created by the administration (Šikić & Ofak, 2011, p. 140).

As mentioned, an important question arising in respect of this principle is the possibility of its *contra legem* effect. Even though, traditionally, the principle of legality has been

considered as supreme in administrative procedure and as such, obligatory at all times, there are jurisdictions which acknowledge the possibility of such a *contra legem* effect in caselaw. Alongside Dutch jurisprudence, Belgian commentators also recognize that the so-called principle of good faith (which encompass the protection of legitimate expectations) can have such an effect, if it prevails in the balancing (Lust, 2002, pp. 31-32). It is seen as part of general principles of justice, as basic norms of any legal system, i.e. are part of constitutional matter. That makes them equal to the principle of legality and not subordinate to it, so the legality principle cannot *a priori* prevail, but is necessary to weigh both interests in a particular case.

All this does not lead to expectations caused by administrative actions being fulfilled in each case – a weighing of interests is necessary. This aspect also differentiates legitimate expectations from the concept of vested rights (also a tenet of legal certainty), because vested rights have a more absolute position and cannot be overridden by public interest (Thomas, 2000, pp. 45-46).

The principle of legitimate expectations was primarily developed in caselaw, although its aspects have found their way into legislation. Germany and the Netherlands are considered frontrunners in that respect, since in the middle of the 20th century, they were the only ones in Europe to have developed this principle.

For example, in German caselaw, legitimate expectations were raised in cases of withdrawal or revocation of administrative acts (*Zuruecknahme und Widerruf von Verwaltungsakten*), where protection of legality was first seen as the deciding argument, with the principle of legitimate expectations later included in the weighing exercise. The first such case was decided by the Federal Administrative Court in 1959, later leading to introduction of the principle of legitimate expectations to the Administrative Procedure Act (Kunnecke, 2006, pp. 125-126). Articles 48 and49 of the Administrative Procedure Act, *inter alia*, deal with situations in which a party had relied on an unlawful administrative act, with regard to the public interest, as well as the (financial) disadvantage to the person affected. It was the German jurisprudence that later influenced the imbedding of this principle in European Union (EU) administrative law (Craig, 2015, p. 342).

On the other hand, even though it was created through caselaw, this principle was not included in the Dutch General Administrative Law Act (GALA) – codification of administrative law, as a general principle and remained a mainly unwritten principle (Peeters, 2005, pp. 57-58). This is justified by the fact that these cases often involve a "subtle process of necessary weighing of different interest which, as such, is not suitable for regulation by rigid legal norms" (Berge & Widdershoven, 1998). As it eventually boils down to evaluation of circumstances of an individual case, the courts' role is crucial. In the Dutch GALA, the principle appears only in relation to subsidies (Division 4.2.6, Article 4:51 GALA). According to the established caselaw in the Netherlands, legitimate expectations can be created by laws, decisions, publication of policy rules and guidelines, provision of information on application of law or promises, contracts, court judgements (Berge & Widdershoven, 1998).

In British caselaw the phrase *legitimate expectations* was first used in 1969 to describe "something less than a right which may nevertheless be protected by principles of natural

justice" (Parpworth, 2008, p. 319). The Belgian State Council, as its supreme administrative court, in the late 1980s, included the principle of legitimate expectations into the principle of legal certainty, since the party has the right to rely on the established practice or policy of the administration (Popelier, 2000, p. 327).

Within the EU, its courts have drawn several principles from the national legal systems, including this one, and developed it further, including them within the corpus of "general principles common to the laws of the Member States" (Koopmans, 2003, p. 88). However, some claim that the meaning of the principle within EU law is narrower than in some of its member states (e.g. according to Addink, 2002, it cannot have a *contra legem* effect). Even though it first appeared in the *Algera* case before the European Court of Justice (ECJ) in 1957 (Widdershoven, 2005, pp. 3-5), the EU jurisprudence on this principle "took off" during the 1970s (Craig, 2015, p. 339) and was later developed further. Therefore, during the 1990s, it was recognized that legitimate expectations could be raised even by soft-law, policy instruments, such as guidelines and notices, as well as by a course of conduct or assurances given by the administration (Craig & de Burca, 2003, pp. 380-387). Further on, the ECJ allowed legitimate expectations to have both procedural and substantive impact, resulting in individuals to whom loss was caused by a change in policy receiving the substantial benefit they sought "in the absence of any overriding public interest to the contrary" (Craig & de Burca, 2003, p. 386).

Of particular relevance here is the caselaw of the Court of Justice of European Union (CJEU) regarding withdrawal of formal European Commission decisions. The caselaw differentiates between lawful and unlawful decisions and between favourable decisions or the ones conferring rights or benefits and non-favourable decisions. The differentiation is relevant since, for example, when lawful beneficial decisions are withdrawn, the beneficiaries are likely to have increased legitimate expectations and the withdrawal should be allowed only under restrictive conditions (Craig, et al., 2017, pp. 136-137).

In addition, the EU caselaw had a feedback effect on the member states' jurisprudence, as well (e.g. according to Millet this happened in Great Britain in the 1990s and later on (Millet, 2002, p. 320). As Craig clams, the UK courts accepted "that EU administrative law precepts, such as proportionality and legitimate expectations, must be applied by UK courts in challenges via judicial review that involve EU law" (Craig, 2015, p. 289). In some other cases, general principles of EU law made their way to member states' legislations, such as the Italian APA containing "a *renvoi*" to the principles, such as due process, proportionality, and legitimate expectations" (Craig, et al., 2017, pp. 17-18), since the principle did not previously exist in Italian law (Chiti, 1995). However, some scholars have shown that the incorporation of the principle into national legal systems does not automatically lead to its interpretation in conformity with the CJEU – some countries have accepted it only in EU-related cases, while in other the incorporation is full and involves the domestic framework, as well (Boymans & Eliantonio, 2013).

As mentioned above, the principle appeared in the 2002 European Ombudsman's Code of Good Administrative Behaviour (Article 10), subdivided into three aspects: the need for consistency in administrative behaviour; the rest of "legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past"; and

the duty to advise the public on how to pursue a particular administrative matter.

The model rules of the Research Network on EU Administrative Law (ReNEUAL) list the principle alongside other prominent principles listed in its preamble, and presents it in conjunction with the principle of consistency (Craig, et al., 2017, p. 40). Similar to German law, the principle is further dealt with in relation to rectification and withdrawal of decisions, in Chapter 6 of the model rules, basically attempting to codify the existing caselaw of the CJEU, and is in part inspired by member states' law (Craig, et al., 2017, pp. 136-137).

In countries which entered the EU since the 2000s, it seems that introduction of the principle ensued more as a result of influence of the so-called European administrative space than the caselaw of their own courts (e.g. on the Czech Republic see Frumarová, 2021, pp. 117-118). There are also those in which neither law, nor jurisprudence recognise the posssibility to protect legitimate expectations in administrative law (e.g. for Poland, see Parchomiuk, 2017, pp. 18-21).

2.1. A view over the fence: Legitimate expectations in laws on the territory of former Socialist Federal Republic of Yugoslavia

Once part of the same administrative space, all former Yugoslav territories reformed their general administrative procedure after acquiring independence – starting with Slovenia in 1999 (Kovač, 2013) to Serbia, which closed the circle in 2016. Some received outside support of foreign experts, who tried to convey into the legislative texts some of the principles and experiences of senior members of the EU (e.g. see Koprić & Đulabić, 2009 and Davinić & Cucić, 2021 on cases of Croatia and Serbia).

In most of these laws (e.g. Slovenia, Croatia, Bosnia and Herzegovina, and North Macedonia), the principle of legitimate expectations – in any of its forms - is not expressly guaranteed among principles of general administrative procedure (for North Macedonia, see (Pavlovska-Daneva & Davitkovska, 2017, str. 274-277), although in some countries, it can be construed from other provisions of their general administrative procedure acts (GAPA) - e.g. in Croatia (Articles 103 and 155 of the GAPA), and is recognized as such in caselaw.

Laws in Montenegro, Serbia and Kosovo do recognize it as one of their general principles, titled either as the principle of predictability (Serbia and Kosovo, Article 8) or of legitimate expectations (Montenegro, GAPA, Article 5 paragraph 2, as a component of the principle of legality). In substance, these provisions limit themselves to the duty of the administration to respect its earlier established caselaw, while failing to establish a specific right of the parties to call upon their expectations legitimately created by such caselaw.

However, more importantly, the principle has been recognized in the caselaw of the courts in only a few of these countries. In Croatia, both the Constitutional Court and Administrative Court have, since the early 2000s, recognized the principle, either explicitly or implicitly and both as a procedural and material guarantee (Šikić & Ofak, 2011, pp. 137-139; Vezmar Barlek, 2011, pp. 575-578). In the given cases, the parties' legitimate expectations were acknowledged when created either by previously applicable regulations

or by final administrative acts. The courts demanded that the expectations be legitimate and reasonable and in each case a balancing against the public interest was performed.

3. SERBIAN CASELAW

As said above, from 2011 to 2016 and in the final text of the GAPA, the principle of legitimate expectations came from having "its own article" to being a part of the legality principle and labelled as predictability in administrative practice. In the very wording of the norm, which is now less harsh, we travelled from a strict obligation to follow its earlier practice (unless it is justified and based on law to act differently), to a duty to "take care" of earlier decisions passed in the same or similar administrative matters.

It is worth noting that even in the earlier drafts, in the very provisions there was no mention of legitimate or any other expectations (the notion just appeared in the rubrum). Formulated in this way, the principle was only directed towards unification of administrative practice, which was later downplayed by the formulation in the adopted LGAP 2016. There is every chance that the interpretation of the norm would go along these lines and not towards the protection of legitimate expectations of the party created by administrative practice.

In that view, one could argue that the notion is not novel to Serbian administrative law, since the administration already had an obligation to act consistently and this was covered by existing principles in GAPAs all through the Yugoslav period. Some Serbian scholars went as far as to deem it unnecessary (Milkov & Radošević, 2020). That position can be accepted, if for no other reason than for reasons of "betrayed" expectations created not so rarely in Serbian administrative practice. Solely for the purpose of illustration, we shall use two similar cases from the Netherlands and Serbia – which occurred 40 years apart.

In 1979, a man in the Netherlands, relying on information given to him by the tax authorities over the phone, reported a certain category of extraordinary expenses as a tax expense. However, the tax inspector did not recognize that as an expense, to the detriment of the party. The Dutch Supreme Court found that the risk of misinformation should regularly be borne by the taxpayer, because otherwise the government would have been hindered in their duty to provide information (Berge & Widdershoven, 1998, p. 446). However, in special cases, the tax authorities may be bound by the information provided. This will be the case when the information is not obviously contrary to the law and if the interested party suffers damage. And if it is phrased as a promise, the tax authorities will be easier to be bound by the given information. The information provided by the taxpayer in order to obtain such a promise must be accurate as well as the promise should not be manifestly contrary to law.

In 2020 in Serbia, tens of people who earn their income working "on the internet" and basically receiving income from abroad, claimed that they have previously (over the previous five years) been orally informed by tax officials that they do not have to report the income and pay the accompanying taxes, *inter alia*, because tax decisions are never issued, especially for small amounts. This Tax Administration later utilize their legal authority to determine tax obligation for the period of five years back. After mass protests, the Government "gave

in" and agreed to amend the underlying legislation to allow for some concessions to the taxpayers, but the principle of legality prevailed, with no regard to created expectations.

Of course, it would be an exaggeration to expect the Serbian Tax Administration to develop an innovative approach towards the created expectations and balance those against the obvious public interest of regular and ample tax collection, particularly in absence of guidance towards that by the judiciary, as offered to their Dutch counterparts. Nevertheless, it can be concluded that this innovative approach viewed in isolation would constitute the most promising solution.

Does this mean that Serbian administrators and administrative adjudicators have to start from the very basics? The current text of the LGAP 2016, as well as its interpretation in caselaw, gives rise to creation of legitimate expectations only by administrative acts, i.e. the parties to administrative proceeding are to be able to rely on the previous practice of the administrative authorities in same or similar issues. A logical question which could follow from this would probably be - how would one (especially a layperson) go about to learn about established administrative practice?

On the other hand, caselaw on the application of the predictability principle from Article 5 of the LGAP 2016 is scarce, or even negligible. It should be added that caselaw on the application of general principles of the LGAP 2016 (even the earlier laws) is very modest. Judgements in administrative disputes rarely apply these provisions directly, let alone their further or more extensive interpretation. The LGAP 2016 is seen as a comprehensive codification of procedural rules, leaving little room from judicial activism.

In a rare example, the Administrative Court focused solely on the procedural aspects of predictability. Finding that the administrative authority has deviated from its earlier practice, the Court annulled the decision because the authority failed to add a justification for the deviation. (Judgement of Administrative Court No. 9 У 3278/19, 2019). In all probability, if a paragraph was added in the decision's rationale, that would satisfy the requirement, without delving into expectations possibly created on the party's side. In a previous case, where the party claimed a breach of the predictability principle, the Court did not delve into that, since it found that the LGAP 2016, which contains it, was not yet in force when the case at hand occurred (Judgement of the Administartive Court, No. 12 У 18623/17, 2018). That pictorially speaks of the Court's willingness to indulge in judicial activism.

As there is little caselaw, there is also little scholarly analysis of the principle's application, other than general and theoretical overview of the LGAP's provisions already referenced in this text. Some notice has been given to potential difficulties of its adequate application on the local government level, i.e. of the challenges of unification of administrative practice on the local level on which all local government units independently apply the same laws. This is because the LGAP 2016 does not oblige administrative authorities simply to follow its own practice, but to follow the practice in "same or similar matters", which in the case of local government competences is shared by all local government units.

Measuring of performance in the application of good governance principles in 2018 showed that one of the lowest scored indicators was exactly predictability (Jerinić, et al., 2020, p. 279). Efforts have been undertaken by the national local government association to standardize administrative procedures and views of contributing to unification of practice.

Some scholars see chances for improvement in increasing transparency and publishing administrative inspection reports which control the LGAP's application in all administrative authorities (Vučetić, 2021, pp. 181-198). On the other hand, even though not expressly mentioned in the present (nor previous) LGAP 2016, legitimate expectations are a known concept in the caselaw of the Ombudsman, as well as of the Serbian Constitutional Court, in several of its decisions which concern review of administrative action.

Since 2011, the Ombudsman has, in its annual reports, recognized the breach of legitimate expectations as one of the most common violations of the right to good administration. In that very year, it singled out an example in which the Tax Administration, by a change in its interpretation of the tax laws, wronged a number of individual farmers who took maternity leave. The Tax Administration refused to act upon the Ombudsman's recommendation and annul their decisions, after which the Government stepped in and covered the costs of taxes of the farmer who have not previously paid the taxes levied according to the controversial interpretation. Still, the ones who have paid the taxes were left without compensation (Protector of Citizens, 2011, pp. 133-134). The following year, the law was amended, once again demonstrating the indisputable primacy of the principle of legality in the eyes of the Serbian administration.

Since then, every annual report contains at least one significant case singled out in the Ombudsman's annual reports in which legitimate expectations of citizens were created by either administration or the legislature – e.g. in 2014 regarding changes of the Law on Road Safety and the ensuing replacement of driving licenses (Protector of Citizens, 2015, pp. 161-162); in 2019 in relation to untimely decisions and erroneous interpretation of laws by the Real Estate Cadastre (Protector of Citizens, 2020, pp. 94-95); in 2020 towards the City of Belgrade concerning a water supply break down (Protector of Citizens, 2021, pp. 114-115) - while the overall annual statistics usually showed over a 100 or 200 individual complaints alleging unfulfilled expectations.

The Constitutional Court found on at least four occasions, between 2013 and 2019, and decided in favour of complainants which called upon their legitimate expectations created by final administrative acts (relating to land usage and building and construction). Interestingly enough, the Constitutional Court did not base its decisions on the provisions of the LGAP 2016, on its principle of legality or other principles. It founded its decisions on constitutional complaints on constitutional guarantees of the right to property and corresponding caselaw of the European Court of Human Rights on Article 1 Protocol 1 to the European Convention on Human Rights, which finds such legitimate expectations part of one's property (Decision of the Constitutional Court [CC], Už 412/2011, 2013; Decision of the CC, Už 6763/2011, 2014; Decision of the CC, Už 8782/2015, 2018 & Decision of the CC, Už 1783/2017, 2019).

4. CONCLUSIONS

In this very initial research, the aim was to determine the position of Serbian GALA within the wider European circle. In respect of Serbian legislation on general administrative procedure, it was mainly a normative analysis, compared to the basic perception of this

principle in European legislatures and caselaw, without going into the nuances of case-to-case considerations in different jurisdictions. This is also due to the fact that Serbian caselaw on application of the new LGAP's predictability principle is practically non-existent and, so far, the principle remained a "letter on paper".

On the other hand, the express recognition of legitimate expectations appears in the decisions of other state bodies, namely the Ombudsman and the Constitutional Court, from as far as 2011, but this apparently had no visible impact neither on the drafting of the LGAP nor the caselaw of the Administrative Court. Therefore, legitimate expectations are far from a novel, or even unnecessary concept in the Serbian legal system.

As defined today, the predictability principle, even though it appeared in the rubrum of the provision in earlier 2011 and 2013 LGAP drafts, is not directed towards the protection of legitimate expectations – procedural or substantive – but it is settled for remaining an incentive for unification of administrative practice. That alone is an important task, which in its turn could also contribute to eventual establishment of the principle of legitimate expectations. So far, the predictability principle has not stretched to the protection of legitimate expectations.

Even without express recognition in the LGAP 2016, the very recognition of the principle by the Constitutional Court, similar to the Croatian example, could eventually lead to changes in Administrative Court's caselaw and administrative practice, in particular if similar cases against administrative authorities and the Administrative Court itself keep appearing before the Constitutional Court. This would mean that the principle actually springs out of caselaw rather than legislation, which, truth be told has not been a feature of Serbian caselaw thus far.

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THE BRUSSELS AND THE WASHINGTON AGREEMENTS IN KOSOVO IN THE FRAMEWORK OF EU POLICIES

The implementation of both The Brussels and Washington Agreements is coming as a challenge for the respective Serbian and Kosovo governments, but for the EU as well. The very complex legal and administrative solutions are posing a threat regarding the time dimension of their application, where such core agreed elements as the Association/ Community of Serbian municipalities have still not been formed. Also, the comparative environment of applying such measures is challenging in the environment of the Western Balkan countries and their potential EU path. Additionally, the agreements are posing another challenge as their application would not be welcome in such a form like in Kosovo regarding their conflict resolution capacity elsewhere. Overall, the agreed constructions and their limitation only to Kosovo will break this line and through various means find a way to other post-conflict communities, ignoring both the EU and USA enforcement mechanism or their shortcomings here or elsewhere. The only partial implementation of the Brussels Agreement is challenging the EU authority in Kosovo and the wider region. Additionally, the broad and somehow unclear requirements of the Washington Agreement are challenging the future role and interest of USA in Kosovo and wider, in this case not just locally or regionally but globally.

Keywords: Brussels Agreement, Washington Agreement, Serbia-Kosovo relationship, post-conflict development, Open Balkan initiative.

1. INTRODUCTION

The very rich and complex system of the conflict resolution mechanisms in Kosovo is teaching us about many various paths in which we can proceed. It is always challenging to follow a path and even more complex to try to achieve something in a society divided such as Kosovo is. When we talk about the two recent agreements, it is evident that they are introducing crucial and complex conflict resolution mechanisms. The Brussels Agreement (BA) and the Washington Agreement (WA) both inherently consist of various norms

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which considerably changethe current systems of life for both communities in Kosovo. In any case, the biggest success of the agreements is the fact that their implementation has started, but we can't exactly determine whether they will be fully implemented. Contrary to some previous plans for reconstruction, these agreements are much more aligned with the needs, interests and future expectations of the parties. Also, the previously established system of dictating conflict resolution paths from above has ended, as these agreements are in that sense more democratic. In such post-conflict situations democracy can't be fully applied, but the mutual agreement of democratically elected governments certainly helps. The practice of making plans and having them enforced by the international community, as the case was with the the Ahtisaari Plan was, has not been as successful in Kosovo and certainly was not as democratic. Instead, the Ahtisaari team was reliant on external actors, such as the Contact Group members, to put additional pressure on the parties and/or provide additional incentives for compromise. (Bergmann, 2017, p. 252) It is not solely the Ahtisaari plan that had a weak point - the entire UNMIK mission previously active in the Kosovo state-building project has failed to advance the society in many aspects. Therefore, the new EULEX mission did not come as a surprise to Kosovo, but the challenge of taking over the UNMIK mandate was a more complex case. Some criticism addressed at UNMIK can be now directed to EULEX as well, but the many conflict resolution aspects active now are not letting us to fully measure certain achievements. In view of this, the only way in which to avert this catastrophe was for the European Union to take over some of the governance functions and try to succeed where UNMIK had failed so badly. (Ker-Lindsay, 2011, p. 185) For a few years, EULEX has advanced the institutions in Kosovo but still not fully established the Rule of Law where the North Kosovo municipalities still completely remained outside of the Kosovo system. The BA has therefore offered a turning point in 2013, where suddenly all the territory of Kosovo was reachable by its institutions. Such an approach, although ambiguous and complex, has helped the EULEX to establish its presence and slowly develop full operational capacity in most parts of Kosovo. (Zirojević, 2016, p. 136) Every year, what is fairly fast in regard post-conflict societies, a new system or institution has been applied in Kosovo. Probably the most important institution, or invention in regards to peace and conflict resolution, isthe Kosovo Specialist Chambers (KSC). Just as the formation of the KSC came as a surprise, so is the case with the WA signing in 2020, which has introduced an array of solutions which are interesting and definitely more challenging than the ones stemming from the BA.

2. UNDERSTANDING THE BRUSSELS AND THE WASHINGTON AGREEMENTS

On paper, both agreements aim to effect mainly economic changes in the relationship between Serbia and Kosovo. Probably the most important sectors which are being re-shaped by both agreements are the Energy and Telecoms (Brussels, 2013, art. 13). Regarding energy, it has to be outlined that Kosovo is an energy rich country and that, additionally, various minerals can be found in abundance. However, coupled with t the issue of energy is the question of ownership over the Trepcha mines, which are being claimed by both Serbian and Kosovo governments. While the case of Trepcha awaits its future solution, both

governments have showed an exemplary understanding and paved a way for a solution regarding the energy supplies in Kosovo, particularly for unpaid electricity bills on North Kosovo. Unpaid bills will be dealt by a separate company owned by the Serbian government and managed by EPS (Elektro Privreda Srbije-The Serbian electricity distributor). Both parties will diversify their energy supplies (Washington, 2020, p. 5) as it was further agreed in Washington. This in fact means that Serbia will also open its electricity market. When it come to the issue of telecommunications, we necessarily need to mention that Kosovo has got its dial code (+383) and the phone calls between Serbia and Kosovo are possible due to BA again. Both parties will prohibit the use of 5G equipment supplied by untrusted vendors in their communications networks (Washington, 2020, p. 7). This very interesting and complex legal issue of 5G equipment suppliers will be in fact a real challenge for Serbia as the company under scrutiny in this case is the Chinese Huawei telecommunications company. Huawei has its regional headquarter in Belgrade and on the Serbian market its hardware has been used predominantly. The development of 5G networks is an issue still to come therefore at this moment this is just a case to be considered in the future. More success has been achieved regarding sharing the water supplies coming from an accumulation in North Kosovo, sharing Gazivoda/Ujmani Lake, as a reliable water and energy supply (Washington, 2020, p. 5). The case of Gazivode Lake has been a challenge for a long period of time, and, while BA provided no solutions, the WA declared that it will be shared. Infact, the water as a resource has been shared and used already, but the control over it was unclear.

There have been other challenges as well, one of the major ones being the enforcement authority or Police in North Kosovo specifically. The BA envisages that there shall be one police force in Kosovo called the Kosovo Police (Brussels, 2013, art. 7). The Police integration on North Kosovo has been concluded fairly quickly and, together with the Judicial integration[163], could be claimed as two big successes of the BA.. The Serbian judicial system in Kosovo has anyway functioned far too long without the capacity to enforce its decisions. Even though Kosovo judicial system is far from being perfect, it is still under the scrutiny of EULEX and can be regularly monitored. . The inclusion of Serbian judges into the Kosovo system was very smooth and came with many and various guarantees in BA for the Serbs in the future Kosovo judicial system. A mono-ethnic system of justice, as agreed in Art. 10 is therefore unconstitutional, and this is due to two underlying reasons: first, it makes a link between the assertion of jurisdiction on the basis of territory-ethnic line of judges/citizen, which seriously damages an independent and multi-ethnic concept of adjudication (Doli, 2019, p. 171). The overly layered and divided system of courts in Kosovo is posing a real challenge to understand who is holding the authority over a certain case – more specifically, in Kosovo we have the functioning EULEX courts and the Kosovo Specialist Chambers (KSC) functioning in the Hague overseeing the past War Crimes that took place on Kosovo territory. While Kosovo has gained authority over its entire territory regarding the judicial authority, Serbia has given up on its un-functional courts and also transferred the burden of serving justice in Kosovo to EULEX and the KSC respectively.

[163] The judicial authorities will be integrated and operate within the Kosovo legal framework (Brussels, 2013, art. 10).

3. LOCAL POTENTIALS AND THE FUTURE MUNICIPALITIES, TERRITORIES, AND AUTONOMIES

The two agreements establish a a very complex system of local administrations. Even before the Association/Community of Serbian Municipalities (A/C) is being established, the administrative system on North Kosovo is already complex and varies between a local administration via a territory with a special treatment to an autonomy like a separate entity. Probably this is one of the reasons why Kosovo government is afraid to fully establish the A/C, as it will again enable Serbian control over this part of Kosovo . Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States (Council, 1985, p. 4). In this system of rules, where Serbia wants to keep Kosovo but fails to control it, or where Kosovo aims to keep North Kosovo but also fails to fully control it, it is hard to reach a final solution. Therefore, the two Agreements have just in some way legalized this situation and left everyone to claim victory and administer this status quo situation. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions (Council, 1985, p. 2). Such discretion will be presumably widely applied to the local contexts, and as we have seen it in Bosnia and Herzegovina, even after more than 20 years, it still still provides opportunity for disagreements over even the most minor issues. One of the positive examples from Bosnia is the mutual external border management, what is also present in some form in Kosovo with the Integrated Border Management (IBM). Establishing permanent IBM crossings where Serbian and Kosovo authorities function together would illustrate great progress in adopting EU structures and would likely indicate both Serbia's and Kosovo's readiness for greater EU integration (Hamilton & Šapić 2013, p. 15). Such integration is not just far away but also entails a very complex legal resolution mechanisms for the now already established and functioning systems of ad hoc solutions. In order to provide sustainable financial support, Kosovo government has provided a separate budget for North Kosovo, with police officers' salaries being covered by that budget (Bjeloš, Elek, and Raifi, 2014, p. 12). It can be seen that even though both countries are very keen to claim sovereignty, they are trying to keep a distance from the other entity as much as possible and not be responsible for its shortcoming and future conflicts. Even after the full implementation of these two agreements, we are not going to have a final and sustainable solution; it is only the EU that can offer such a solution, but it still has a long way to go to fully maintain and align everyday life in Kosovo. To ethnic Albanians, Serbs are a minority like any other, not a 'co-nation' or component of a multi-ethnic state, as per the constitution (Potter, 2020, p. 221). The interest of Albanians is not to keep the Serbs in Kosovo and so is not the interest of Serbs to have Albanians interfere into their political life in any form. Therefore, the vague and unclear definitions from the BA and WA perfectly serve the interests of all and are meant to remain so together with the local understanding of the sovereignty in both Serbia and Kosovo.

3.1. Regional development potentials

As prospected, the U.S. International Development Finance Corporation (Washington, 2020, p. 3) will be one of the biggest counterbalances for the many and various Chinese investments in the Western Balkans and wider. With a focus on infrastructure, this tool will help mainly in bringing Serbia and Kosovo closer to each other and by that naturally linking them closer economically. Another interesting example was an official's reflection on the EU's strategy for renewing IPA funding, 'the strategy is, if Bosnia doesn't use some money, Kosovo gets it, but it is sent to the [Serbian municipalities in the] North (Tomić, 2020, p. 15). For a longer period of time, EU was paying more attention to the North, which certainly worries Kosovo Albanians. Overall, in Kosovo, the economic situation is not perfect, given that there are no big and crucial foreign investments, usually coming with multinational corporations, which are very rare in Kosovo. It is undisputed that multinational companies are able to quickly employ big numbers of people, and this was proven numerous times to solve unemployment issues in post-communist countries in East Europe. A similar plan exists for this part of Europe, as seen in the establishmentof the Open Balkan initiative, which has been previously called Mini Schengen. Both parties will join the "mini-Schengen zone" (Washington, 2020, p. 4), as previously agreed, although Kosovo is officially not supporting this idea. Nonetheless, quick advances and changes are possible, as was the case previously many times. This is particularly the case for Serbia, where public opinion has shifted away from the European Union and Serbia's geopolitical ties to China and Russia are emphasized, making Belgrade less responsive to EU pressure (Conley & Saric, 2021, p. 9). It is not just Serbia which is hesitant to gain full trust in its own EU integrations, but it is also Kosovo, which is still not getting the long-awaited visa free travel to the EU. First, whereas Serbia is explicitly recognized as 'a potential candidate for EU membership', the preamble to the SAA with Kosovo carefully avoids such wording (Elsuwege, 2017, p. 405). The Stabilisation and Association Agreements (SAA) have been signed with both Serbia and Kosovo; however, for now, the priorities have been shifted for the EU, not just because of Brexit but also because of the rising and deepening divisions lines inside the EU.

4. LEGAL AND COMPARATIVE CHALLENGES

Apart from regional, there are many challenges stemming from the two agreements and are widely used, misused and understood differently in various perspectives. Also, all the efforts as done by the EU at the end do not fully recognize Kosovo even after the SAA itself has been signed. As mentioned above, the Lisbon Treaty allows the EU to conclude an SAA without the agreement of all Member States (Viceré, 2015, p. 15). The division inside the EU is accordingly continued and the next steps towards integration of Kosovo got another dimension, but are left at the same point in a legal void. We can take another example from the Treaty on the Functioning of the European Union (TFEU). What is important in the context of articles 217 and 218 of TFEU is the fact, that Kosovo is not an international organization, and according to article 2 of the SAA neither is it a State in relation to the EU (Stepien, 2018, p. 53). It is therefore not a surprise if we see that more

encouraging and recognition related steps are coming from the Washington agreement. Probably the most crucial and ground-breaking event in the WA is the mutual recognition of Kosovo and Israel. Kosovo (Pristina) and Israel agree to mutually recognize each other (Washington, 2020, p. 12). In the past few decades this recognition would not have been possible - the standpoints of Israel towards Kosovo were very strict and Serbian sovereignty was fully acknowledged. With this recognition, Israel has stepped into a completely new and different dimension of statehood, while Serbia has lost an important ally but without any intention to change its own position. It also came as a surprise to EU when Serbia moved its embassy from Tel-Aviv to Jerusalem, which is contrary to the EU policies and its relationship with Israel as a state. The substantial autonomy of the Autonomous province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution (Constitution, 2006, p. 56). The Serbian Constitutional framework at the moment does not allow any changes regarding Kosovo de iure but the de facto situation is completely different and controlled by the BA and WA agreements. Nonetheless, the level of comparative use of examples stemming from the agreements depends more on the Serbian interpretation and acceptance of realities. The opinion of ICJ will probably give other states the confidence to recognise and continue exploiting double standards and explore the opportunities for politically motivated legal interpretation (Vakhtangidze, 2020, p. 426). The usage of double standards is very popular, but the real recognition still depends more on the wider recognition from the UN member states. It is completely contrary to the logic of precedent to claim that no case could be of such a nature as to justify the implementation of ratio decidendi of the already adjudicated case (Jovanović, 2020, p. 373). The interest of Serbia at the moment is to not recognize Kosovo, which is and is supported by its campaign of asking states which have previously recognized Kosovo to de-recognize it. With many states, especially smaller ones, such campaign can be successful and it is possible to convince them to change their previous recognition. Still ultimately, there is the hard-core minority of states which are never going to recognize Kosovo, not because of Serbia, but because of their own internal issues and challenges regarding sovereignty.

4.1. Association/Community of Serbian municipalities

In legal terms, the biggest challenge for Kosovo is the implementation frame and the establishment of the Association/Community of Serbian Municipalities, which will in fact unite the presently divided Serbian Municipalities from both North and South of the Ibar River in Kosovo. Even though the Kosovo government is very hesitant to form the A/C, the initial legal framework is very clear and useful for shaping the future of the A/C. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo (Constitution, 2008, p. 5). The Kosovo constitutional framework is therefore very much challenged by all the agreements it has signed, or even not signed. The BA itself furthers this, as it is a rather informal agreement which has later been followed by WA as well. The Agreement does not indicate whether Kosovo is a state or not; the parties are described as “sides” without further details, and

there is no definition of how the Association/Community of Serb municipalities—the cornerstone of the agreement— should be organizedand what legal status it should have (Bieber, 2015, p. 313). In Kosovo, BA has a status of an International agreement which could be similarly applied to the WA, but these agreements are more unclear regarding Serbia and its future Constitutional frame regarding them. The Association/Community of Serb majority municipalities (Brussels, 2013, art. 1) has been the cornerstone of the initial acceptance of the Brussels Agreement by Serbia, which is not giving up easily on this important and life changing institution for the Serbs on Kosovo. As Serbia held and controlled many aspects of political life in North Kosovo after the Kosovo declaration of independence from 2008, it does not plan to fully give control over to Kosovo authorities a. The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning (Brussels, 2013, art. 4). Such areas of political life would, in any other democratic societ,y also need an integration which is of a higher level than a simple municipality. Additionally, if we consider that additional competences as may be delegated by the central authorities (Brussels, 2013, art. 5) could be added to the A/C, it clearly shapes its future and makes a real territorial and personal autonomy for Serbs in Kosovo. In fact, the biggest opposition for the implementation and existence of the A/C is not the Kosovo government, but the Serbs from North Kosovo. On paper, the compromise provides for the integration in exchange for the protection frame provided by the "Association/Community of Serb municipalities in Kosovo" (Martino, 2014, p. 6). The almost two-decade long ignorance of the Kosovo institutions by Serbs from North Kosovo can't be in any case changed quickly and smoothly. Therefore, the many and various obstacles are at the moment of more of a legal challenge and the actual implementation phase is still pending and is far in the future. While Serbia insists on the term Community, as this would imply much stronger competences including those of executive nature, Kosovo fears that this could lead toward Daytonisation of Kosovo and eventually its partition, and therefore insists on the term Association which will have lower competences (Ejdus, 2020, p. 140). In this regard, the future of the A/C can definitely be seen and compared to the entity of the Republic of Srpska as it is present in the state of Bosnia and Herzegovina, where these two authorities are in a constant disagreement over many legal and real life facts and situations. While some in Belgrade see the Community as highly autonomous, others, equally well placed, describe it as "an imaginary embryo of autonomy", whose main goal was to convince the Serbs to accept Kosovo institutions (Prelec & Rashiti, 2015, p. 31). As previously mentioned, Serbs have accepted the Kosovo Police and courts and are now waiting to see the last steps of the implementation of BA and the formation of the A/C in the future. The role of the A/C is not just important for the Serbian and Kosovo future relationship but also crucial in the understanding of the possible conflict resolution mechanism in other similar conflicts globally. In this scheme, much of the Belgrade-Pristina relationship would be channelled through the Community, as the sole institution formally recognised by both (Prelec & Rashiti, 2015, p. 39). Once established, it is expected that the first challenges and disagreements will be those regarding its flag and official symbols, leaving the options of being either status/neutral, like the ones Kosovo has, or strongly national/ oriented and Serbian, like in the Republic of Srpska.

5. LOST ARTICLES/AGREEMENTS IN THE TRANSLATION

The Agreements have been praised initially for their ground-breaking success and tool for post conflict-resolution or breaking the frozen conflicts. These agreements have not been the first ones regarding the most important constitutional matters for Kosovo. The Ahtisaari Plan was also widely praised among human rights experts in Europe and the United States as the most detailed and sophisticated structure for protecting minority rights in a multi-ethnic society ever developed through international diplomacy (Perritt, 2010, p. 165). Initially, the Ahtisaari plan could not take into account the future developments nor could it foresee the establishment of institutions such as EULEX, KSC, A/C and ultimately the Open Balkan initiative, which have all influenced or have been influenced by the different developments on the field. Over the years, the Serbs and Albanians gradually grew more and more divided in Kosovo, with their own specific institutions. The agreements have introduced changes, which are of such importance, that their revision or non-application would harm the whole process. At the same times, , many of their words are just an empty phrase. In addition to the lack of tangible results from the dialogue, this pessimism can also be understood considering a big ethnic distance towards Albanians, which is constantly present and promoted in the public sphere (Bjeloš, and Elek, 2020, p. 5). Serbia claims and enforces sovereignty demands over Kosovo, but once it comes to citizens and their rights, it is more silent and distanced. Such a limbo has been created where the whole system of the international community together with Serbia ignores the desire of citizens for a normal life in and outside of Kosovo. Serbia (Belgrade) will agree to a one-year moratorium of its de-recognition campaign and will refrain from formally or informally requesting any nation or International Organization not to recognize Kosovo (Pristina) as an independent state (Washington, 2020, p. 11-12). The timespan of this moratorium is rather frustratingly short, and does not seem to be able to to encourage the two governments to agree and get closer in reaching and implementing what was agreed. Enforced disappearance of persons (KSC, 2020, p. 50) is, for instance, a burden which has been standing between the governments, citizens, and the entire international community for decades, without even a provisional date of when it would be fully resolved. Both parties pledge to expedite efforts to locate and identify the remains of missing persons (Washington, 2020, p. 8-9). Overall declarations in such a form do not make things happen faster or at all; therefore the lack of a timeframe is probably the biggest shortcoming of both agreements. On the other hand, the agreements themselves do show a certain concern and interest from both the EU and USA where they maximally encourage the sides to agree and comply. In real life, such efforts quickly fall behind various other agendas which are more important globally and at the given moment. For insatance, the French Non-paper does not even mention Kosovo (Deimel, 2020, p. 16). Therefore, Kosovo is not a priority for EU at this time, or just not any longer, and its future will be determined together with the future of the whole Western Balkans. If we add to this the case of Brexit which is there to worry more the EU as a whole and its future, there is even less to expect. The question now is whether, in the context of Brexit, Britain will regard Kosovo as an important enough actor to merit its attention in what is likely to be a very challenging time for British foreign policy

(Ker-Lindsay, 2020, p. 60). Even when the common British future development agendas are being developed, it is evident that there are many other priorities for UK, such as the migration crisis, the future of UK from inside and the Russian and Chinese development, which also happen to be common EU challenges and priorities. More explicitly, given the economic challenges the EU is facing, as well as its geopolitical concerns (mostly relating to the position of Russia, such as its involvement in Ukraine), enlargement seems to be on the verge of a long pause or an unprecedented acceleration (Mehmeti, 2016, p. 240). Such developments leave a very problematic hope for EU prospects of Kosovo and Serbia , It is therefore unsurprising that Kosovo has turned a focus to its NATO membership. In this sense, while Kosovo may have exemplified the degree to which the EU can be innovative in foreign policy decision-making, it nevertheless also highlighted the degree to which the Union still has a long way to go if it is to play a central role as a major actor in international affairs (Economides & Ker-Lindsay 2010, p. 510). Together with USA, the EU influence is lowered not just globally, but also regionally in its neighbourhood, which poses a real challenge and threat for their development and future foreign policy. This has also directly influenced the formation of the BA and WA agreements, which are not coming any longer in a form of a dictate, but as a supervised agreements which have been agreed upon by the parties without any pressure or demands. Nonetheless, Belgrade's decision to increase trade with Moscow soon after refusing to impose sanctions against it alongside EU member states and other candidate countries raises questions about the genuineness of Serbia's desire to pursue EU membership (Viceré, 2019, p. 9). If Kosovo turns its focus to NATO and Serbia to its partners from the East, there is a very slim chance to expect the full implantation of agreements without more and wider economic incentives. Such a situation puts once again the territory of Serbia and Kosovo together with the whole Western Balkans to the crossroads and divides which were not so long ago dividing this territory between the East and West.

6. CONCLUSION

In the framework of post-conflict societies and their reconciliation recently there have not been such big and ground-breaking agreements as in the relationship between Serbia and Kosovo. Both the Brussels and Washington agreements have stepped deep into the conflict and touched upon many and even the smallest points of disagreements of the Serbian and Kosovo governments. Nevertheless, one of the major shortcomings of the agreements is the unclear and questionable final full implementation. Just as it was the case with the Ahtisaari plan for Kosovo, which was somehow only got applied partially without leaving a clear answer as to why it has failed, a similar faith threatens these two agreements. Since these new agreements lack a reasonable time dimension for their implementation, the Brussels Agreement is soon to be overdue and potentially change its core. On the other hand, the Washington Agreements is very fresh, but has already additionally divided the international community and in particular the EU, given that through it both Serbia and Kosovo turned their back to common EU policies regarding Israel. The real success has been the developments and implementation of the Energy and Telecom agreements where

real advancements have been achieved. Together with the infrastructural developments the Washington agreement is aiming to connect Serbia and Kosovo more and ultimately bind them to the USA interest sphere more tightly, and in this way form a counter-balance to the Chinese infrastructural investments in the region which pose a threat to the EU as well. However, among the many topics touched upon in the Washington Agreement, there are many which are simply neither a priority for Serbia or Kosovo but neither for the USA or EU governments. The very broad and timely unclear Washington Agreement risks to be just partially implemented as well. As a supportive argument to this, we can see the change in the USA policies regarding the new President and his sudden withdrawal from Afghanistan. For the EU this threat and the refugee crisis pose a bigger challenge than Kosovo and its continuous improvements regarding the rule of law. Even though the process is time consuming, it seems evident that Kosovo will be joining the Open Balkan initiative and form the Association/Community of Serbian municipalities as it has no other priorities at the moment, apart from KSC which functions and its NATO integration, which has not really been encouraged by NATO members and is far from being unanimously supported. Apart from the weaknesses showed, EU is keen to still maintain and fully control Kosovo. The main challenge in achieving this is Serbia leaning towards Russia and China, against which EU has fewer tools, arguments and enforcement capacities as the days go by. Accordingly, the ultimate answer and solution to the Kosovo case is its faster EU integration together with its Western Balkan neighbours, an outcome which seems to develop on the right track in the scope of the Open Balkan initiative, soon to be a dominant EU-like integration. The Open Balkan initiative sees the two agreements as its predecessors and also, they can find their full and most complete application in this initiative in the future.

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PUBLIC CONSULTATION IN THE WESTERN BALKANS IN THE LIGHT OF THE EUROPEAN UNION INTEGRATION

The increasing emphasis on openness and transparency of policy making fits into the overall set of reforms stemming from the EU accession process of the Western Balkan countries. Such an approach is especially relevant in the context of the requirements related to the public administration reform, good governance, rule of law as well as civil society development. This paper will analyse the legal framework regarding the public consultation, as key to public participation, in the public policy process of the Western Balkan countries in the light to the EU accession and approximation of their legislation with the EU legal standards. The paper will explore if and how such a legal framework has contributed to better public policies in these countries, as well as to their EU integration progress. Even though all the Western Balkan countries are not in the same stage in the accession process, challenges remain similar. The methodology of monitoring and accountability mechanism of the public consultation process is of high relevance for fulfilling this specific requirement. The tools that will be explored through this paper are aimed to contribute into improving the process in the Western Balkan countries.

Keywords: public consultation, public policy, European integration, Western Balkan countries.

1. INTRODUCTION

The benefits of systematic collection, analysis, and presentation of relevant data through public consultations conducted by respective public institutions are multifold. The process of public consultations spreads the culture of evidence-based policy, strengthens the potential for effective central scrutiny of the quality of public policies, and promotes the active participation by bringing additional meaning and value to the citizen and

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stakeholders' participation in policymaking. They also contribute to strengthening trust in public institutions, rule of law and democracy. The public institutions are reinforced by the public consultation in the decision-making process and this directs towards sustainable policies which meet the needs of the society.[164] The public consultation process enables public authorities to ask for public opinion regarding a certain topic or policy at hand, through informing on current policy developments and progress reached within the competent government authorities, inviting the public to submit comments, opinions and replies, as well as informing on how the latter are assessed and valued by the public authorities.[165] Such a scheme not only empowers the public, but it also allows for better policies addressing public interests.[166] All the Western Balkan countries (WB countries) reflect a specific level of progress in harmonizing with the European Union (EU) standards on this issue. However, they also reflect loopholes to be further addressed on the long road to EU accession.

2. WESTERN BALKANS TOWARDS EUROPEAN UNION REGARDING PUBLIC CONSULTATION

As the WB countries strive to access the EU, the latter is identifying more conditions related to good governance, legal standards, and procedures, including standards of public consultation in policymaking. It is required that governments set appropriate timeframes for the public consultation processes, independent mechanisms not only responsible for the monitoring and implementation of the public consultation but also efficient in annulling and/or suspending the draft projects if public consultation standards are not held in compliance with the corresponsive legislation.[167] The EU considers policy-making public consultation a fundamental element of the rule of law and proper functioning of the democratic institutions for the countries that aspire to access EU.[168] It is the primary sources of EU legal acts that stipulate this principle. Article 11 of the Treaty of the European Union (TEU) requires that EU institutions to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action, maintain an open, transparent and regular dialogue with representative associations and civil society, and carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. This needs to be respect in the course of the legislative functioning the EU

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[164] Rosenzweigova, I., Skoric, V., & Asipovich, H. 2016. Civil Participation in Decision-Making Processes: An Overview of Standards and Practices in Council of Europe Member States. Pieejams: https://rm. coe. int/168068690f.

[165] Divjak, T. & Forbici, G. 2014. *Public Participation in Decision-Making Process: International Analysis of the legal framework with a collection of good practices*, CNVOS.

[166] National Endowment for Democracy. 2017. *Commentary of the Law no. 146/2014 "On Notification and Public Consultation*"

[167] Divjak, T. & Forbici, G. 2014. *Public Participation in Decision-Making Process: International Analysis of the legal framework with a collection of good practices*, CNVOS.

[168] ReSPA. 2018, Recommendation on Public Participation in Policy-Making Process for the Western Balkans.

institutions.[169] On such basis, the European Union has paid a special attention on the stakeholders engagement into the policy-making process during legislative process.[170] The opinions of the citizens on the legal acts and other policy-making documents is heard through the 'Have Your Say' portal of the European Commission.[171] This process, known as a 'better regulation' by requiring that policy-making process is an evidences-based and a transparent one, aims not only to ensure the application of the principles of subsidiarity and proportionality key for the EU functioning, but also that EU legal acts are in line with the UN Sustainable Development Agenda 2030.[172]

In similar ground, EU requires that such standards be respect by the WB countries. The communication issued by the European Commission (EC) on "Enhancing the accession process - A credible EU perspective for the Western Balkans" in 2020 highlighted that there is a need for the WB countries to be better equipped with mechanisms dealing with the much-needed reforms in the area rule of law, and fundamental democratic and economic growth. In the aspect of the building a clear strategy on the functioning of the democratic institutions, there is a need in the reformation of the public administration functions in its entirety.[173] One of the most important aspects that has impact in the trust in the public institutions is the impartiality and the fairness of the institutions in the decision-making process which is needed to be made in consultation with the citizens.[174]

All WB countries have embedded the public participation in their internal legislation (See Table 1). Albania adopted the Law on Notification and Public Consultation in 2014[175], while that matter was regulated in Montenegro by the Law on State Administration and by the Decree on the Selection of the Representatives of NGOs in the Working Committees of Public Administration Bodies and Implementing Consultation in Preparing Laws and Strategies.[176] In 2019, the Serbian government adopted the Regulation on the Methodology

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[169] See the Consolidated Version of the Treaty on European Union at: http://data.europa.eu/eli/treaty/teu_2012/oj. This needs to be respected in cases of legislative process of the EU institutions as per article 289 of the Treaty on the Functioning of the European Union (http://data.europa.eu/eli/treaty/tfeu_2012/oj)

[170] European Commission. (2002). '*Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue–General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*". See at: https://ec.europa.eu/governance/docs/comm_standards_en.pdf

[171] https://ec.europa.eu/info/law/better-regulation/have-your-say_en

[172] European Union: White Paper on European Governance (http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10109_en.htm)

[173] EC. 2020, Enhancing the accession process - A credible EU perspective for the Western Balkans & OECD (2020), Government at a Glance: Western Balkans, OECD Publishing, Paris, https://doi.org/10.1787/a8c72f1b-en

[174] OECD, 2020, Government at a Glance: Western Balkans, OECD Publishing, Paris, https://doi.org/10.1787/a8c72f1b-en.

[175] Law no. 146/2014, date 30 October 2014 'On Notification and Public Consultation'. https://www.legislationline.org/download/id/8099/file/Albania_law_notification_public_consultation_2014_en.pdf In addition, the Decision of the Council of Ministers No. 584, dated 28 August 2003, "The Rules of Procedures of the Council of Ministers", as amended, stipulate this principle in the drafting process of normative acts by the Council of Ministers. The General Secretary of the Council of Ministers adopted in 2021 a Guide which serves as a manual of the public consultation processes to the state administration institutions. See the manual in Albanian, at https://www.adisa.gov.al/wp-content/uploads/2021/03/URDHER-Nr.-3-Dt.-29.01.2021-compressed.pdf.

[176] Decree No. 01-332/2 on Proclamation of Law on State Administration, (as amended) Republic of Montenegro. https://www.gov.me/en/search?page=1&sort=published_at&q=LAW%20ON%20STATE%20Administration%20

of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents which is relevant for the given issue.[177] In a similar vein, North Macedonia also does not have a specific law but regulates it with governmental rules and provides details on the process in the Guide which was adopted in 2013.[178] Bosnia and Herzegovina adopted the Council of Ministers Decision which contains rules on consultation in legislative drafting" in 2016 (Council of Ministers Decision No. 314/2016: Rules on Consultation in Drafting Legal Provisions)[179], while Kosovo*[180] adopted the Regulation on minimum standards for public consultation process addressing the given matter (Regulation No. 05/2016 on Minimum Standards for Public Consultation Process).[181] The existing legal frameworks in the WB countries governing public consultation prove the need for a well-constructed legislation that would guarantee a better protection of public consultation through the highest legal norms in the country. In addition, the applicable legislation should be upgraded with secondary normative acts and clear strategic documents. As an example, Albania has adopted the Guide on Public Consultation which addresses only selected state administration institutions. Those state administration institutions include only the centre of governance, while not other institutions which might be involved in policy-making processes. Serbia and North Macedonia regulate this process through secondary legislation, although the statutory provisions could provide better guarantees for the successful application of public consultations.

Table no. 1: Regulation of the Public Consultation in the Legal Frameworks of the WB countries

WB Country	Special Law	Normative Act/s (sublegal)	Other Law/s
Albania	X	X	X
Kosovo*		X	
North Macedonia		X	X
Serbia		X	X
Montenegro		X	X
Bosnia and Herzegovina		X	

In addition, the implementation of such legislation needs to be improved. A regional study conducted in 2018 by the ReSPA indicated that shortcomings were present in both public consultation legislation and its applicability. The ReSPA finds that a careful planning

[177] The regulation was published in the 'Official Gazette of the RS' No. 8/19 of 8 February and will enter into force on 16 February 2019. See at: https://rsjp.gov.rs/wp-content/uploads/Regulation-on-the-methodology-of-public-policy-management-with-Annex.pdf

[178] See at: https://mioa.gov.mk/sites/default/files/pbl_files/documents/Vodic_za_povratna%20informacija_do_javnosta_pri_podgotovka_zakoni.pdf

[179] Republic of Bosnia and Herzegovina, Council of Ministers Rules on Consultation in Drafting Legal Provisions („Official Gazette of BiH" No. 5/17). http://www.mpr.gov.ba/web_dokumenti/default.aspx?id=11087&langTag=en-US

[180] * This designation is without prejudice to positions on status, and is in line with the UNSCR 1244(1999) and the International Court of Justice (ICJ) Opinion on the Kosovo declaration of independence.

[181] Republic of Kosovo, Regulation no. 05/2016 of the Government of the Republic of Kosovo on the Minimum Standards for Public Consultation process. https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=15036

of consultation is needed,[182] and that consultation methods should be made available to the public within a defined time. Short time (less than 20 days) and consultations in latter stages do not fulfil the minimum standards as provided in the ReSPA's recommendations.[183] As per these recommendations, it is important that the administration not only makes available the document in process of consultation, but also takes all the measures in providing necessary tools for the stakeholders not to encounter difficulties during the process and to be proactively involved through permanent communication channels. Stakeholders' feedbacks should be taken into consideration, while the state institutions should provide feedbacks as well.[184] It is the duty of public organs to efficiently inform all the interested parties on the consultation processes, in a tailor-made methodology as well as to share with the public all the documents. Only by ensuring these standards, the institutions are conducting an inclusive process starting from the drafting through the adoption.[185]

The EC country reports for all the WB countries highlight shortcomings regarding public consultation, including low level implementation in local government decision-making bodies, limited scope of the legislation, or poor consultation process with civil society. While most of the WB countries have adopted the legislation that is well in line with EU standards, there are cases, such as the law of Bosnia and Hercegovina, which was assessed as preventing public scrutiny over government work.[186] A summary of these assessments is shown in table no. 2.

[182] Kasements. L, 2021. Policy co-ordination in the Western Balkans, ReSPA, pp. 34.

[183] ReSPA. 2018, Recommendation on Public Participation in Policy-Making Process for the Western Balkans, pp. 5.

[184] ibid, pp. 3.

[185] ReSPA. 2018, Recommendation on Public Participation in Policy-Making Process for the Western Balkans; EC. 2020, Enhancing the accession process - A credible EU perspective for the Western Balkans & OECD (2020).

[186] See at:
https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/bosnia_and_herzegovina_report_2020.pdf

Table 2: EC country reports 2020 for WB countries public-consultation highlights

WB Country	*Shortcomings*
Albania[187]	- scope of law to be extended to government decisions - little evidence of the use and effectiveness of the feedback mechanisms - administration to strengthen capacity in terms of inclusive and evidence-based policy and legislative development - electronic web-portal for public consultations is operational, but its use by the public remains limited - quality control function on public consultation remains weak and focuses mostly on the process rather than on the content - local-level implementation unsatisfactory
Kosovo*[188]	- public consultations to be further improved with easier access to data and more regular feedback from public authorities - awareness and promotion of consultation platforms is crucial to broaden public engagement - minimum standards for public consultations not being followed consistently
North Macedonia[189]	- efforts are needed to ensure a more meaningful and timely consultation process - evidence-based policy and legislative development continue to be partially ensured - inclusive participation in public consultations continued to be encouraged through the national electronic consultation system - quality control of the public consultation process needs to improve - a significant number of laws adopted under shortened procedures, not undergoing a proper public consultation process
Serbia[190]	- inclusiveness and transparency of the reform process, of the EU accession related process, to be improved as a matter of priority - public consultations on policies and legislation need to be more substantive - use of the urgent procedure for law adoption reduced, but a few civil society organizations (CSOs) reported that the time given for public consultations was still too short, or that their comments were not given sufficient consideration and follow-up - improve central and local level administrative capacities to give adequate time for legislative consultations and qualitative public consultations (particularly at local level)
Montenegro[191]	- still lack the genuine and systematic inclusion of relevant stakeholders
Bosnia and Herzegovina[192]	- meaningful and systematic consultations with civil society to be ensured - legislation on public consultations is uneven across the country - no strategic framework for cooperation with civil society - legal framework on public consultations to be improved and applied consistently; it does not fully establish standards for monitoring and reporting on key government planning documents at each level of government - efforts are needed to raise awareness on various forms of consultation with the public - need to strengthen technical capacities at all levels of government on regular use of public consultations as a tool of policymaking

[187] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/albania_report_2020.pdf

[188] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/kosovo_report_2020.pdf

[189] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/north_macedonia_report_2020.pdf

[190] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/serbia_report_2020.pdf

[191] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/montenegro_report_2020.pdf

[192] https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/bosnia_and_herzegovina_report_2020.pdf

2.1. Public Consultation in Albania

The Government of Albania has invested in increasing capacities on public consultation by the adoption of the Law on Notification and Public Consultation in 2014, RIA Guidelines in 2018,[193] and Public Consultation Guideline in 2021.[194] The aspects on strengthening the public participation in the policy making process are embedded in the Public Administration Strategy 2015-2020[195] as extended till 2022. As Albania is making the efforts to strengthen the good governance principle, one of the attentive areas is that the government should clearly design a roadmap on public consultation legislative acts, in the way to provide more trustworthy policy-making processes.[196]

For the first time, Albania adopted the Law on Notification and Public Consultation in 2014 (Law 164/2014). It provides for the principles, rules and procedures for public participation in policy-making processes. It serves the purpose of informing the public on aimed policies, consulting in the preparatory phases, allowing for the participation of the public in the preparation of policies. The law is further detailed by the Decision of the Council of Ministers[197] Establishing the Rules on the Register for Notifications and Public Consultations (Decision of the Council of Ministers No. 828, dated 10. 07. 2015 on Approval of the Rules for the Creation and Administration of the Electronic Register on Notifications and Public Consultations),[198] serving as an open access platform to publish draft policies and provide comments and suggestions on such policies.

Article 1 of the Law on Notification and Public Consultation defines the acts which are subject to notification and consultation process,[199] while Article 4 prescribes exceptions.[200] The notification and consultation process starts from the publication of the draft act with all the consolidated documents, its notification through the electronic register. That process also includes public meetings with interested parties. The public body initiating the draft policy is required to publish an annual report on the consultation

[193] OECD (2019), Better Regulation Practices across the European Union, OECD Publishing, Paris, https://doi.org/10.1787/9789264311732-en.

[194] Law no. 146/2014, date 30 October 2014 'On Notification and Public Consultation', Republic of Albania, OJ no. 178. act. no. 146, date 30/01/2014, https://www.idp.al/legislation-on-notification-and-public-consultation/?lang=en

[195] http://dap.gov.al/images/DokumentaStrategjik/PAR_Strategy_2015-2020_English.pdf

[196] Regional Cooperation Council, 2019, *Report on the Preparation of Post-2020 Strategy in Albania*. Available at: https://www.rcc.int/pubs/106/report-on-preparation-of-post-2020-strategy-in-albania

[197] Council of Ministers of the Republic of Albania Decision no. 828, date 10.07.2015 on "Approval of the rules for the creation and administration of the Electronic Register on Notifications and Public Consultations".

[198] https://konsultimipublik.gov.al/

[199] Article 1/1 of the Law 146/2014 *reads:*
This law regulates the process of notification and public consultation of the draft-laws, national and local strategic draft-documents, and policies of high interest for the public.

[200] See Article 4 of the Law 146/2014*:*
The provisions of this law shall not be applied during the decision-making processes related to: a) the national security issues, as long as they constitute a state secret, pursuant to the law on information classified "sate secrete"; b) international agreements, bilateral and multilateral agreements; c) individual administrative acts and normative administrative acts, expect when with a specific law is foreseen differently; ç) normative acts, with the power of law approved by the Council of Ministers; d) civil emergency; dh) other exemption cases foreseen by the law.

processes.[201] Similarly, the Rules of Procedures of the Council of Ministers[202] require the drafting body to prepare an explanatory note that contains information on stakeholders and institutions who can contribute to the completion of the draft, as well as, other documents reflecting the process itself, including participating stakeholders, duration of the process, issues discussed and comments provided, as well as if comments were included or if not, what was the reason for this.[203]

Overall, the legal framework on public consultation is well-designed and in general in line with EU standards. However, its scope needs to widen. Public institutions remain to be criticized for not publishing all draft acts in the Electronic Register for Notification and Public Consultation.[204] Access to consultation in the websites/channels of the public bodies is still low,[205] making the law to be considered not fully implemented[206] and the need for training to be high. Institutions consider this process as merely formalistic and not a content-based one. Evidences on how the inputs from the stakeholders are taken into consideration in the process of consultation are limited.[207] Partners Albania for Change and Development in the report of 2020, assesses that out of 129 laws approved by the Albanian Parliament, only 60 were submitted to public consultation.[208] In the local level, the EU recommends to further strengthening the policies and actions for effective and inclusive participation, as not all of the municipalities disclose information for the public.[209]

The platform of public consultation is a centralized channel where the stakeholders can access draft acts and submit their comments. This platform is not yet known and used widely. Also, documents submitted to clarify the public consultation process have until recently lacked clear information. In addition, they only provided a limited timeline for submission of comments, or information that did not feed in qualitative feedback.

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[201] See Articles 6-20 of the Law 146/2014.

[202] The Rules of Procedures were approved by the Decision of the Council of Ministers No. 584, dated 28 August 2003, and later amended several times (Decision of the Council of Ministers No. 201, dated 29 March 2006; Decision of the Council of Ministers No. 4, dated 7 January 2009; Decision of the Council of Ministers No. 233, dated 18 March 2015; Decision of the Council of Ministers No. 653, dated 14 September 2016, Decision of the Council of Ministers No. 197, dated 11 April 2018).

[203] See art.18/b and 19/ë of the Rules of Procedures adopted by the Council of Ministers Decision No. 584, dated 28 August 2003.

[204] https://www.konsultimipublik.gov.al/

[205] Partners Albania for Change and Development. *Annual Report 2020*. Available at: http://partnersalbania.org/publication/annual-report-2020/ & National Endowment for Democracy, 2017, *Commentary of the Law no. 146/2014 "On Notification and Public Consultation"*.

[206] European Commission, Albania 2020 Report, pp. 15. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/albania_report_2020.pdf

[207] Ibid, pp. 13 & Partners Albania for Change and Development, *Annual Report 2020*. Available at: http://partnersalbania.org/publication/annual-report-2020/

[208] Partners Albania for Change and Development. *Annual Report 2020*. Available at: http://partnersalbania.org/publication/annual-report-2020/

[209] European Commission, Albania 2020 Report, pp. 12. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/albania_report_2020.pdf

Moreover, there were pieces of laws that were not submitted to consultation at all.[210]

An important example is the consultation procedure which followed the amendments of the constitutions. The Venice Commission Opinion and Report 2021 stated that the procedure was very hasty, and the stakeholders of the public consultation had only few days to assess the draft amendments of the constitution.[211] It should be highlighted that in such important draft acts there is a need for more than a platform-based consultation process, due to the need to have comprehensive and not only procedural based inputs. When it comes to the mechanism and strategy of public consultation, there is a need for having an efficient and effective participation of the experts through ensuring reasonable timelines and based assessment of draft acts to feed into a reasoned contribution by the public.

2.2. Public Consultation in Kosovo*

The standardized public consultation procedure in Kosovo* is regulated by the regulation on minimum standards for public consultation process through the online platform of public consultation.[212] It is the first binding mechanism serving as a gate for consultation in the policy-making process in the country[213] which defines the standards during public consultation process of policies and legal acts. It imposes the obligation to the public bodies to plan and implement the whole consultation process in an effective way.[214] It set a standardized consultation timeline of 21 calendar days (15 working days) and for complex processes a time-limit of 60 calendar days from the notification date for written consultations. It clearly stipulates the institutional obligation to publish the consultation documents that include public feedbacks.[215]

There is a need to increase the number of implemented consultation processes for acts at national and local level, regardless of the fact that attempts are being made to increase the awareness including the active support of the EU through different instruments such as the EU Contract for the Public Administration Reform. One of the most important objectives of Kosovo in the light of EU accession, is that it should fulfil the recommendation of the EC and establish mechanisms based on RIA standards, data collection and efficient

[210] Partners Albania for Change and Development mentions the law on the central register of the bank accounts, law on the beneficial owners', etc. See: Partners Albania for Change and Development. Annual Report 2020, pp. 12 & European Commission. Albania 2020 Report, pp. 13.

[211] * This designation is without prejudice to positions on status, and is in line with UNSCR 1244(1999) and the ICJ Opinion on the Kosovo declaration of independence. European Commission for Democracy through Law (Venice Commission). 2021. Compilation of Venice Commission Opinions and Reports on Law-Making Procedures and the Quality of the Law. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)003-e

[212] Regulation No.05/2016 on minimum standards for public consultation process, approved by the Government of Kosovo on 29 April 2016 and entered into force on 1 January 2017 (https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=15036) & https://konsultimet.rks-gov.net/index.php

[213] Article 32, 39 and 69 of the Rules of Procedure of the Government of the Republic of Kosovo no 09/201, https://kryeministri.rks-gov.net/repository/docs/RREGULLORE_E_PUNES_SE_QEVERISE_SE_REPUBLIKES_SE_KOSOVES_NR_09_2011.pdf

[214] See Article 5 of the Regulation No.05/2016 on minimum standards for public consultation process, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=15036

[215] Akse, E. et.al, 2020. Better Regulation Strategy: Case Studies Report, pp. 87-90.

consultation process with all the parties and take all the appropriate efforts to increase public awareness.[216]

2.3. Public Consultation in North Macedonia

The Rules of Procedure of the Government of the Republic of North Macedonia are relevant since they set the obligatory standards on public participation in the policy-making process in North Macedonia.[217] They stipulate that consultations are to be conducted in cases of draft policies. The obligation to involve stakeholders into the policy making process is also stipulated in specific sectoral legislation. In addition, the Strategy of the Republic of North Macedonia 2017-2020 includes among its main objectives the promotion and collaboration with the civil society in the strengthening of the democratic institutions and decision-making processes.[218]

The process is facilitated by the ENER platform (Single Electronic Register of Regulation).[219] The Ministry for Information Society and Administration (MISA) is responsible for the consultation platform. All draft acts are published for 10 days, and the public is invited to provide feedback through this platform. At the end of this process, a report shall be issued with feedbacks and outcomes of the involved stakeholders. It is observed that the platform is not offered in the Albanian language although it is the second official language of the country. Several activities related to the public consultation such as conferences, forums, workshops, etc. have taken place in the country. However, state institutions should do more especially in the rule of law area.[220] The adoption of the Transparency Strategy 2019-2021 can be considered as a key step for the public consultation process in North Macedonia. That Strategy improved the public consultation processes *inter alia* through the increasing number of the civil society organization involved as well as through feedbacks provided from the public. Despite those serious North Macedonian attempts directed towards the Public Administration Reform[221], the EC requires more attention to be paid to evidence-based policy, promulgation of the

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[216] European Commission, Kosovo* 2020 Report, pg. 13. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/kosovo_report_2020.pdf

[217] Rules of Procedure of the Government of the Republic of North Macedonia & Government Rulebook for Organization of public consultations when initiating a legislation process, https://vlada.mk/node/18913?ln=en-gb

[218] Strategic Priorities | Vlada na Republika Severna Makedonija (vlada.mk)

[219] https://ener.gov.mk/

[220] Ognenovska. S, 2020. Monitoring Matrix on Enabling Environment for Civil Society Development Country Report for North Macedonia 2019 Available at: http://www.balkancsd.net/novo/wp-content/uploads/2020/09/Monitoring-Matrix-Report-2019_North-Macedonia.pdf & Council of Europe. Steering Committee for Human Rights (CDDH). 2018. Overview document on the protection and promotion of the civil-society space, based on the compilation of measures and practices in place in the Council of Europe member States and Compilation of measures and practices in place in the Council of Europe member States.

[221] European Commission. 2020. Digital Public Administration Factsheets – Republic of North Macedonia, pp. 13, 30. Available at: https://joinup.ec.europa.eu/sites/default/files/inline-files/Digital_Public_Administration_Factsheets_North_Macedonia_vFINAL.pdf

acts containing qualitative impact assessments and mandatory consultation processes.[222] The public consultation timeline is considerably short, and the public does not have a practical opportunity to address all the stages of the consultation process. There are cases when consultations have been made regarding the formalistic aspect with a few considerations of the substantiality of the process, such as in the areas of infrastructure, hydropower, mining, environment, and elections where, or even when there was a lack of well-defined timeframes such as the case of the amendments of the Electoral Code of 2020.[223]

2.4. Public Consultation in the Republic of Serbia

The Republic of Serbia regulates public consultation through different acts. The two most important legal acts are the Law on Free Access to Information of Public Importance[224] and the Governmental Rules of Procedure.[225] The first legal instrument does not impose the obligation to submit draft acts to public consultation, while the later defines the standards for that process. Another important non-binding document which defines standards for public participation of the CSO's is the 'Guidelines for Involvement of Civil Society Organizations in the Adoption of Regulations' approved in 2014. Similar to North Macedonia, sectorial laws impose the obligation to involve stakeholders into the policy-making process.

The legal framework does not require publishing announcements in the beginning of the policy drafting. However, the government rules define the mechanisms, the timeline, activities to be followed, methods of consultations, and background of the working group for the public consultation process. All the institutions are obliged to publish the draft acts on the online official platform of the Republic of Serbia (e-administration portal) and on the official website of the institution.[226] Public consultation deadline is set to be minimum 20 days, but the respective body has the opportunity to extend the date for receiving public feedbacks. The public body is required to submit a document to the central portal which includes details from the process within 15 days after the consultation process has terminated.

Disregarding such efforts, Serbia is criticized for using urgent legislative procedure quite frequently. The need for reducing the frequent recourse to urgent legislative procedure is strongly highlighted by international organizations, CSOs and the EC. There are important cases, such as the amendments to the Electoral Code in 2020, which were adopted without public consultation and by not following relevant standards of the Venice Commission

[222] European Commission, North Macedonia 2020 Report, October 2020, pg. 13. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/north_macedonia_report_2020.pdf

[223] Ibid, pp. 8.

[224] Law on Free Access to information of Public Importance, The Official Gazette of the Republic of Serbia, number 120/04 and 54/07, https://www.poverenik.rs/en/o-nama/authority.html

[225] Article 41 of the Government of the Republic of Serbia Rules of Procedure, OJ of Republic of Serbia No. 36/2010, http://www.gs.gov.rs/doc/podzak/Poslovnik%20Vlade.pdf

[226] https://euprava.gov.rs/?

in that respect.[227] The EU in its country reports identifies several shortcomings of that process in Serbia.[228]

2.5 Public Consultation in Montenegro

The Law on the State Administration and the Decree on the Selection of the Representatives of NGOs in the working committees of public administration bodies and implementing consultation in preparing laws and strategies both regulate public consultation in Montenegro.[229] The Law on the States Administration establishes the standards to conduct public consultation in draft acts, except for specific cases as provided by law.[230] Such legislation was part of the national Strategy on Public Administration following the priorities identified by the EU since 2010 in the country's EU accession process.[231] The Public Administration Strategy 2016-2020 was drafted in full collaboration with the CSOs where a well-structured consultation process took place. Among the objectives set was: '*…better quality of consultation among stakeholders when drafting policies*.[232]

Montenegro follows the example of Serbia by decentralizing the organization of public consultation processes through websites of the public institutions, besides their publication in the e-government portal (e-participation platform) which was launched in 2019.[233] Public institutions initiating legal act/s are required to conduct the public consultation process, otherwise the Council of Ministers returns the draft act requiring that the process takes pace.[234] The government has taken specific steps to raise the awareness of the public in participating in the consultation processes and increase the quality of the stakeholders' feedback. Still, the EC country report of 2020 for Montenegro observes that there is a number of laws passed without even a formalistic public consultation process, requiring that the government takes actions in guaranteeing an inclusive and participatory process where all actors are consulted.[235] On the other hand, the well-designed legislation on the participation of the CSOs in the decision-making process, and on the inclusion and access of the later in designing public-policies is not sufficiently fulfilled and often remains formalistic.

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[227] European Commission, Serbia 2020 Report, pg. 10. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/serbia_report_2020.pdf

[228] See table no. 2 above.

[229] Official Gazette 41/2018 & Government Strategy for improving enabling environment for NGOs 2018-2020 (Action Plan Measure 2.4). Available at: https://www.gov.me/en/documents/1110c53f-e21b-417b-9d36-57474ab05275

[230] Decree No. 01-332/2 On Proclamation of Law on State Administration, (as amended) Republic of Montenegro. https://www.gov.me/en/search?page=1&sort=published_at&q=LAW%20ON%20STATE%20Administration%20

[231] Republic of Montenegro. Public Administration Reform Strategy, 2016-2020. Available at: https://www.gov.me/dokumenta/1a107a62-5961-4c9e-b8ce-8c8c652549e2

[232] ibid, pp. 52.

[233] https://www.euprava.me/en/Individuals/law_and_order/

[234] Article 35, Rule of Procedure of the Government of Montenegro & Akse, E. et.al, 2020. Better Regulation Strategy: Case Studies Report, pp. 96.

[235] European Commission, Montenegro 2020 Report, pg. 14. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/montenegro_report_2020.pdf

2.6 Public Consultation in Bosnia and Herzegovina

The obligation to conduct the consultation process in Bosnia and Herzegovina is stipulated by the Regulation on Consultation in Legislative Drafting. [236] It was amended in 2016 with the aim to harmonize the legal standards with the Union acquis and introduce the portal (*eKonsultacije*),[237] and by doing so increase the number of the interested stakeholders in that process.[238] The regulation defines in Article 5 the obligation of the public institutions to publish the annual plan for the legislative drafting in their portals.

The government attempts to make inclusive processes regarding the public consultation, and the participation of the stakeholders. However, that process remains weak and, as in most of the WB countries, merely formalistic. The Action Plan 2019-2021 identified the need for the adoption of a strategy with a clear roadmap aimed at increasing the awareness of the public to actively participate in different public consultation processes (Action Plan of the Council of Ministers of Bosnia and Herzegovina for the Implementation of the Initiative "Open Government Partnership " 2019 – 2021).[239] The consultative platform is user-friendly and available in four languages, in contrast with the complexity of issues which are reflected in other WB countries consultative portals.[240] The platform shows the number of the registered users who expressed interest in cooperation with a particular institution: averagely this figure reaches to 53.85%.[241]

Disregarding these efforts, according to the EC country report 2020 for Bosnia and Herzegovina, no progress is made in guaranteeing an inclusive environment for the CSOs.[242] The government is required to draft a comprehensive roadmap to clearly make sure the applicability of the public consultation as a mandatory mechanism. Also, the Council of Ministers and CSOs cooperation charter signed in 2017 still need to enter into force in order to increase the fruitful cooperation in-between them.[243] In the case of Bosnia and Herzegovina, the public consultation legislation needs to be amended to fulfil proper monitoring and reporting standards.[244]

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[236] Council of Ministers Decision no 314/2016 Rules on Consultation in Drafting Legal Provisions, Republic of Bosnia and Herzegovina, OJ of BiH, No. 5/17. Available at: http://www.mpr.gov.ba/web_dokumenti/rules_for_consultations.pdf

[237] https://ekonsultacije.gov.ba/

[238] Delegation of the European Union to Bosnia and Herzegovina. 2015. Guidelines for EU support to civil society in enlargement countries, https://ec.europa.eu/neighbourhood-enlargement/conditions-membership/check-current-status-old/bosnia-and-herzegovina-old_en

[239] Action Plan of the Council of Ministers of Bosnia and Herzegovina for the Implementation of the Initiative „Open Government Partnership „ for the Period 2019 – 2021, pp.13 https://www.opengovpartnership.org/documents/bosnia-and-herzegovina-action-plan-2019-2021/

[240] http://europa.ba/?page_id=676

[241] https://ekonsultacije.gov.ba/statistic

[242] European Commission, Bosnia and Herzegovina 2020 Report, pg. 4 & 10. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/bosnia_and_herzegovina_report_2020.pdf

[243] Charter on Cooperation between the Council of Ministers of Bosnia and Herzegovina and CSOs. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/ipa_ii_2018-040-646.03_2019-040-647.03-csfmedia-bosnia_and_herzegovina.pdf

[244] European Commission, Bosnia and Herzegovina 2020 Report, p. 13. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/bosnia_and_herzegovina_report_2020.pdf

3. CONCLUSION

In the light of the EU accession of the WB countries, the six countries have adopted reforms and strategies which seems to be 'never-ending'. Although, out of the six countries only Serbia and Montenegro have moved forward to conduct negotiations in several sectors with the EU, the EC country reports still indicate that Albania, North Macedonia, Montenegro, and Serbia are moderately prepared in public administration reform. It is noteworthy that the public administration reform also includes public consultation among its objectives in all these countries, while Kosovo* has some level of preparation and Bosnia and Hercegovina is at an early stage. Similarly, the ability to accept membership obligations seems to be on the same level. See table 3.

Table 3. EC Western Balkans' country reports 2020

Political criteria	Albania 2020	North Macedonia 2020	Montenegro 2020	Serbia 2020	Kosovo* 2020	Bosnia & Herceg. 2020
Public administration reform	moderately prepared / some progress	moderately prepared / some progress	moderately prepared / some progress	moderately prepared / no progress	some level of preparation/ limited progress	early stage / limited progress
Ability to accept membership obligations	moderately prepared in many areas	moderately prepared in most areas	moderately prepared in many chapters	good progress in economic areas/ limited progress on public procurement.	some level of preparation	early stage/ some level of preparation

In a general assessment, the reforms on implementation of the national legal frameworks on public consultation comply with the EU standards/acquis. The 'left-out' have tried the 'ins' and 'outs' reforms in making all stakeholders part of the decision-making process and improving institutions by attempting to share the burden with the public in the law-making process. An increased emphasis on openness and transparency of policymaking noticed in these countries fits into the overall set of reforms stemming from the EU accession process, especially in the context of the Public Administration Principles confirmed by the EC in 2014. Those principles pertain to requirements of public administration reform, good governance, rule of law and civil society enabling environment.[245] The WB countries not only have adopted legislation regulating public consultation, but are pursuing its implementation thoroughly.[246] Still, the legislation needs to improve, especially in the

[245] http://sigmaweb.org/publications/principles-public-administration.htmhttp://sigmaweb.org/publications/principles-public-administration.htm

[246] European Union: White Paper on European Governance (http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10109_en.htm); General principles and minimum standards for consultation of interested parties by the Commission (http://ec.europa.eu/

countries that do regulate public consultation neither through the dedicated law, nor through adopting sublegal rules or manuals explaining the public consultation process.[247] Disregarding support and incentives from the EU, the public consultation and participation in policymaking needs to become an inherent feature of public administration in the WB countries. In this regard, there is an obvious need for installing a public administration culture in becoming more transparent and overall inclusive in policymaking, as well as for increasing the public trust into public consultation processes in these countries.

governance/docs/comm_standards_en.pdf); OECD: Open Government – Fostering dialogue with civil society (http://www.oecd-ilibrary.org/governance/open-government_9789264019959-en); Citizens as Partners: OECD Guide to Information, Consultation and Public Participation in Policy-Making (http://internationalbudget.org/wp-content/uploads/Citizens-as-PartnersOECD-Handbook.pdf).

[247] While this paper is finalized and presented, it is to be noted that the EC will issue the 2021 Communication on EU Enlargements, which needs to be carefully scrutinized by the WB countries with regard to public consultation and try to further improve this approach in their policy-making processes.

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UDK: 349.6 DOI: https://doi.org/10.18485/iup_rlrc.2021.2.ch10

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ENVIROMENTAL IMPACT ASSESSMENT IN THE CONTEXT OF THE ENVIRONMENTAL LAW AND POLICY OF THE EUROPEAN UNION: EVOLVEMENT AND FUTURE PERSPECTIVES

This paper examines the role of the Environmental Impact Assessment (EIA) as a tool of the EU environmental legislation and an aid to the decision-making process aiming at prioritization of environmental interests over other interests. The EIA Directive has evolved after more than 35 years of implementation while at the same time, EU acquis has grown and new policies have developed along with the broadening of the European integration process. Hence, this contribution provides an overview of the application and effectiveness of the EIA process and of the main challenges that served as indications for further modifications in order to enhance the EIA as an effective instrument of environmental protection. Special emphasis is put on the judicial control imposed by the Court of Justice of the EU in the light of the environmental justice notion and articulation of environmental rights under the EIA Directive(s). The paper concludes with reflections on the environmental considerations raised by the EIA process, arguing that although the full potential of the EIA Directive has yet to be realized, having a separate directive that focuses on the likely environmental effects in the decision-making process ultimately makes a difference.

Keywords: European Union, environmental law, EIA, environmental policy, environmental justice.

1. INTRODUCING THE ENVIRONMENTAL IMPACT ASSESSMENT CONCEPT INTO THE EUROPEAN UNION ENVIRONMENTAL POLICY AND LEGISLATION

European Union (EU) environmental policy and legislation is a reflection of the broadening of European integration as an outcome of the Europeans' willingness to accept and implement EU policy on areas peripheral to the EU's original mandate (Hall, 2007, p.

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277). The main driver behind the development of a comprehensive body of environmental legislation was to prevent member states from misusing national regulations as non-tariff barriers in the internal market (Zito, 2000). With regard to the protection of the environment, the absence of a concrete legal basis in the original Treaty establishing the European Economic Community (EEC) has not prevented EU action in this field (Orlando, 2013, p. 1) and the first measures adopted by the EU in the 1960s and early 1970s were very much influenced by the prominence of the internal market objective. Nonetheless, as some authors say (Rehbinder & Stewart, 1985) the original EEC Treaty did contain some indications that EU competence could potentially extend far beyond the common market objective. In the absence of an express competence in the Treaty, Koppen (2002, p. 106) stated that the Court of Justice of the EU (CJEU) (then European Court of Justice) by its creative and extensive interpretation legitimized the EU internal and external environmental policy as an implied power.

However, European integration regarding the environmental policy went really deep since the Single European Act (1986) introduced an explicit legal basis for environmental legislation at the European level. This conferral represented a milestone in the European integration process as it paved the way for setting the environmental protection as a separate policy area whose requirements must be integrated into other EU policies. Environmental policy was also developed as one of the most important fields in which internal and external activities are often so closely linked that EU internal competence would be limited in effect without its counterpart of external EU action (Thieme, 2001, p. 252). Additionally, this step has also enabled the evolution of the EU environmental *acquis* - from uncoordinated group of measures on a policy level incidental to the objectives of market integration to a sophisticated and detailed system of environmental regulation and multilevel governance where the "Europeanisation" of national legislation is most apparent (Orlando, 2013, p. 2). Subsequent treaties extended explicit EU jurisdiction beyond purely economic matters and articulated the importance of integrating environmental objectives, thus validated the concepts of integration and environmental protection (Hall, 2007, pp. 282-283). The Lisbon Treaty has reaffirmed the EU commitment to environmental protection and sustainable development as an integral goal of the EU and it highlights the internal and external dimensions of EU action in this field. Environmental protection is mentioned in the preamble of the Treaty on the EU[248] with Article 3(3) thereof establishing the sustainable development of EU and a high level of protection and improvement in the quality of the environment as some of its fundamental goals.

Overall, there has been a remarkable growth of interest in environmental issues aiming at better management of policy development in harmony with the environment. At the same time, as some authors stated (Collins & Earnshaw, 1992, p. 213; Hoffman, 2019, p. 342) compliance with the environmental *acquis* is still a significant challenge, if taken into account the infringement cases initiated by the European Commission against member states. The European Commission began to explore instruments of environmental policy that seek to influence the relationship between development and the environment. Along

[248] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

with legislation on nature protection, the environmental impact assessment (EIA) was one of the first pieces of the EU environmental *acquis*. The original EIA Directive[249] was first introduced in 1985, requiring that certain types of projects are subject to an assessment of their environmental effects before consent can be granted if the project is likely to have a significant effect on the environment. Hence, its objective was to provide systematic assessment of the likely environmental impacts of projects in a wide range of sectors. The EIA Directive of 1985 has been amended three times - in 1997[250], in 2003[251] and in 2009[252], in order to align the provisions with the Espoo Convention[253] and Aarhus Convention[254] on public participation in decision-making and access to justice in environmental matters, as well as to broaden its scope on projects related to the transport, capture and storage of carbon dioxide. In 2011 the EIA Directive, together with its three amendments, was codified by the Directive 2011/92/EU[255] which was further amended in 2014 by the Directive 2014/52/EU.[256] The main objective of the 2014 amending Directive is to simplify the rules for assessing the potential effects of projects on the environment, in line with the drive for smarter regulation, as it reduces the administrative burden.

The proper implementation of environmental assessments is one of the most important tools for putting the ”green” principle of EU *acquis* into practice through integration of environmental considerations within the preparation of specific projects. This contribution will examine the role of effective EIA as a tool of EU environmental legislation and as an aid to the decision-making process in terms of its objective concerning the prioritization of environmental interests over other interests. Hence, the starting premise is that having a special legislative instrument that focuses on the environmental impact ultimately makes a difference, but it is important to determine what are the main preconditions and factors that influence its effectiveness. A special emphasis will be put on the judicial control imposed by the CJEU in the light of the environmental justice notion and articulation of environmental rights. These issues are particularly important and relevant given the recent

[249] EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

[250] Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L 73/5.

[251] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.

[252] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140/114.

[253] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991.

[254] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

[255] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1.

[256] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

codification of the EIA Directive and such an approach is needed in order to be able to give predictions whether the EIA is (finally) ready to meet future challenges so as to attain one of the EU's objectives that is high on the agenda: the protection of the environment and the quality of life.

2. ROLE OF THE ENVIRONMENTAL IMPACT ASSESSMENT IN DECISION-MAKING PROCESS: THEORETICAL APPROACH

The philosophy and principles of the EIA can be traced back to a rationalist approach to decision making that emerged in the 1960s (Jay *et al*., 2007, p. 288). This requires a technical evaluation to be made which provides the basis for objective decision making (Owens *et al*., 2004, p. 1943). The 'technical–rational' model has been translated into a whole suite of assessment tools, among which the EIA has arguably become the most widely recognized and practiced one. The Conference on the Human Environment, that was organized within the framework of United Nations' Environment Programme (UNEP) in Stockholm in 1972, declared the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Principle 21 in the Declaration). Even though there was no measure adopted in the field of environmental assessments under international law, certain activities under the stewardship of international organizations such as the Organization for Security and Co-operation in Europe and the United Nations Economic Commission for Europe,[257] were essential drivers for the development of legislation on environmental assessments. General principles of environmental impact assessment in international law can be found in numerous landmark cases such as *Gabčíkovo-Nagymaros Project*[258] stressing the awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis, while the obligation for conducting environmental impact assessment in accordance with international practice played a central role in *Pulp Mills*[259] case. However, the US National Environmental Policy Act (NEPA), which was enacted on 1 January 1970, represented the first formal incorporation of the impact assessment process in a legislative form (O'Riordan & Sewell, 1981, p. 1). The growing interest for integration of the EIA process was dominated by three key societal influences: growth of modern environmental concern, the drive for more rational, scientific and objective environmental decision making and a desire for more public involvement in environmental decision making (Weston, 2004, p. 313).

The EU has long admired American procedures for the EIAand this model was used in drafting the EU directives. In essence, as Glasson *et al*. stated (2005), the EIA is a systematic process that examines the environmental consequences of development actions, in advance, so that the emphasis, compared with many other mechanisms for environmental protection, is on prevention. The EIA does not 'make' decisions, but its findings should be considered

[257] United Nations' Economic Commission for Europe.

[258] *GabCikovo-Nagymaros Project (Hungary-Slovakia) Judgment* I.C. J. Reports 1997, p. 7.

[259] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment* I.C.J. Reports 2010, p. 14.

in policy and decision-making and should be reflected in final choices (Caldwell, 1989). Thus, it should be part of decision-making processes. As a tool to aid decision making, the EIA is widely seen as a proactive environmental safeguard that, together with public participation and consultation, can help to meet the EU's wider environmental concerns and policy principles (Commission of the European Communities, 2003, p. 10). The Directive establishes the EIA as a process that can be summarised as follows: the developer may request the competent authority to say what should be covered by the EIA information (scoping stage); the developer must provide information on the environmental impact of the project (EIA report); the environmental authorities and the public must be informed and consulted; the competent authority decides taking into consideration the results of consultations.[260] The public is informed of the decision afterwards and can challenge the decision before the courts. Depending on the national implementing legislation in the Member State in question, the EIA may be integrated into existing procedures granting consent for projects or established as a separate procedure specifically to comply with the Directive. However, the Directive does not prevent Member States from laying down stricter national rules regarding the scope and procedure for environmental assessments of planned developments within their jurisdiction. When deciding on the merits of a relevant proposed creation, the competent authorities should also take account of the objectives and purposes of the EIA Directive, as set out in the preamble thereto. The assessment of environmental impacts enables a more informed decision which can lead to the prevention or mitigation of adverse environmental consequences. EU environmental legislation is supplemented by the Strategic Environment Assessment Directive 2001/42/EC[261] (SEA Directive) that applies a more general approach towards public plans and programmes from a variety of sectors, while the EIA focuses on a specific project and on the environmental impacts of that project only.

Several categories of implicit policy models differ in the EIA literature (Wood, 2003). One of these, the 'information processing model' assumed that the key to better decision making was the availability of high-quality information, but it tended to undermine the influence of politics in the decision-making process of which the EIA forms part. Other model emphasized the subjective nature of the supposedly rational EIA process on the basis of the subjective standards, values and interests of one or more of the parties concerned that affect the outcome of the EIA (Mostert, 1996, p. 191). In that manner, many key decisions that are to be made within the EIA process are almost certainly not based upon the rational principles of value free objectivity (Weston, 2000, p. 185). The best model probably integrates all of the mentioned factors: the decision-making process itself has a political nature that is influenced by economic and social factors as well; but on the other hand, the availability of high-quality environmental information provides for public participation and ensures that actions are allowed with full awareness of their environmental implications. It depends also on the evolution of norms and values of the

[260] See more at https://ec.europa.eu/environment/eia/eia-legalcontext.htm [31.01.2021].

[261] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

stakeholders engaged in the process which factor will prevail. Majority of Europeans consider protection of the environment to be an important objective to them personally and there is overwhelming support for fundamental changes in the society to tackle environmental problems.[262] In that context, most Europeans think that decisions to protect environment should be taken jointly with the EU and agree that the role of EU legislation is very significant. This corresponds with the principle of subsidiarity, which maintains that the EU shall take action to the extent to which the objectives can be attained better at the EU level than at the level of the individual member states. Hence, the momentum for prioritizing the environmental protection over other economic and social interests has already been gained as it has become part of the EU's core values and "European way of life" [263], what remains is to assess the effectiveness of the process. To the extent that most of the environmental laws in the member states originate in EU measures, rather than in national laws, the EU is responsible for the most significant developments in the member states' environmental law and policy (Onida, 2005).

3. APPLICATION AND EFFECTIVENESS REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: STATE OF PLAY

The EIA Directive has evolved after more than 35 years of implementation while at the same time, EU legislation has grown and new policies have developed. The main purpose of the EIA is to identify any significant environmental effects of a major development project, and where possible to design mitigation measures to reduce or remedy those effects, in advance of any decision to authorise the construction of the project. However, to achieve these objectives, the EIA Directive must be applied as consistently as possible across the EU as a whole. Hence, an evaluative framework is required to compare legal processes, the arrangements for their implementation and the practice of enforcing them in the EIA systems. In search for such a model, this paper follows the Sadler's suggestions (1996, p. 39) that there should be three different components of an effectiveness review of the EIA process: a) procedural: does the EIA process conform to established provisions and principles? B) substantive: does the EIA process achieve the objectives set – support wellinformed decision making and result in environmental protection? C) transactive: does the EIA process deliver these outcome[s] at least cost in the minimum time possible – is it effective and efficient?

The criteria and procedures for environmental impact assessment have been reviewed and updated several times. Having in mind the legal nature of the directive as an instrument, assessment of the procedural component will be based on review of the formal compliance with the EIA Directive(s). In terms of its transposition, this Directive has attracted a greater annual number of complaints than the average for all environmental directives, and this

[262] European Commission, Special Eurobarometer 501 Attitudes of European citizens towards the Environment (2019), available at: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2020/surveyKy/2257 [03.02.2021].

[263] European Commission Priorities 2019-2024: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en [05.02.2021].

number has continued to increase each year since 1988 as a final deadline for enacting national EIA legislation. By the end of the transitional period, European Commission[264] reported for most member states very limited degree of formal compliance with the 1985 EIA Directive (Commission of the European Communities, 1993, p. 33). The transposition of the EIA Directive into member states' legal systems has been seriously delayed beyond the approved date for full formal compliance and, three years later (July 1991), the transposition has not been completed in a number of cases. Correct implementation of the EIA Directive by the member states has proven difficult to achieve in practice, while the Commission has adopted an rigorous approach towards this issue in order to ensure that the EIA process conforms to established provisions. Further, it was accepted that even though the burden of proof lies with the Commission to show breach, where the complaint is of inadequate transposition of a directive it is not necessary for the European Commission to demonstrate the harmful effects of the transposing legislation (*Commission v. Ireland*, Case C-392/96).

Given the nature of this Directive, such delays and inaccuracies were probably inevitable. Beyond formal, legal transposition, the application of the provisions in practice by the relevant member states authorities is essential for the efficacy of the intentions behind the Directive. First Commission's Report concluded that although many member states were in the early stages of implementation, their experiences demonstrated that the planning, design and authorization of projects are beginning to be influenced by the EIA process and that environmental benefits are resulting, but the full potential of this has not yet being realized (Commission of the European Communities, 1993, p. 65). Hence, Second Commission's Report noted the increasing extent of formal compliance whereby all member states have transposed the Directive. Moreover, in many cases there has already been a "second generation" of EIA legislation. Some member states used the chance of transposing the Directive to unify and improve their systems for granting development consents while in most cases, the EIA requirements have been integrated into existing procedures. On the side of practical compliance, the numbers of EIAs varies considerably between the member states, depending on the different sizes of the member states, differences in legislation and also differences in the economic development. Overall, the European Commission reviews of the operation of the Directive 85/337/EEC reported low level of consistency in the application of the key EIA procedures such as screening and scoping. Although the EIA was established as a regular feature of project licensing, yet many different EIA systems operated across the EU due to various reasons such as ambiguity and lack of definitions of key terms in combination with the given discretion on establishing screening thresholds for Annex II projects that led to different interpretations and procedures - in some cases thresholds even had a practical effect of excluding whole project types from the EIA, and wide variety of authorisation procedures used for different types of projects in different member states.

These findings also served as indications for the needed modifications in order to enhance the role of the EIA as an effective instrument of environmental protection, that were

[264] European Commission prepares multi-annual reports on the application and effectiveness of the EIA Directive, available on the following link: https://ec.europa.eu/environment/eia/eia-support.htm [05.02.2021].

introduced with the amending EIA Directive 97/11/EC. Apart from the changes introduced as a consequence of the Commission's first report evaluating the effectiveness of the Directive 85/337/EEC, the amendments made by Directive 97/11/EC also reflect the considerable strengthening and clarification given to certain elements of the EIA Directive as advanced by the European Court of Justice (*Commission of the European Communities v Federal Republic of Germany,* Case C-431/92; *Commission of the European Communities v Kingdom of Belgium*, Case C-133/94; *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland*, Case C-72/95; *Commission v.Ireland*, Case C-392/96). Indeed, a major objective of the amending Directive 97/11/EC was, in part, to minimise the differences of application between member states and to harmonise implementation. It appears from the third European Commission report of the EIA Directive in 2003, which reviews the operation of the Directive 85/337/EEC as amended by the Directive 97/11/EC, that the main problem lies with the application and implementation of the Directive and not, for the most part, with the transposition of the legal requirements of the Directive. The most significant difference between the EU Directive and transposition at the member states' level relates to the screening stage, and more specifically, the manner in which Annex I and II have been transposed into national regulations (GHK, 2008, p. 24). Several of the member states appear to have implemented their own 'rules' with regards to the types of projects which require the EIA (GHK, 2008, p. 24).

As the European Commission reported, by 2009 all member states have established comprehensive regulatory frameworks and implement the EIA in a manner which is largely in line with the Directive's requirements while in many cases, implementation of the EIA Directive has created specific national dynamics in a way that member states have gone beyond the minimal requirements - this is the case regarding the key stages of the EIA, such as screening (the determination whether an EIA is required for a specific project) and scoping (the identification of the issues to be covered by the environmental impact statement). On the basis of the recommendation for further improvements and the need for simplification, the EIA Directive was codified in 2011 within the Directive 2011/92. Still, issues concerning practical compliance continued to occur – one example for such practice is described as 'salami slicing' which refers to dividing projects up into two or more separate entities so that each individual element does not require an EIA and thus the project as a whole is not assessed; or the practice of obtaining permission for a project that is below a threshold (and thus not subject to the EIA) and at a later date extending that project or its capacity above the threshold limits (Graggaber & Pistecky, 2012, p. 31).

Nevertheless, the challenge of ensuring that the Directive is implemented effectively and consistently across all member states is a continuous one. The Directive 2014/52 amending the Directive 2011/92 aimed to address certain problems of implementation, reduce unnecessary administrative burdens, simplify the assessment procedure, and reinforce certain levels of environmental protection taking into account emerging challenges such as resource efficiency, climate change, biodiversity and disaster prevention. As the European Commission highlighted in its 2011 and 2012 Annual reports on monitoring the application of EU law, timely transposition is considered essential to ensure the effectiveness of European policies. However, out of the 113 cases of late transposition initiated in 2017,

the European Commission has initiated infringement procedures against 21 Member States for late transposition of Directive 2014/52/EU (Ballesteros, 2018). Moreover, in 2019 the European Commission launched infringement procedures against 17 member states to improve the implementation of the EIA Directive and reported that two member states – Germany and Lithuania still need to complete the transposition of the revised EIA Directive into national law. The CJEU also issued a preliminary ruling regarding the implementation of the EIA Directive in Italy where it stated that, in the event of failure to carry out an environmental impact assessment, member states are required to nullify the unlawful consequences of that failure. As some authors say (Börzel & Buzogány, 2019, pp. 315-341) infringements proceedings concern not only the timely transposition of directives into national law but also cover the incorrect legal implementation or incorrect application of directives as noncompliance with EU legislation.

Fulfilment of the procedural component is a precondition to achieve the objectives set, mainly to support well-informed decision making that results in enhanced environmental protection. Hence, the evidence on the benefits could be more evident once full implementation of the EIA Directive has occurred. In the early days, certain beneficial effects in protecting the environment of member states were noted by providing lead authorities with environmental information to be used in the assessment of individual project proposals, identifying, in advance of project realization, mitigating measures for the impact of the project on the environment and modifications to the project proposal and greater awareness of the impacts of projects on significant biotopes in the Community (Commission of the European Communities, 2003, p. 63). Over the years, it has become apparent that the environmental considerations raised by the EIA process are balanced against other societal and economic considerations in decision making (Commission of the European Communities, 2003, p. 63). What makes the difference, however, is the fact that the separate Directive focuses on and highlights the consideration of likely environmental effects in decision-making. The quality of the information used in the EIA process affects the ability to make valid decisions, while involvement of the public ensures more transparency in environmental decision-making and, consequently, greater social acceptance. There is a general view that the EIA has been a valuable tool in preventing harmful environmental impacts and contributed to increase the understanding of their significance, as well as improving the awareness of the need for sustainable development (GHK, 2008). In addition, the member states that joined the EU in 2004 and 2007 reported that the EIA Directive had contributed directly to consolidating democratic development, by improving public participation and transparency in decision-making (Commission of the European Communities, 2009, p. 4).

The transactive component concerning the effectiveness of the EIA Directive clearly depends on the procedural and substantive component – the formal compliance and the quality of the process. The quality of the decision depends on the consistent transposition and the quality of information provided in the EIA process. Thus, the strength of an effective EIA should be shown in a decision that takes into account and reflects the environmental dimension highlighted in the EIA process. Substantial differences regarding the effectiveness of the EIA Directive exist between different member states, which to a certain extent could

be related to differences in its interpretation and implementation. Finally, even if most benefits of the EIA cannot be expressed financially, there is widespread agreement that the benefits of carrying out an EIA outweigh the costs of preparing an EIA (Oosterhuis, 2007, p.15).

4. ENVIRONMENTAL IMPACT ASSESSMENT AND THE NOTION OF ENVIRONMENTAL JUSTICE: PERSPECTIVE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU[265] is one of the most significant institutions for establishing member states' compliance with the EU law, including the environmental *acquis* as well. Once the EU had established environmental law instruments, CJEU's decisions were shown to be protective of the EU environmental law as an instrument of integration (Baldock & Keane, 1993, pp. 584-605). As the CJEU stated, it must be kept in mind, first of all, that the objective of protecting the environment constitutes one of the essential objectives of the EU and is both fundamental and inter-disciplinary in nature (*Inter-Environnement Wallonie*, Case C-41/11, para. 57). Article 3 para3 of the Treaty on the EU provides that the EU works in particular for a 'high level of protection and improvement of the quality of the environment'.

The notion of environmental justice, based on the need for fair treatment of nature, as far as can be seen, has never been used in EU environmental legislation or, indeed, by the European judiciary represented by the CJEU (Kramer, 2009, p. 195). However, similar to the concept of the environmental impact assessment, the concept of environmental justice first appeared in the United States in the Presidential Executive Order No. 12898 of 1994 entitled 'Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations', requiring the federal administration to address the impact of environmental measures on minority populations and low-income groups (Kramer, 2009, p. 195). One interpretation of the notion of environmental justice increases the attention to social aspects, ethnic or racial discrimination of minority groups in environmental policy matters, while the other puts more focus on the right of citizens to a clean and healthy environment (Kramer, 2009, p. 195). The Sierra Club's 'Environmental Justice Principles' of 2001[266] follow the second approach according to which eight rights are systematized.[267] The CJEU jurisprudence was developed in that regard, not tackling the social aspect of the notion of environmental justice. Neither the European Commission, as the most

[265] Prior to the Lisbon Treaty, the Community Courts comprised the Court of Justice (ECJ), the Court of First Instance (CFI) and judicial panels. Their nomenclature has been changed by the Lisbon Treaty. Pursuant to Article 19 (1), the Court of Justice of the European Union shall consist of the Court of Justice, the General Court and the specialized courts. Given the jurisdiction of these courts established by the Lisbon Treaty, especially in the preliminary ruling process, when it comes to the European Court of Justice or Court of Justice, the General Court is usually included.

[266] Sierra Club, www.sierraclub.org/policy/conservation/justice.asp [15.02.2021].

[267] The eight rights cover (1) the reduction of corporate influence; (2) the right to equal protection and the avoiding of disproportionate charges to certain groups; (3) the right to enjoy natural resources; (4) the rights of indigenous populations; (5) the siting of facilities and infrastructure projects (the right to equity); (6) intergenerational equity; (7) the right to know; (8) the right to participate in decision-making.

common initiator of all environmental cases before the CJEU, nor the national courts, as such cases did not occur at national level, had become aware of that issue (Kramer, 2009, p. 198). For that reason, some authors (Kramer, 2020, p. 1; Petrić, 2019, p. 215) claim that the environmental law has directly or indirectly contributed to environmental injustice in the EU Member States.

Most of the CJEU judgments in the field of the EU environmental law refer to proceedings initiated under the EIA Directive provisions.

Through its jurisprudence, the CJEU has also assessed the rights of individuals on the basis of the EIA Directive. To that end, the CJEU early found that if an obligation is imposed on member states to pursue a particular course of conduct, the effectiveness of the Directive would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration on the question of whether the national legislature had kept within the limits of its discretion set by the Directive when carrying out its transposition or not (*Kraaijeveld and Others,* Case C-72/95, para. 56; *WWF and Others*, Case C-435/97, para. 69; *Linster*, Case C-287/98, para. 32; *Wells*, Case C-201/02, para. 57). Given the content of the EIA Directive, the following analysis will focus on *the right to know* and *the right to participate in decision-making* under the EIA, as well as *access to justice* as inherent to these rights, to examine the readiness of the CJEU to rule primarily in the interest of the environment thus developing certain elements of the concept of environmental justice.

These specific rights with regard to the environment are enshrined in the Aarhus Convention whose provisions form an integral part of the legal order of the EU but are also transposed in the 2003 amending EIA Directive. Nevertheless, as early as 1996 the CJEU (then European Court of Justice) confirmed the principle of access to justice for 'concerned' individuals to invoke provisions of the EIA Directive in national courts (*Kraaijeveld and Others,* Case C-72/95, para. 56). Obligations deriving from the EU legislation are to be treated as the obligations deriving from national legislation. Furthermore, the CJEU also invokes the principle of sincere cooperation in order to underline the role of a national judge which is to ensure the legal protection which persons derive from the direct effect of provisions of EU (then Community) law. Afterwards, the CJEU (then the European Court of Justice) highlighted that one of the underlying principles of the EIA Directive is to promote the access to justice in environmental matters, along the lines of the Aarhus Convention on the access to information, public participation in decision-making and access to justice in environmental matters (*Commission of the European Communities v Ireland*, Case C-427/07, paras. 96-98). In that regard, the CJEU (then European Court of Justice) recognized the availability to the public of practical information on the access to justice as a precondition for exercising the specific rights with regard to the environment, setting the minimum standards for the information to be regarded as ensuring, in a sufficiently clear and precise manner.

The citizens' right to know has, throughout the jurisprudence of the CJEU, played a considerable role (Kramer, 2009, p. 207). To start with, within the EIA case law relating to the Habitats Directive, the CJEU stated (*Holohan v. An Bord Pleanála,* Case C-467/17, paras. 58-59) that Article 5(1) and (3) of the EIA Directive sets an obligation for the developer

to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions. In that regard, under Article 6 (4) of the EIA Directive the opportunities for the public concerned to be granted participation early in the environmental decision-making procedure must be effective, while Article 6 (5) of the EIA Directive expressly leaves to the Member States the task of determining the detailed arrangements both for informing the public and for consulting the public concerned. In *Flausch and Others,* the CJEU agreed with the Advocate General's Opinion on the obligation of the competent authorities who must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure (Case C-208/18, *Flausch and Others*, paras. 26, 31-32, 42 and 44). Finally, the Article 6 of the EIA Directive must be interpreted as precluding a member state from carrying out the procedures for public participation in decision-making that relate to a project at the central level, and not at the local level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with. Hence, the CJEU took implicit notice of certain social aspects such as uneven development of different regions and the need for distributive, procedural and corrective measures in the light of the specific arrangements about informing the public and consulting the public concerned within the right to know.

In view of protecting the environment, CJEU (then European Court of Justice) under Article 9 of the EIA Directive declared that the public is to be informed once the decision to grant or refuse development consent has been taken (*Commission of the European Communities v Kingdom of Spain,* Case C-332/04, paras. 55-59). The purpose of issuing this information is not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines. This interpretation is supported by the purpose of the EIA Directive.

The outcome of decision-making procedures, but also the trust in the procedure for reaching decisions, depends on who has the opportunity to be part of the decision-making process (Ebbesson, 2009, p. 1). In environmental matters that are directly linked with the human health, such opportunities are of utmost importance and directly linked to human rights law (Ebbesson, 1997, p. 69). The CJEU emphasized that the EIA Directive guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment (*Djurgården-Lilla Värtans Miljöskyddsförening,* Case C-263/08, para. 36). It further clarified that participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure (para. 38). Timing of the consultation process in which the authorities likely to be concerned by the project and the public are invited to give their opinion, is also emphasized, thus providing that such a procedure to be carried out, necessarily, before consent is granted (*Commission of the European Communities v Kingdom of Spain*, Case C-332/04, para 54). In terms of setting conditions on public

participation, the levying of an administrative fee is not in itself incompatible with the purpose of the EIA Directive but it should not pose an obstacle to the exercise of the right of participation conferred by Article 6 of the EIA Directive (*Commission v. Ireland,* Case C-216/05, paras. 37-38, 42-45).

Access to justice is necessary in order to ensure that the environmental standards are respected. The EIA Directive provides for members of the public concerned to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, or acts or omissions which fall within its scope, regardless of the role they might have played in the examination of that request (*Djurgården*, Case C-263/08, paras. 32-39). In order to exercise the access to justice, if requested the competent authority is obliged to communicate the reasons for that decision or the relevant information and accompanying documents (*Solway and Others,* Case C-182/10, para. 64.). The CJEU held that the provision of national law transposing Article 11 of Directive 2011/92 on access to justice may not limit its applicability solely to cases in which the legality of a decision is challenged but also has in no way restricted the pleas on the ground of a total absence of the mandatory environmental impact assessment or pre-assessment (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, Case C 115/09, paras. 37; *Gemeinde Altrip and Others,* Case C-72/12, paras. 36-37; *Commission v Germany*, Case C-137/14, paras. 47-48). Within the national procedural autonomy principle, the CJEU found that the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of the EIA Directive on judicial remedies, in line with the 'principle of equivalence' and 'principle of effectiveness' (*Djurgården*, Case C-263/08, paras. 45-47).

However, it must be noted that the EU perspective on access to information and access to justice has evolved through the years. In 1998, in the case *Greenpeace v. Commission* (Case C-321/95P), the CJEU refused to grant standing to the environmental NGO, Greenpeace, on the grounds that the potential consequences of a contested Commission decision, which concerned the European Commission financing of a power station, could only affect the rights of a NGO such as Greenpeace *indirectly*. Greenpeace sought information on whether the European Commission had allocated Community Structural Funds to Spain in 1991 to build power stations on the Canary Islands without first requiring the EIA, as required by the Directive 85/337/EEC. Later, in a number of cases, the CJEU permitted public interest actions to be brought in a form of a quasi *actio popularis* mechanism, following an intermediate approach regarding the admissibility of law-suits before the courts in general and access by non-governmental organisations which promote environmental protection in particular, in cases where there is s 'sufficient interest' or 'impairment of a right' (*Djurgården*, Case C-263/08, paras 42-52; *Bund für Umwelt,* Case C 115/09, paras 45, 59; *IL and Others v Land Nordrhein Westfalen,* Case C-535/18, para 57). The last sentence of the third paragraph of Article 10a [11 as per codification] of the Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environmental law having direct effect (*Bund für Umwelt*, Case C 115/09, para. 48).

It can be noted that the CJEU approach towards the environment was neither particularly creative nor extensive and it did not play its usual role of an 'engine of integration', but its interpretation of environmental rights under the EIA was rather moderate and predictable. It considered the environment as a policy area not different from the rest and limited the protection of the interests within it only to judicial aspect – protecting, defending and enlarging the interests in question (Kramer, 2009, p. 209).

5. CONCLUDING REMARKS

This paper provided an overview on the evolvement of the EIA Directive during more than 35 years of implementation, along with the broadening of the European integration process that resulted in development of the EU *acquis* and introduction of new policies. Main obstacles in terms of ensuring that the EIA Directive is effectively implemented across an enlarged EU were faced in terms of the formal compliance with its provisions. Having the European Commission to assist did not ensure member states' environmental enforcement, however, and implementation by the member states was typically late and imprecise. Nevertheless, the EIA Directive provides the framework and the existing review and infringement mechanisms provide legal support for better transposition or application. While ensuring that the EIA Directive is effectively implemented across the EU, these shortcomings also served as indications of the areas where improvements were needed, to identify the implementation gaps, inconsistencies and ambiguities. Accordingly, different factors contributed for differences in non-compliance, along which are the country-specific variables, such as legal culture and administrative traditions, prioritization of the environmental protection as well as state power and state capacity.

During this time, the EIA procedures have been strengthened and EIA capacity has been improved in many different contexts. The EIA Directive contributes to ensure that environmental considerations are integrated into decision-making for projects, while also empowering citizens and ensuring that they are informed and consulted before decisions are made. There is no doubt that the EIA has made a difference to the patterns of decision-making process through highlighting the environmental interests over other interests, design modifications, institutional learning, and public involvement. The latest codification which again underwent amendments, addresses all these issues sufficiently. Many member states have also developed their own guidance on good practice and on specific project categories and these national experiences can be shared across the EU. It can therefore be concluded that the principal objective of the EIA Directive has been achieved and that the momentum is there to improve its application and effectiveness and to achieve the Directive's ultimate aim which is the protection of the environment and the quality of life.

The design and application of better regulation tools at EU level should be accompanied with a closer collaboration with member states to ensure a consistent application of better regulation principle and stronger, constructive dialogue between the EU institutions, member states and other stakeholders. It is also necessary to ensure that the EIA Directive is adapted to the national, EU and international policy and legal contexts. To the extent that the EIA Directive as most of the environmental laws in the member states originates

in the Union *acquis*, the EU should provide leadership in this process, by increasing the weight given to environmental resources and capacities in the existing EIA systems, while strongly and undoubtedly emphasizing its commitment to environmental protection over other objectives. This approach will also strengthen its role within the internal integration process but also in the external action.

The judicial contribution of the CJEU and national courts is very important in order to develop consistent jurisprudence and thus ensurcoe proper application of the EIA Directive. Along with the European Commission, the CJEU should also step in its usual role as a catalyst of the integration that sets the priorities through its progressive and influential role and to shed the light on the environmental protection.

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THE CRIME OF RAPE IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA IN COMPARATION WITH COUNTRIES OF REGION AND CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The main idea for this topic came as a reflection of the recent happenings that shocked the entire Region, especially Serbia. Actresses from Serbia, after several years, gathered courage and told the whole world how they survived rape. The cases were investigated, and some of them had a criminal proceeding as the epilogue. This paper will contain three chapters. The first chapter will give the definition of the "sexual assault" with special emphasis on consent, which is the key element that connects several sexual offences such as crimes "sexual harassment" and "raping". The second chapter will provide an overview of European Court of Human Rights practice considering the crime of rape and the effect of ECtHR case law on national legislation. Finally, the final chapter will present the legislation regulating the "crime of rape" in Bosnia and Herzegovina, Serbia and Croatia. This chapter is important for showing the difference between the definition, processing and the punishment for raping a person. It is well known that, for example, in 2019, Serbia adopted "Tijanas law" which implies life imprisonment for the most serious crimes : aggravated murder of a child, rape with a fatal consequence, sexual intercourse with a helpless person with a fatal consequence, sexual intercourse with a child with a fatal consequence, sexual intercourse with a child with abuse of position with a fatal consequence. Finally, in the conclusion of the paper the authors will try to answer several questions, for example to what extent the courts respect the Strasbourg principles, why

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rape victims find it difficult to dare to press criminal charges, what should states improve in the judicial system when it comes to the crime of rape.

Keywords: gender equality, sex offences, rape, Istanbul Convention, European court for the human rights.

1. INTRODUCTION: UNDERSTANDING GENDER AND SEXUAL-BASED VIOLENCE

One of the forms of discrimination[268] and violation of the basic rights and freedoms of the victim is gender-based violence or violence that disproportionately affects persons of one gender and is noticeable in a wide range of sexual violence acts (rape, sexual harassment, and abuse), human trafficking, slavery, forced marriages, the so-called "Crimes of honor" and in numerous variations of other forms of harmful conduct. It can be said that sexual violence, along with domestic violence, is among the most common forms of gender-based violence. Sexual violence is the use of force, coercion, or imbalance of power, to engage a person in sexual activity without his or her consent. In most cases, the perpetrator of sexual violence is a man. Sexual violence can happen to anyone of any gender. However, women,[269] children, LGBTI people, people with disabilities, and people of different skin color are more likely to be victims of sexual violence than others. Victims are most often harmed by crimes against sexual freedom and morals, or crimes against marriage, family, and youth. Criminal offenses falling under these two categories can be committed only with intent (Petrović, Jovašević, Ferhatović, 2016, p. 149). There is often a problem in defining this form of violence, and in connection with it, in characterizing some form of behavior as a sexual offense. The reasons lie in the very cultural, social but also traditional understandings of what values should be protected by criminal legislation, as well as in ingrained patriarchal values. Sexual violence, as one of the most brutal forms of violence against women, in many cases goes unpunished due to inadequate and scientifically inaccurate legal definition of this crime and prevalence of frequent stereotypes and myths about rape. In defining the concept of sexual violence, the legislator has a complex task, and should be comprehensive and precise - but at the same time monitor the development of society and perceptions of sexuality. One of the basic definitions of sexual violence is given by the World Health Organization (WHO), reading: "Sexual violence is any sexual act, attempted sexual act, unwanted sexual comment or suggestion directed against a person and his sexuality, which can be committed by another person regardless of the relationship with the victim or the situation in which they find

[268] Considering the rights contained in the Universal Declaration of Human Rights, which represent a common standard to which every society should strive, as well as the individual who makes up society, and which states that all human beings are born free and equal in dignity and rights (article 1), to achieve real equality, it is necessary to provide equal opportunities for the exercise of all rights, as well as the effective sanctioning of all forms of gender inequality. The prohibition of discrimination based on sex and gender is defined in numerous international documents and instruments, and the European Convention on Human Rights and Fundamental Freedoms itself establishes the obligation of the state to respect human rights, as well as to enable their enjoyment and protection.

[269] https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women, 30 August 2021.

themselves. It is characterized by the use of force, threats, or blackmail to endanger the welfare and/or life of the victim or persons close to her."[270] However, the definitions of sexual violence in law, both as a war crime and as a crime against humanity, have shortcomings and are unjustifiably narrow due to the anticipation of an additional and unnecessary essential feature, requiring that these acts be committed with "use of force or threat of use of force".

It should be noted that in Bosnia and Herzegovina, every form of sexual violence is regulated by law, and represents a broad category that includes not only sexual harassment, but also rape, fornication, trafficking in women and other crimes. In this context, it is important to mention criminal offenses such as sexual intercourse with a disabled person, sexual intercourse with abuse of position, forced sexual intercourse, sexual intercourse with minor, lewd acts, sexual blackmail, sexual harassment, and satisfaction of lust in front of a minor. These offenses should certainly be mentioned as they fully correspond to the offenses described in Article 36 (Sexual Violence, including Rape) of the Istanbul Convention.[271]

Rape is the most severe form of sexual violence that leaves long-lasting consequences; it causes extremely severe traumatic experiences for the victim. Rape has long been recognized as a crime in society, but it should be noted that there were significant differences in its incrimination and sanctioning in different legislations, depending on the cultural and traditional values of the given societies and their level of human rights development – hence, there is no single definition of the crime. Even the Istanbul Convention itself does not provide a precise, unique definition of rape. Rather, it defines sexual violence, which includes rape, as: a) "engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person."

Sexual consent means actively accepting sex with someone. Consent lets someone know that sex is desirable. Sexual activity with someone without consent is rape or some other form of sexual violence (e.g., sexual harassment).[272] Also, how far one can go, what one wants or does not want, must be checked first. Without consent, any sexual activity (at least

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[270] World Health Organization (2002) 'Report on Violence and Health', Geneva, p. 149.

[271] Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, 11. 05. 2011. year, Istanbul.

[5] For the elements that can be taken to constitute the definition of rape, we suggest those given by 70 authors, leading experts in various fields, in 189 determinants in the excellent book Encyclopedia of Rape (2004), edited by Merril D. Smith.

[272] Sexual harassment in Bosnia and Herzegovina as a criminal offense was regulated by the Law on Gender Equality („Official Gazette of BiH", No. 16/03, 102/09) in 2003. It is also prescribed as a criminal offense by the Criminal Code of the Republika Srpska. It is also a form of discrimination, which, following the Law on Prohibition of Discrimination of BiH, is resolved in civil proceedings and administrative proceedings/ administrative disputes. Labor law also contains norms on combating sexual harassment. When defining sexual harassment, it is usually stated that it includes all those unwanted sexual behaviors that may or may not involve physical contact. Certain behaviors that represent sexual violence are criminalized by Article 29of the BiH Law on Gender Equality, which defines "any unwanted form of the verbal, non-verbal or physical behavior of a sexual nature which seeks to violate the dignity of a person or group of persons, or which achieves such an effect, especially when it creates frightening, hostile, degrading or offensive environment." Thus, such unwanted

one activity - oral sex, touching the genitals, vaginal or anal penetration) is rape or sexual violence. Consent is never implied by past behaviour, the clothes being worn, where one goes out ...[273]. Consent is always clearly stated, and silence never signifies consent.

The past must never be given significance in assessing consent. This also applies to couples who have been in a relationship for a long time and have had sexual intercourse many times. Each state has norms that regulate who can give consent. It is a generally accepted fact that people who are under the influence of alcohol, drugs or are unconscious, cannot consent to sex. Additionally, states regulate the minimum age of consent for minors.

2. LEGAL FRAMEWORK IN THE COUNTRIES OF THE REGION

2.1. Bosnia and Herzegovina

In the legal system of Bosnia and Herzegovina, rape, as the most specific criminal offense of this type, is prescribed in criminal law (entity criminal laws and the criminal law of Brčko District), and it refers to vaginal, anal, or oral penetration with a penis and/or objects. The criminal law of both entities and Brčko District define rape as a sexual intercourse/act/relation which arises under the threat of the use of force and an attack on the life or body of that person or another person close to him or her. The act of committing is forcing on sexual intercourse or sexual activity equalized with it by using force or threatening to directly attack the life or body of that person or a person close to him or her, i.e., it is directed immediately towards the passive subject or implicitly towards a person close to him or her. Thus, according to the favourable legislation of Bosnia and Herzegovina, rape exists only provided there is a direct threat of physical violence, due to which the victim is forced to agree to the demands of the rapist. Under previous provisions of criminal law (criminal laws until the year 2003), only a man could commit rape. The positive substantive law in Bosnia and Herzegovina is gender-neutral, i.e., it does not distinguish between crimes committed by men or women, which, if done, would unnecessarily narrow the range of crimes that can be the subject of criminal prosecution. In the legal system of Bosnia and Herzegovina, the primary form of rape, as a criminal offense, is punishable by imprisonment from one to ten years, i.e., three to ten years. It is defined as coercion to intercourse or some other sexual act by using force or threat to the life or body of the victim or a person close to her. Criminal law also prescribes

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sexual behaviors include various types of conduct, such as verbal suggestions (sexual offers), unwanted sexual remarks and comments about the body and sexuality, unwanted physical touches (kissing, hugging, touching), inappropriate sexual attention, various physical gestures, and similar behavior. Unlike gender-based harassment, sexual harassment is characterized by compromising a person's sexual integrity because it puts a person in an awkward and humiliating position, causes a sense of shame and creates a hostile, humiliating, or offensive environment. Although many years have passed since the adoption of the Law on gender equality, the case law for sexual harassment is underdeveloped.

[273] "Common myths are: Only a certain type of woman is raped (those who are promiscuous or those who have poor judgment); women provoke being raped by the way they dress or the way they flirt; men rape women because they are sexually aroused or because they have not had sexual activity for a long time (in fact, men rape women to control and humiliate them).": Council of Europe doc. 11038, Report of the Committee on Equal Opportunities for Women and Men, 2 October 2006, fn 1

qualified forms of crime, which include extremely cruel or degrading ways of committing the crime, the diversity of committed acts, the fact that the crime resulted in death, grievous body harms, pregnancy, the fact that the crime is commited due to ethnic, racial, religious or linguistic animosity to the victim or the fact that the victim is minor.

In the Criminal Code of Federation Bosnia and Herzegovina and Brčko District, the criminal offense of rape is classified under the group of criminal offenses against sexual freedom and morals. Conversely, in the Criminal Code of Republic Srpska, the criminal offense of rape falls under the group of criminal offenses against sexual integrity. The following lines will give more details on the normative solutions to the crime of rape. The criminal offense of rape is defined in the Criminal Code of Federation Bosnia and Herzegovina as follows: "*Whoever forces another person, by using force or threatening to directly attack the life or body of that person or a person close to him or her, to engage in sexual intercourse or other sexual act equalised with intercourse, will be punished by imprisonment from one to ten years.*" (Article 203, paragraph 1 of the Criminal Code of Federation Bosnia and Herzegovina). The Criminal Code of Republic Srpska determines rape with the following statement: "*Whoever forces another person to engage in sexual intercourse or a sexual act equalized with it by using force or threatening to attack the life or body of that person directly, or a person close to him or her, will be punished by imprisonment from three to ten years.*" (Article 165, paragraph 1 of the Criminal Code of Republic Srpska). In the Criminal Code of Brčko District of Bosnia and Herzegovina, the criminal offense of rape is regulated in paragraph 1 Article 200 of the Criminal Code of Brčko District Bosnia and Herzegovina: Whoever forces another person " *to engage in sexual intercourse or a sexual act equalized with it by using force or threatening to directly attack the life or body of that person or the life or body of a person close to him or her, will be punished by imprisonment from one to ten years.*"

Both entity laws and the law of Brčko District define the crime of rape as forcing (using the force or threatening to attack the life or body of the person being raped or the life or body of a close person) to engage in sexual intercourse or a sexual act equalized with it. The difference between the three laws lies in the prescribed statutory minimum of imprisonment. In the Federation of Bosnia and Herzegovina the minimum sentence of imprisonment is one year. Conversely, in the Republic of Srpska and Brčko District, the statutory minimum is three years. All three provisions prescribe a statutory maximum of ten years of imprisonment for committing the crime of rape.

In addition to the basic offence all three laws also have qualified i.e. aggravated offences, such as:

- If the criminal offense of rape is executed in a particularly cruel or degrading manner;
- If more than one sexual intercourse or sexual acts equalized with it have been committed against the same victim by several persons;
- If the criminal offense of rape was committed against a minor;
- If the criminal offense of rape was executed as a hate crime;
- If the criminal offense of rape has caused severe injury, serious impairment of health, or pregnancy of a raped female person;
- If the rape victim has died as a result of the criminal offense of rape being committed.

The legal minimum for committing a qualified form of the criminal offense of rape is three years in the Criminal Code of Federation Bosnia and Herzegovina and the Criminal Code of Brčko District. In comparison, the legal minimum in the Criminal Code of Republic Srpska is higher and amounts to five years. The legal maximum is set equally in all three laws, and amounts to 15 years. The distinction regarding the penalty of imprisonment mainly concerns the qualified offence for the criminal offense of rape – causing death of a rape victim. The Criminal Code of Republic Srpska prescribes a statutory minimum of ten years for this form of crime. Nevertheless, it does not determine the legal maximum that could be pronounced for this aggravated form of rape.

The Centre for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina analysed the case law connected with the criminal offense of rape from courts across Bosnia and Herzegovina. Seventy-four judgments, submitted to the Center by the courts (passed in the 2010- 2021 period), were analysed. Fifty-two of the judgments are first instance, 17-second instance, and five from the entity Supreme Court. Decisions were made for about 83 persons, of which 73 persons were convicted, while ten persons were acquitted.. Judgments were based on a plea agreement concerning two persons, while evidentiary procedure was led concerning others. As a rule, penalties of imprisonment were pronounced, and in one case, prison sentence was replaced with a fine. In one case, based on a plea agreement, the court pronounced imprisonment of six months, which is below the statutory minimum.

Among the rape victims, most of them are minor girls, followed by women, while the elderly are in the third place. There are no LGBTI persons as rape victims in the received judgments. There are also no rape victims among the prison population (in world statistics, that population dominates among perpetrators and victims of same-sex rape, men-men, woman-woman). There is just one judgment (later confirmed in the second instance) in which the criminal offense of rape was committed as a hate crime. To summarize, analysing the received judgments of the courts in Bosnia and Herzegovina, the following was noted:

- There are more convicting judgments for perpetrators of the criminal offense of rape than acquitting judgments;
- Most perpetrators of the criminal offense of rape have a lower level of education (having completed or even not completed primary or secondary school);
- Most perpretrators are unemployed;
- A large number of rape cases were committed within the family;
- There is a large number of cases in which minors or disabled persons are rape victims;
- The courts most often imposed a criminal sentence of imprisonment higher than the one determined in the law, especially when a minor is the rape victim, and
- There is a negligible number of cases where the criminal offense of rape was committed as a hate crime.

Furthermore, based on the analysis of the received judgments, a positive practice of the Supreme Court of the Federation of Bosnia and Herzegovina can be identified. Namely, in most cases, the Supreme Court of the Federation of Bosnia and Herzegovina, rejected

the appeals lodged by the perpetrators and upheld the appeals of the prosecution service, and increased the imprisonment sentence imposed by the first instance court.

It is also important to note that the most frequent reason for the judgment of acquittal is that the court could not establish physical coercion in the criminal offense of rape, contrary to the definition of rape in the Istanbul Convention and the "Strasbourg" standard. In one judgment, it has been noted that the accused was acquitted because it was proven that he was in an intimate relationship with the rape victim.

Earlier court practice for the criminal offense of rape in Bosnia and Herzegovina showed that courts, in some cases, especially in the 2004-2007 period, did not apply the "Strasbourg" standards (the condition of resistance was rejected in international court opinions/reasoning). Nevertheless, it was used in certain judgments of the Supreme Court of Bosnia and Herzegovina. This was followed by a period where the entity and Brčko District courts began to apply the concepts of coercion and coercive environment, under international standards. This tendency of increased compliance with the international standards can also be seen in some cases where the courts tried to apply the said international standards, but failed to overcome the unnecessary focus on the use of force and resistance.[274]

2.2. Republic of Serbia

In the Republic of Serbia law, the criminal offense of rape is classified as one of criminal offenses against sexual freedom. The basic form of the criminal offense of rape is regulated in paragraph 1 of Article 178 of the Criminal Code of Republic of Serbia[275], and is determined as follows: "*Whoever forces another to sexual intercourse or an equal act by use of force or threat of direct attack against the body of such or other person, shall be punished with imprisonment from five to twelve years .*" A particular form of the criminal offense of rape can be found in the provision of paragraph 2 of this Article, in which coercion consists of blackmail or other grave evil. That is a lighter form of the criminal offense of rape and is in fact a modification of the former criminal offense coercion to sexual intercourse[276] or wrongful fornication (Škulić, 2017. p. 417). A more severe form of a criminal offense of rape exists when the basic form is committed with certain alternatively prescribed qualifying circumstances. Professor Milan Škulić states them as follows: "1. Occurrence of a more serious consequence - if the act of committing the rape causes grievous bodily harm of the rape victim, 2. Acquisition of perpetrators – if several persons committed the crime of rape, 3. Tough manner of execution – if the act

[274] „Figthing against Impunity for Sexual Violence in Armed Conflict in Bosnia and Herzegovina: achieve progress and challenges", Analysis of Criminal Proceedings before the courts of the Federation of Bosnia and Herzegovina, Republic Srpska and Brčko District of Bosnia and Herzegovina in the Period from 2004. to 2014., OSCE Mission to Bosnia and Herzegovina, June 2015, pp. 25-31.

[275] Official Gazette of Republic of Serbia, no. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

[276] Judicial practice in Serbia followed the practice of the European Court of Human Rights, even at the time of the validity of the "classic" definition of rape (as forced sexual intercoure) in the criminal legislation of Serbia. It is a matter of "latent coercion", where the rape victim got into the car in which the criminal offense

was committed in a particularly cruel or particularly degrading manner, 4. The attribute of a passive subject – if the rape was committed against a minor or 5. The occurrence of a special consequence – if the rape resulted in pregnancy of the victim." (Škulić, 2017, p. 418). As in the entity and Brčko District laws of Bosnia and Herzegovina, the Republic of Serbia criminal law envisages death of a passive subject as a qualifying factor for the existence of aggravated form of the criminal offense of rape. The most severe form of rape exists if the act resulted in the death of a passive subject or if the act was committed against a child, i.e., a person who was not 14 years old at the time the crime was committed.

In the year 2014, the Republic of Serbia was shocked by a horrific crime. A fifteen-year-old girl T.J. was kidnapped and murdered near the Vojvodina village Bajmok. Her body was found after a thirteen-day search, and a butcher D.Đ. was identified as the perpetrator of the crime. The case of the minor T.J. was the motive for establishment of the Foundation named after her. The Foundation submitted a national initiative to the National Assembly for amendments to the Criminal Code of the Republic of Serbia. One hundred fifty-eight thousand four hundred sixty citizens of the country supported the initiative. The initiative proposed the introduction of life imprisonment for the most severe crimes against life and body and crimes against sexual freedom in cases which resulted in the death of a child, minor, pregnant woman, or helpless person. A possibility of conditional release in these cases was excluded with the same initiative.[277] The National Assembly of the Republic of Serbia adopted the initiative. Amendments to the Criminal Code of the Republic of Serbia had direct implications in the case of "Malčanski berberin". Namely, the multiple rapist N.J. was sentenced to life imprisonment for raping a twelve-year-old girl; the first judgment passed after the amendments to the Criminal Code were adopted.[278]

2.3. Republic of Croatia

According to paragraph 1 of Article 153 of the Criminal Code of the Republic of Croatia[279], the crime of rape is defined as follows "*Whoever engages sexual intercourse or equal sexual act with another person without his or her consent or induces another person to have sexual intercourse or an equal act with a third person without his or her consent or to commit a sexual act equalized with sexual intercourse on himself/herself*

of rape was committed, without any physical coercion, and which she could not leave of her own free will. No injuries were found on her body. The three defendants were found guilty. See: case of the High Court in Belgrade K. 509/11 of 3 November 2012. The first-instance verdict was confirmed by the decision of the Court of Appeals in Belgrade - KŽ1 2099/2013 of 3 July 2013, and by the verdict of the Supreme Court of Cassation (Kzz 622015 of 28 January 2015).

[277] The impossibility of conditional release in these cases caused criticism from the professional public. It was pointed out that only a small number of Council of Europe member states do not have the possibility of conditional realase. https://www.slobodnaevropa.org/a/dozivotni-zatvor-kazne-srbija/29905316.html, August 30th 2021.

[278] So far, there have been only two final judgments for life imprisonment in the Republic of Serbia. The second relates to the crime of aggravated murder.

[279] Criminal law of Republic of Croatia, Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

without consent will be punished with imprisonment from one to five years". Paragraph 2 of the same Article determines a punishment of imprisonment between three and ten years for committing the act referred in paragraph 1 by using force or threat of a direct attack on life or the body of a rape victim or another person. The perpetrator who was in a reversible delusion regarding the existence of consent determined in paragraph 1 of Article 153 of the Criminal Code of the Republic of Croatia, will be punished with imprisonment for a term not longer than three years, while the perpetrator who was in an inescapable delusion regarding the existence of consent determined in paragraph 2 of Article 153 of the Criminal Code of Republic of Croatia will be punished with imprisonment for a term between one and five years. The Croatian law provides a precise definition of consent in paragraph 5 of Article 153 of the Criminal Code, prescribing that that consent from paragraph 1 exists "*if a person decides to have sexual intercourse or equal sexual act of own will and if such person was able to make and express such a decision. It is considered that such consent does not exist particularly if sexual intercourse or equal sexual act was committed by use of threat, fraud, abuse of position towards a person who is dependent from the perpetrator, exploitation of the person's condition due to which he/she was unable to express refusal or over a person who was unlawfully deprived of liberty." Before, the legal definition of rape did not refer to consent or absence of consent, but in their practice Croatian courts did consider whether there were indications of victims consent*.[280] Consent must refer to a future act or omission while subsequent consent has no effect (Radačić, 2012, p. 40).

3. THE CRIME OF RAPE IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

3. 1. The impact of ECtHR practice on national legislation

Rape is always a subject of criminal protection and the state has several positive obligations in this regard. Andrew Clapman suggested that "rethinking states" human rights obligations specifically requires "reconfiguring traditional approaches to violence against women" (Clapman, 2006). All elements of the case-law of the European Court of Human Rights have been incorporated into the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),[281]

[280] Eg. Judgment of the Supreme Court of the Republic of Croatia, I Kž 390 / 07-7 of 10 July 2007, which is significant because the Court found that the behavior of the victim, who in the night tram approached the perpetrator she did not know and went with him to the park , recklessly, but still does not give the perpetrator the right to conclude that she thereby gave her consent to sexual intercourse or a sexual act equated with it.

[281] In November 2013, Bosnia and Herzegovina ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and thus took on the obligation to harmonize domestic legislation with the provisions of the Convention. Article 36 of the Convention defines sexual violence, including rape in the following way "1. The Parties shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalized: a. vaginal, anal, or oral penetration of a sexual nature by any part of the body or object into the body of another person without the consent of that person; b. other acts of a sexual nature with another person without the consent of that

which is binding on all states that have ratified this Convention. The European Court of Human Rights has established certain criteria, which the Member States should respect when creating their legislative policy. Thus, the shortcomings of the substantive law can also be manifested in the failure of the legislator to ensure its effective protection through an appropriate definition of a criminal offense (Batistić Kos, 2008, p. 59). The most significant example is the judgment in the case *M. C. v. Bulgaria,*[282] in which Court, based on current trends in European law, concluded that the requirement to prove physical resistance in all circumstances to establish rape is a risk that may result in impunity for certain types of rape. The Court, therefore, found that the positive obligations of States parties under Articles 3 and 8 of the Convention required the punishment and effective prosecution of the perpetrator of any sexual act without the consent of the victim, including a case of lack of physical resistance from the victim. The European Court of Human Rights, in a series of judgments (*XIY v. The Netherlands, Aydin v. Turkey, M. C. v. Bulgaria, Maslova and Nalbandov v. Russia, P. M. v. Bulgaria, I. G. v. Moldova, M. and Others v. Italy and Bulgaria, P. and S. v. Poland, O 'Keefe v. Ireland, W. v. Slovenia, M. A. v. Slovenia and N. D. v. Slovenia, S. Z. v. Bulgaria, I.P. v. the Republic of Moldova, Y. v. Slovenia, B.V. v. Belgium, E. B. v. Romania, E. G. v. the Republic of Moldova and J. L. v. Italy*) relating to rape and sexual abuse found insufficient protection in the legal systems of specific states.

The crime of rape and the rape of a child are among criminal offenses for which life imprisonment can be imposed in the states that have incorporated it into the criminal law. The European Court of Human Rights has taken the position that member states can prescribe in criminal laws the sentence of life imprisonment, provided they, in addition, prescribe three other important segments regarding the introduction of life imprisonment. First, the legislation of the Member States must provide for a period of time during the serving of the sentence after which there is a possibility to reconsider the sentence. Second, the Member States must establish a procedure for revising it. In addition, detention must be organized in such a way as to enable life-sentenced prisoners to progress towards their rehabilitation. The key judgment of the European Court of Human Rights to date, in the case of *Vinter and Others v. The United Kingdom*,[283] states that it is inconsistent with

person; c. the influence that another person, without his or her consent, engages in acts of a sexual nature with a third person. 2. Consent must be voluntary as a result of the free will of the person, which is assessed according to the circumstances of the case. 3. The Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed to the detriment of former or current spouses or partners, as recognized by domestic law." We can conclude that there is a discrepancy in defining the crime of rape in Bosnia and Herzegovina, Serbia and Croatia with the provisions of the Convention. Namely, in the criminal legislation of Bosnia and Herzegovina and Serbia, rape implies coercion to sexual intercourse by force or threat to the life or body of the victim or the life or body of a person close to him, while "the Convention requires only the absence of consent" (Čengić, N. et al., 2017, p. 29). It is important to point out that now only the Criminal Code of the Republic of Croatia in Article 153 of the Criminal Code precisely defined what is considered consent, which brought it closest to the harmonization of the law with the Convention. According to an Amnesty International analysis, only 12 of Europe's 31 countries have laws that define rape as consentless sex: Belgium, Croatia, Cyprus, Denmark, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Sweden and the United Kingdom.

[282] Application no. 39272/98, the judgment of 4 December 2003

[283] Application no. 66069/09, 130/10, and 3896/10, the judgment of 09.07.2013 (see in particular para. 121).

human dignity, and therefore contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to deprive a person freedom without allowing her to regain that freedom one day.

The minimum period a prisoner must serve before being able to take parole varies from state to state.[284] In the United Kingdom of Great Britain and Northern Ireland, the law does not set a minimum period of imprisonment; rather, such period is set by a judge when sentencing. Several states[285] do not envisage parole when it comes to prisoners sentenced to life in prison. In practice, in Iceland and Liechtenstein, life imprisonment was never imposed. Some states do not have a sentence of life imprisonment. [286] Bosnia and Herzegovina is the last country to introduce this punishment. This was not done at the state level of government (in the Criminal Code of BiH), but it was done by the entity of the Republic of Srpska in February 2021, following the example of the introduction of this punishment in Serbia in 2019.

The concept of life imprisonment was introduced in the 1990's in many Council of Europe member states following the ratification of Protocol 6 to the European Convention on Human Rights, which abolished the death penalty. Although it was never pronounced, nor was it known to the criminal legislation of the Republic of Srpska, death penalty was enshrined in the Constitution of this Bosnian entity. In 2019, such sentence formally ceased to exist, given that the said provisions of the Constitution of the Republic of Srpska were repealed by the Constitutional Court of BiH. Today in Europe the death penalty exists only in Belarus.[287] The last execution in a member state of the Council of Europe took place in 1997. A moratorium on the death penalty has been introduced in the Russian Federation.[288]

3.2. ECtHR as a mechanism of justice for rape victims

Sexual violence, as a form of gender-based violence, violates women's human rights. It also manifests itself on a range of human rights and freedoms of any individual, and thus has far-reaching negative consequences for any society.[289] State responses are often inappropriate and do not provide effective remedies to victims (Radačić, 2015, p. 127). Criminal proceedings are often traumatic for victims, because not only do they have to "go through" the details of the attack all over again, but they often face gender stereotypes. Three stereotypes about women's sexual behaviour are particularly prevalent: that women enjoy being sexually obsessed over regardless of the circumstances; they lie that they

[284] The lowest is 12 years (e.g. Denmark and Finland), then 15 years (e.g. Austria, Belgium, Germany, Switzerland), and the highest is 40 years (e.g. Turkey, in the case of multiple offenses). In most countries where long-term imprisonment can be imposed, the period is between 20 and 30 years.

[285] Netherlands, Ukraine, Moldova, and Malta.

[286] Eg. Andorra, Montenegro, Croatia, Portugal, San Marino, Slovenia, and Spain.

[287] Amnesty International- Document- Commonwealth of Independent states: Belarus- the last executioner.

[288] It was established implicitly by Boris Yeltcin in 1996, and the Constitutional Court of the Russian Federation explicitly in 1999, which was reaffirmed in 2009. In this country, the death penalty has not been carried out since 1996.

[289] UNGA (2006) 'Indepth Study on All Forms of Violence Against Women: Report of the Secretary General', *UN* Doc. A / 61/122 / Add.1, paras 171–81.

have been raped; and they are responsible for their victimization (Edwards, Turchik, Dardis, Reynolds, & Gidyez, 2011; Radačić, 2014a; Temkin, Krahé, 2008). Based on these stereotypes, the definition of "actual" rape was, roughly, that it was a "violent attack on a 'respectable' victim who suspects nothing and who resists to the maximum". The application of such gender stereotypes in the legal proceedings of the member states of the Council of Europe has been recognized by the European Court of Human Rights in a number of its judgments, and in the following lines, we will present three such judgments that we think best illustrate the rape stereotype.

In *Aydin v. Turkey*,[290] the European Court of Human Rights held that rape could constitute torture.[291] The case concerned a 17-year-old who was as raped by a member of the Turkish security forces. Sukran Aydin was detained, allegedly as a part of security operations, to obtain information from her and other members of her family about alleged terrorist activities or sympathies. Her imprisonment lasted for three days, during which time she was beaten several times, sprayed with water while she was naked, and raped after being blindfolded. This is the first time Aydin has had sexual intercourse and long after that, she suffered from psychological consequences. Only two years after the first discovery of torture (*Aksoy v. Turkey*),[292] the Court was asked to consider whether the conduct, including rape, constituted torture under Article 3 of the European Convention, which provides: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*. The court concluded that the rape of detainees by a civil servant must be considered a particularly severe heinous form of abuse given the ease with which the perpetrator can exploit the victim's vulnerability and weakened resistance, and that rape leaves deep psychological scars on the victim that do not respond as quickly as other forms of physical and mental violence.[293] The Court continued that, in addition to the damage caused by the rape, other acts against her produced "a series of particularly frightening and humiliating experiences", in particular taking into account her „gender and youth and the circumstances in which she was held."[294] Moreover, the suffering inflicted on her by the security forces was „for a purpose" - namely to gather information.[295] Accordingly, the Court found the accumulation of acts of physical and mental violence inflicted on the applicant and the particularly cruel act of rape to which she had been subjected constituted torture in violation of Article 3 of the Convention. The Court would reach the same conclusion if considered any of these grounds separately.[296]

Another seminal judgments of the European Court of Human Rights is the one in the M. C. v. Bulgaria case from 2003. In it, the European Court of Human Rights took the

[290] Application no. 23178/94, the judgment of 25 September 1997.

[291] Shortly after the verdict in Aydin v. Turkey, the International Criminal Tribunal for Rwanda (ICTR) issued its significant verdict in Prosecutor v. Akayesu, on which responsibility for genocide and war crimes of rape is based: Prosecutor v. Akayesu, Case no ICTR-96-4-T, 2 September 1998.

[292] Application no. 21987/93, the judgment of 18 December 1996

[293] Aydin v. Turkey, para. 83.

[294] Aydin v. Turkey, para. 84.

[295] Aydin v. Turkey, para. 85.

[296] Aydin v. Turkey, para. 86.

position that the lack of consent to sexual activity must be a basic element of the definition of criminal offenses of sexual violence and rape. Punishment of any involuntary sexual act is a standard of the European Court of Human Rights, and is established by Article 36 of the Istanbul Convention. The victim, a 14-year-old, claimed she was raped by two men, but an investigation that followed found that there was not enough evidence that the girl was forced to have sex. The investigation established that no force was used and that therefore no rape occurred. Therefore, before bringing the case before the European Court of Human Rights, the victim argued that Bulgarian law did not protect her because in it, committing rape required force, a higher standard than in other countries, where, for example, only non-consent was required.[297] She also challenged the thoroughness of the investigation. The ECtHR found that Bulgaria had violated its positive obligations under Articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Bulgaria was ordered to pay the victim non-pecuniary damage and expenses.

The latest important judgment of the European Court of Human Rights is that in the case *J. L v. Italy*,[298] in which the ECtHR condemned an Italian court for "reproducing sexist stereotypes" after referring to women's red underwear and bisexuality as a sign of her "ambivalent attitude towards sex", releasing six people accused of gang rape. The case dates to 2008, when a woman, then a student, claimed to have been raped by seven men in Florence. In its verdict, the court in Florence pointed out inconsistencies in her story. The European Court did not challenge the verdict, but it did criticize the court in Florence for using language that violated a woman's right to privacy. In its ruling, the ECtHR stated the language "conveyed prejudices in Italian society regarding the role of women that could be an obstacle to providing effective protection of the rights of victims of gender-based violence, despite a satisfactory legislative framework." The European Court specifically pointed out that the comments on the "red underwear" shown by the applicant during the evening were unjustified, and the same applied to the comments concerning her bisexuality, relationships and casual sexual relations before the events in question." The ECtHR also ordered the Italian state to pay the woman 12,000 euros in damages.

4. CONCLUSION

In the most legislations in the region, the definition of rape is based on the use of force and not on lack of consent, although the Istanbul Convention provides otherwise, a norm that stems from the case law of the European Court of Human Rights. The Convention explicitly requires that States change the definition of the criminal offense of rape in the way that any act of sexual penetration, committed against a person who has not given his or her consent, is punishable, regardless of the form and nature of the act. Consent, as emphasized

[297] This assumption is followed by the decision of the CEDAW Committee, in the case of *Vertido v. Philippines* (communication number 018/2008), adopted on 16 July 2010. The Committee considers that the Philippine State Court erred in relying on gender-based myths and stereotypes about rape and rape victims in the victim's case, and stressed that there should be no presumption in law and practice that a woman gives her consent where she has not physically resisted unwanted sexual behavior.

[298] Application no. 5671/16, the judgment of 27 May 2021.

in the Convention, must be given freely, which will be appreciated in the context of each individual case. In November 2013, Bosnia and Herzegovina was the sixth Member State of the Council of Europe to ratify the Istanbul Convention, thus overtaking the obligation to incorporate in its legislation a lot of instruments provided in this Convention aiming to establish the most efficient system for preventing and combating violence against woman and family violence. When it comes to the area of sexual violence, which this analyses deals with, in the period from November 2013 to November 2017, only the Criminal Code of Republic Srpska went through the process of harmonization with the provisions of the Istanbul Convention. However, this was only a partial effort. Namely, during these changes, the opportunity was missed to provide a precise definition of consent and to address the issue of marital sexual violence, as well as to clearly define the terms used to describe the criminal offense of rape and other sexual violence in Bosnia and Herzegovina. Of particular concern is the fact that similar amendments of the Criminal Code of Federation Bosnia and Herzegovina and the Criminal Code of Brčko District are even not under preparation. Currently, the legal solutions from the Criminal Code of Republic Croatia are most coherent with the provisions of the Istanbul Convention (e.g. we have seen that the definition of "consent" is precisely given in the Criminal Code of Republic Croatia) and can serve as an example of a positive practice and basis for similar changes in Bosnia and Herzegovina. Nevertheless, it is obvious that, for regulating numerous issues, it is necessary to change the entity and Brčko District laws and harmonize them with the Istanbul Convention. More precise regulation of consent in other criminal laws could also encourage victims to report a crime. During the writing of this paper and analysing the court practice, we came to the conclusion that perpetrators of the criminal offense of rape often appear as returnees, even if they committed the acts in different countries. This would mean that a unique register of the of persons convicted of the criminal offense of rape (register of rapist) should be established for the countries in the region. The register of rapists would not be public - it would be available only to judicial and police authorities. Analysing the rape case law in Bosnia and Herzegovina (we have not analysed other legal systems in terms of systematic insight into a number of cases) we discovered a mild penal policy (usually the sentence of imprisonment from one to two years). In this respect, consideration should be given to increasing the prescribed sentences for the criminal offense of rape, perhaps even the introduction of the sentence of life imprisonment, like in the Criminal Code of the Republic of Serbia (noting that this country should also harmonize the Criminal Code with the "Strasbourg" standards and to introduce the possibility of parole).

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THE CONTROL OF CRIMINAL PROSECUTION IN BOSNIA AND HERZEGOVINA AND CROATIA

The article deals with the critical assessment of the control of criminal prosecution in the legal systems of Bosnia and Herzegovina and the Republic of Croatia. For the purpose of this paper, criminal prosecution concerns only decisions to initiate, continue and discontinue criminal procedure but not to take individual investigative measures or other procedural actions. The normative and comparative methods are predominantly employed in the article to conduct a qualitative assessment of relevant provisions of criminal procedure acts of both countries. Additionally, the paper evaluates its subject through the lens of the jurisprudence of the European Court of Human Rights. Albeit the mentioned countries belong to the same legal tradition, they have adopted different legal solutions regarding the conception of the control of criminal prosecution. B&H law primarily relies on the internal control of criminal prosecution through the use of a complaint filed with the prosecutor's office. In contrast, besides establishing judicial control of criminal prosecution, Croatian law retained subsidiary prosecution as a form of external control of prosecutorial function. While the defendant has the right to be shielded from arbitrary criminal prosecution, the injured party as a person suffering harm from a criminal offense has the right to effective criminal prosecution in the case of serious violations of his/her human rights. Hence, the article aims to establish that the nonexistence of external control of criminal prosecution in B&H law violates the mentioned rights of the defendant and those of the injured person. The article also argues that the legal solutions in Croatian law regarding the external control of criminal prosecution could be used to some extent as a model for future reform of criminal procedure in B&H. Lastly, the article highlights that subsidiary prosecution as a corrective to prosecutorial function in Croatia has its shortcomings.

Keywords: Criminal procedure - the prosecutor - the injured party - criminal prosecution - control.

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1. INTRODUCTION

In addition to being neighbouring states, with the exception of approximately the last thirty years when they became independent states, Bosnia and Herzegovina and the Republic of Croatia (hereinafter: Croatia) were incorporated in the same state. Moreover, they belong to the same civil legal tradition as all other states of continental Europe. The criminal procedure of Bosnia and Herzegovina is regulated by the laws that entered into force in 2003.[299] The present-day Croatian criminal procedure is governed by the Criminal Procedure Act of the Republic of Croatia (hereinafter: the CPA of Croatia) adopted by the Parliament of the Republic of Croatia in 2008.[300] With the entry into force of the laws in question, the Bosnian and Croatian criminal procedure has been significantly reformed. It is worth observing that the chief objective of the reforms in question was the replacement of the judicial investigation with the prosecutorial investigation (Đurđević, 2014, p. 61). From the normative point of view, the criminal procedural legislation of Bosnia and Herzegovina recognizes and governs four distinct stages of criminal proceedings - investigation, indictment proceedings, the main hearing, proceedings on ordinary and extraordinary legal remedies (Sijerčić-Čolić, 2012b, p. 21).[301] Croatian criminal procedure is divided into two major stages: the pre-trial procedure and the main hearing, between which there are intermediate proceedings of judicial review of the indictment, and the proceedings on ordinary and extraordinary legal remedies.[302] The function of the criminal prosecution is entrusted to the prosecutor in Bosnia and Herzegovina, and to the state attorney in Croatia. The public prosecution service in the mentioned states is an autonomous and independent, hierarchically structured, monocratic judicial body authorized and bound to act against perpetrators of criminal offenses and to execute other duties in accordance with the law (Turković, 2008, p. 266). The function of public prosecution in mentioned

[299] The legal system of Bosnia and Herzegovina is a complex legal system comprising the legal systems of the state of Bosnia and Herzegovina and those of its entities - the Federation of Bosnia and Herzegovina and the Republic of Srpska, and the legal system of the Brčko District of Bosnia and Herzegovina, which is the *sui generis* administrative-territorial unit under the direct jurisdiction of Bosnia and Herzegovina. In Bosnia and Herzegovina, there are four laws in force governing the criminal procedure of the abovementioned legal systems. The Criminal Procedure Act of Bosnia and Herzegovina (hereinafter: the CPA of B&H) governs the criminal proceedings before the Court of Bosnia and Herzegovina. The Criminal Procedure Act of the Federation of Bosnia and Herzegovina governs the criminal proceedings before the courts of the Federation of Bosnia and Herzegovina. The Criminal Procedure Act of the Republic of Srpska governs the criminal proceedings before the courts of the Republic of Srpska. The Criminal Procedure Act of the Brčko District of Bosnia and Herzegovina governs the criminal proceedings before the courts of the Brčko District of Bosnia and Herzegovina.

[300] Unlike Bosnia and Herzegovina, Croatia is a unitary state in which criminal procedure is governed by a single criminal procedure law brought by the Parliament of the Republic of Croatia.

[301] However, from the structural point of view, the criminal procedure of Bosnia and Herzegovina consists of the pre-trial procedure comprising the investigation and the indictment proceedings, the main hearing, that is to say, the trial, and proceedings on legal remedies (Bubalović, 2008, p. 1133).

[302] Unlike the criminal procedure of Bosnia and Herzegovina, where there is no division between the pre-investigatory and the investigatory phase, a peculiar feature of the Croatian criminal procedure is the division of the preliminary proceedings into an informal phase—the inquiry of criminal offenses (pre-investigatory phase) — and the second formal phase: the investigation (Pavišić, 2013, pp. 503-526).

states operates on the basis of the principle of legality of criminal prosecution that obliges the prosecutor to institute and stay in the criminal proceedings as long as requirements for criminal prosecution exist (Bayer, 1972, p. 167). Besides the legality principle, the CPA of B&H and the CPA of Croatia also accept the principle of mutability under which the prosecutor may desist from prosecution if some of the factual or legal assumptions for prosecution cease to exist during proceedings (Pavišić, 2013, p. 192; Simović & Simović, 2016, p. 170). However, despite the abovementioned similarities, the legal systems of the states in question have adopted different solutions with regard to the control of criminal prosecution, which has significant implications, for the following reasons. Namely, even though the prosecutor in Bosnia and Herzegovina and Croatia is the professional enjoying the constitutional guarantees of independence and autonomy, bound by the principle of legality of prosecution, he/she may still wrongly (intentionally or unintentionally) assess the requirements for prosecution and violate the rights of certain persons if the prosecutor opts to institute or desist from criminal prosecution (Novokmet, 2017, pp. 378-379). First and foremost, citizens should not be subjected to criminal proceedings if requirements for prosecution are not met, since such action violates the rule of law and the principle of legal certainty, and the subjective right of the individual not to be subjected to criminal proceedings if all the factual and legal requirements for that are not fulfilled. On the other hand, from the perspective of the victim of serious human rights violations, the decision not to prosecute may violate his/her right to an effective investigation derived from international legal instruments such as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and the standards developed in the jurisprudence of the European Court of Human Rights (hereinafter: the ECtHR) (Kamber, 2017; Ochoa, 2013; Seibert-Fohr, 2009). Namely, if the prosecuting authorities decide not to prosecute, there are different mechanisms aimed at being the corrective of such decisions ending the criminal proceedings that can exist in the form of: (1) limited authority for private parties to initiate or continue criminal prosecution as authorized prosecutors in the capacity of private or subsidiary prosecutors; (2) independent review of initial non-prosecution decisions, upon request from the victim; and (3) multiple, independent public prosecution agencies with independent authority to bring charges for the same wrongdoing - the last mechanism being a characteristic feature of the criminal justice system of the United States of America only (Brown, 2018, pp. 861-862). The prerequisite for the realization of the legal standing of the victim in the criminal proceedings is the existence of an adequate (effective) legal remedy with regard to the decision not to prosecute (the so-called negative prosecutorial decision) whereby the prosecutor desists from criminal prosecution (Beloof, 2005, pp. 258-259). In contrast, the absence of such a remedy precludes the realization of the legal standing of the victim, making rights belonging to the victim illusory and theoretical (Beloof, 2005, p. 259). Consequently, the right of the victim to an effective remedy, which would enable the victim to challenge the decision not to prosecute, occupies a prominent place in the jurisprudence of the ECtHR.[303] However,

[303] If the decision not to prosecute can violate certain human rights guaranteed in the ECHR, the state has to give the person concerned an effective remedy before a national authority. (Đurđević, 2013a, p. 1004)

in European national criminal justice systems there is no uniform approach with regard either to the availability of review of the decisions not to prosecute or, if available, the scope of that review. (*Armani Da Silva v. the United Kingdom* [GC], § 279). Nonetheless, it is worth emphasizing that the requirement of an effective investigation of serious human rights violations stemming from the procedural positive obligation includes the obligation in terms of accessibility of the investigation to the victim's family to the extent necessary to safeguard their legitimate interests (*Hanan v. Germany* [GC], § 208). Even though the procedural obligation concerning an effective investigation does not oblige national legislators to establish a judicial review of investigative decisions (*Hanan v. Germany* [GC], § 220), there is no doubt that the procedural mechanism standing at the disposal of the victim must satisfy the requirements of effectiveness with the aim of providing the victim with a realistic possibility to successfully challenge the decision not to prosecute (*Isayeva v. Russia*, §§ 209-223).

2. THE CONTROL OF CRIMINAL PROSECUTION IN BOSNIA AND HERZEGOVINA

2. 1. The Decision to Prosecute

In the judicial concept of the investigation that had been in force in Bosnia and Herzegovina and Croatia before the already mentioned reforms of the criminal procedural legislations of the countries in question, if the prosecutor deemed that all the factual and legal requirements for the criminal prosecution exist, he/she could not unilaterally initiate investigation, and consequently the criminal procedure; instead, the prosecutor, in that case, could only file the request for the conducting of investigation with the investigative judge (Bayer, 1972, p. 140). Afterward, the investigative judge had the obligation to examine the prosecutorial request for the conducting of the investigation in order to determine whether such a request was grounded. If the investigative judge considered that the prosecutorial request is grounded, he/she would render the decree for the conducting of the investigation. Accordingly, when proceeding upon the request of the prosecutor for the conducting of the investigation, the investigative judge exercised *ex officio* control of the legality of all the assumptions for criminal prosecution. Therefore, the control exercised by the investigative judge was mandatory. Additionally, the judicial concept of the investigation established the twofold control of the legality of criminal prosecution. The judicial control over the legality of the initiation of the investigation went one step further (Đurđević, 2010, p. 15). Namely, the decree for the conducting of the investigation had to be delivered to the accused. The reason for this lay in the fact that the accused, that is, the person against whom the decree for the conducting of the investigation was brought, was entitled to lodge an appeal against such a decree. In the latter case, the control over the initiation of the investigation was optional and dependent upon the request of the accused, expressed in the appeal. Hence, in view of the fact that the investigation commenced with the decision of the court, the investigation itself was a constitutive part of court proceedings in structural and functional terms. Further, deciding upon the submitted appeal was within the competence of a panel

of three judges, while the investigative judge who brought the challenged decree for the conducting of the investigation could not be a member of this panel, with the aim of ensuring the impartiality and objectiveness of the court. Besides, it is worth emphasizing that the twofold judicial control over the initiation of the investigation satisfied the requirement stemming from the principle of equality of arms and the adversarial principle, in view of the fact that the accused was on equal footing with the prosecutor with regard to the issuing of the decree for the conducting of the investigation, that is to say, the initiation of the investigation and consequently the initiation of the criminal procedure.

However, according to the present-day procedural solutions in force in Bosnia and Herzegovina, the prosecutor opens the investigation[304] by rendering the order on conducting the investigation if grounds for suspicion that the criminal offense has been committed exist (Article 216, paragraph 1 of the CPA of B&H), where the CPA of B&H only stipulates the content of the order in question.[305] Hence, the reform of the criminal procedural legislation of Bosnia and Herzegovina has significantly exacerbated the legal standing of the person against whom criminal proceedings are being conducted when it comes to the commencement and the conducting of the investigation.[306] This is because the prosecutor has the right to unilaterally open the investigation on the one hand, while the suspect does not have any procedural mechanisms at disposal to challenge the prosecutorial decision, on the other. Accordingly, criminal prosecution has become the monopoly of the prosecutor, deprived of any form of judicial or other effective control during the investigation. Furthermore, according to the prevailing view adopted in domestic legal scholarship, the order to conduct the investigation is an internal act of the prosecutor that does not affect the legal standing of the suspect during the investigation (Sijerčić-Čolić *et al*., 2005, p. 587). What is more, such a view has been embraced by the Constitutional Court of Bosnia and Herzegovina in one of its decisions brought in 2017 (The Partial Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina, no. U-5/16, §§ 68-72). Namely, in the case in question, the Constitutional Court of Bosnia and Herzegovina has taken the view that the order for the conducting of the investigation is an internal and preparatory act of the prosecutor. In support of this view, the Constitutional Court of Bosnia and Herzegovina held that the order for the conducting of the investigation does not have to be delivered to the suspect, where the suspect does not have to be notified on the initiation of the investigation nor on any of procedural actions executed against him/her in the

[304] The investigation is the first stage not only within the general (ordinary) criminal proceedings but also within some special criminal proceedings, such as the proceedings for rendering the penal order and the criminal proceedings against legal persons. What is more, the investigation is the only mandatory stage of the criminal proceedings in Bosnia and Herzegovina, given that the criminal procedure can advance to its next phase only on the condition that the investigation is completed, whereby the suspect must be examined during the investigation if the prosecutor intends to file the indictment.

[305] In accordance with the provision of Article 216(2) of the CPA of B&H, the order on conducting the investigation must contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. Besides, the prosecutor shall list in the order in question which circumstances need to be investigated and which investigative measures need to be undertaken.

[306] In that regard, „the change of the subject with investigative function from the judge to prosecutor results in the loss of implicit judicial protection of individual rights". (Đurđević, 2013a, p. 1002)

course of the investigation. The Constitutional Court has further observed that the mere issuance of an order to conduct the investigation does not generate any consequences for the suspect in terms of restriction of certain rights. Finally, following the preceding arguments as regards the order for the conducting of the investigation, the Constitutional Court of Bosnia and Herzegovina has concluded that the provision of the CPA of B&H regulating the content of the order on conducting the investigation is in line with Article III(3)(e) of the Constitution of Bosnia and Herzegovina, as well as with Articles 6 and 13 of the ECHR (The Partial Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina, no. U-5/16, §§ 71-72).

However, these arguments are unpersuasive, since the criminal procedure itself, in the first place, is a repressive measure of the state directed against the affected individual (Grubač, 2014, p. 222). Moreover, it is an undeniable fact that the opening of the criminal procedure imposes certain obligations upon the citizen and limits his/her rights and freedoms, and for this reason, the decision initiating criminal procedure must be susceptible to judicial review with the aim of protecting the individual against unfounded or unlawful criminal prosecution (Grubač, 2014, *ibid.*). Also, even though during the investigation there is no formal indictment act upon which the court would make a decision, the order on conducting the investigation, nonetheless, constitutes a criminal charge (an indictment act) in a substantive sense, considering that the order in question contains the description of the criminal offense for which a certain person is charged (Škulić, 2015, p. 40). Besides, according to the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina (democratic principles), Bosnia and Herzegovina shall operate under the rule of law. With regards to this, an element inherent to the rule of law, despite not being explicitly stipulated by the Constitution of Bosnia and Herzegovina, is the principle of legal certainty, which is a view confirmed in numerous decisions of the Constitutional Court of Bosnia and Herzegovina (Steiner *et al.*, 2010, pp. 88-93). Furthermore, the principle of legal certainty requires that individuals have effective legal protection from the arbitrariness of the bodies of state authority when the latter execute their competences (Steiner *et al.*, 2010, pp. 90-92), whereby judicial protection plays a crucial role when shielding individuals from such unconstitutional or unlawful proceedings.

Turning back to the issue of the power of the prosecutor to unilaterally initiate the investigatory stage of the criminal procedure, the question is why the procedural behaviour of the prosecutor would not be susceptible to the same level of scrutiny as is the case with the court, whose decisions brought in the first instance are, as a rule, susceptible to the review of the second-instance court, thus enabling a higher authority to examine the disputed decision in an impartial and objective manner, ensuring, in doing so, the observance of the rule of law and the principle of legal certainty. In other words, there are no convincing reasons why different standards should apply to the prosecutor when it comes to his/her procedural behaviour. Namely, the requirements derived from the rule of law and the principle of legal certainty incorporated in the Constitution of Bosnia and Herzegovina can hardly be achieved and maintained if the individual is not shielded from ungrounded or unlawful criminal prosecution being exercised by the prosecutor during the investigation. Therefore, following this line of thought, in light of the above considerations,

in addition to obliging the prosecutor to notify the defence of the commencement of the investigation through the delivery of the order on conducting the investigation to the defence, the Bosnian legislator should bestow the suspect and his/her defence attorney with the right to lodge an appeal against the order on conducting the investigation (Pilić & Rajić, 2021, p. 182).

2. 2. The Decision not to Prosecute

2. 2. 1. The Decision not to Prosecute in the Investigation

In addition to significantly reducing the role of the suspect in the first stage of the criminal procedure - the investigation (Dodik, 2012, p. 30), the reform of the criminal procedural legislation of Bosnia and Herzegovina also marginalized the procedural legal standing of the victim of the criminal offense (hereinafter: the victim) in each stage of criminal proceedings, considering that the role of the victim[307] in the criminal procedure is practically confined to the role of the witness on the condition that the prosecutor deems that it is necessary to hear the victim in that capacity (Dautbegović & Pivić, 2010, pp. 13-32). The present-day criminal procedural legislation does not contain the definition of the victim. The term victim is only sporadically mentioned in few provisions of the CPA of B&H. It is worth observing that the victim can participate in the criminal procedure only in the capacity of the injured party, which is defined as a person whose personal or property rights have been threatened or violated by the criminal offense (Article 20(h) of the CPA of B&H), whereby the notion of the injured party refers to both natural and legal persons (Sijerčić-Čolić, 2012a, p. 231). As a result of the reform of the criminal procedure of Bosnia and Herzegovina, notwithstanding the fact that one of the principal aims was the democratization of the criminal procedure as a whole and the enhancement of human rights of its participants, the victim has lost the possibility to acquire the status of a party to the criminal procedure in the roles of the subsidiary prosecutor and the private prosecutor, since the (public) prosecutor has completely monopolized the function of criminal prosecution (Novokmet, 2015, p. 416).

The weakened legal standing of the injured party is clearly perceived when one takes into account the injured party's possibilities and rights in the case of the decision not to prosecute. The injured party has the following rights during the investigation: to file a report on the committed criminal offense, to file the claim under property law, to be notified of

[307] The Criminal Procedure Act of Bosnia and Herzegovina, the Criminal Procedure Act of the Federation of Bosnia and Herzegovina, the Criminal Procedure Act of the Brčko District of Bosnia and Herzegovina contain identical provisions with regard to the procedural standing of the victim of the criminal offense in the event of the decision not to prosecute. The procedural solutions examined in this paper are those of the Criminal Procedure Act of Bosnia and Herzegovina. Nonetheless, this analysis is relevant to the criminal procedural legislation of the Federation of Bosnia and Herzegovina and those of the Brčko District of Bosnia and Herzegovina. However, the procedural solutions contained in the Criminal Procedure Act of the Republic of Srpska are different in that respect. Hence, the analysis of this paper and conclusions does not refer to the legal system of the Republic of Srpska, since its legal system grants the victim of the criminal offense different (broader) rights in the event of the decision not to prosecute.

the non-conduct and discontinuation of the investigation, and to file a complaint against such decisions, and the right to be heard as a witness (both in the investigation and at the main hearing) (Simović, 2014, p. 51). The decision not to prosecute may occur in the investigation in two procedural situations. As a corollary of the right and duty to issue the order on conducting the investigation, the prosecutor also has the right to issue the order not to conduct the investigation. Furthermore, only the prosecutor may discontinue the investigation by rendering the order to discontinue the investigation (Simović & Šikman, 2017, p. 381). It is worth observing that grounds for the nonconduction and the discontinuation of the investigation are factual and legal (Sijerčić-Čolić, 2012b, pp. 35-36, 55). When the prosecutor orders that the investigation shall not be conducted, he/she must notify the injured party and the person who reported the offense within 3 (three) days of the fact that the investigation shall not be conducted, as well as of the reasons thereof (Article 216, paragraph 4 of the CPA of B&H). In such a case, the injured party and the person who reported the offense have the right to file a complaint with the chief prosecutor's office within 8 (eight) days (Article 216, paragraph 4 of the CPA of B&H). The same procedure applies after the prosecutor renders the order to discontinue the investigation, but the person who reported the offense does not have the right to file a complaint in this case (Article 224, paragraph 2 of the CPA of B&H).[308]

However, the complaint is regulated in an inappropriate and too superficial manner, given that the legislator left out a number of issues related to the complaint from the CPA of B&H (Barašin & Hasanspahić, 2009, p. 513). Namely, when regulating the complaint against the order not to conduct the investigation and the order to discontinue the investigation, the criminal procedural legislation prescribes only: 1) subjects to which the right to file the complaint belongs - the injured party and the person who reported the offense, while the right to file the complaint against the order to discontinue the investigation belongs exclusively to the injured party; 2) the obligation of the prosecutor to notify in writing the aforementioned persons of the reasons for non-conduct and the discontinuation of the investigation within (3) three days from the day of issuing the order on non-conduct, i.e. the discontinuation of the investigation; 3) the body to which the complaint is submitted which is the office of the chief prosecutor; 4) the deadline for filing the complaint, which is eight days from the day of the delivery of the notification that the prosecutor has decided not to conduct the investigation or that he/she decided to discontinue the investigation (Janković, 2018, p. 217). The shortcomings of the complaint consist in the following. In the first place, the law in question does not determine within whose competence it is to decide on the submitted complaint of the injured party. The CPA of B&H only stipulates that the complaint is submitted to the office of the chief prosecutor, but this does not mean that bringing the decisions regarding the complaint is within his/her competence (Dodik, 2012, pp. 27-28). Besides, the CPA of B&H does not stipulate the composition of the office of the chief prosecutor. In summary, the Bosnian legislator does not regulate who should decide upon the submitted complaint of the injured party.

[308] It is worth observing that the order not to conduct the investigation and the order to discontinue the investigation become final if the complaint is not filed or if the complaint is dismissed as inadmissible or rejected as ungrounded.

All things considered, the question arises as to whether the complaint against the order not to conduct the investigation, that is, the complaint against the order to discontinue the investigation should be the responsibility of the acting prosecutor, the chief prosecutor, the chief prosecutor's office, or whether it should be decided on by the college of prosecutors of the relevant prosecutor's office (Dodik, 2012, *ibid.*). Therefore, it is clear that the law in question does not ensure that the complaint of the injured party is examined objectively and impartially, due to the fact that there is no guarantee that the authority or the official person exercising review of the decision not to prosecute is different from the authority or the official person making such a contested decision in the first place (Novokmet, 2015, p. 418). In the second place, the law also does not stipulate the deadline for making decisions with regard to this legal remedy. In the third place, the provisions of the criminal procedural legislation of Bosnia and Herzegovina also do not prescribe nor govern the procedure that follows after the submission of the complaint. In the fourth place, the CPA of B&H does not regulate the admissibility and the groundedness of the complaint. In the fifth place, the additional omission of the Bosnian legislator consists in the fact that the prosecutor is not obliged to notify the injured party about the outcome of the procedure upon the submitted complaint. In the sixth place, the CPA of B&H does not regulate whether the prosecutor must bring a formal decisions upon the submitted complaint of the injured party, nor the form of such decisions, namely, whether it is a ruling or an order. Hence, all of these questions regarding the complaint are left to each individual prosecutor's office to determine by its internal regulations, which leads to turning the procedure triggered by the complaint into an administrative matter (Grubač, 2005, p. 535). Such a procedural solution is unacceptable, since this legal remedy is the only form of control over the decision not to prosecute in the investigative stage of the criminal proceedings. Considering all these omissions of the Bosnian legislator when it comes to the procedure that follows after the submission of the complaint, the legal remedy in question does not satisfy the requirement of an effective legal remedy. In other words, the criminal procedural legislation does not regulate the legal destiny of the submitted complaint. Hence, all things considered, the complaint against the order not to conduct the investigation and the order to discontinue investigation remains a dead letter of the law (Novokmet, 2015, *loc. cit.*). It seems therefore that the right to file the complaint is the right of a purely declarative nature that does not bear any practical consequences to the outcome of the criminal proceedings (Halilović, Adžajlić-Dedović & Budimlić, 2019, p. 84).

What is more, it is worth pointing out that the complaint, as envisaged by the Bosnian legislator, is not considered an effective legal remedy in light of the jurisprudence of the ECtHR for the purposes of Article 35 of the ECHR (Schabas, 2015, p. 552). Namely, according to the well-established case-law of the ECtHR, as regards an appeal to a higher prosecutor, such a hierarchical appeal does not give the person making it a personal right to the exercise by the state of its supervisory powers (*Horvat v. Croatia*, § 47, *Belevitskiy v. Russia*, § 59). Furthermore, the ECtHR observed that a hierarchical complaint presents an information statement followed by a request to that authority to make use of its power to order an additional inquiry if it deems appropriate to do so. Hence, the higher prosecutor is not obliged to hear the complainant, and the subsequent proceedings are entirely a

matter between the supervising prosecutor and his subordinates. Consequently, the complainant does not have a role of a party to any proceedings and is entitled only to obtain information about the way in which the supervisory body has dealt with his hierarchical appeal (*Belevitskiy v. Russia*, § 60). Hence, taking into account the above analysis of the provisions of the CPA of B&H regulating the complaint, and the cited judgments of the ECtHR, it is an undeniable fact that the complaint against the order not to conduct the investigation, that is, the complaint against the order to discontinue the investigation is not effective legal remedy that would enable the victim to challenge the decision not to prosecute rendered in the investigation.

In addition, according to the ECtHR, the victim must be notified of the decision not to prosecute and be provided with access to the investigation and court documents in order to participate effectively in proceedings aimed at challenging the decision not to prosecute (*McKerr v. the United Kingdom*, §§ 111-115; *Ramsahai and Others v. the Netherlands* [GC], § 349). In the case of *Khamzayev and Others v. Russia*, the ECtHR found the violation of the right to life with regard to an effective investigation, since the applicants were only notified of the outcome of the criminal proceedings, but did not have the access to the decision not to prosecute (*Khamzayev and Others v. Russia,* §§ 205-207). The ECtHR held in the same case that the applicants could have hardly identified possible defects in the investigation and brought them to the attention of a domestic court, or presented, in a comprehensive appeal, any other arguments that they might have considered relevant. In other words, taking into account the circumstances of the case in question, the applicants were left without a realistic opportunity to effectively challenge the decision not to prosecute (*Khamzayev and Others v. Russia,* § 205). In the same vein, in the case of *Anık and Others v. Turkey,* the ECtHR found the violation of the procedural obligation regarding an effective investigation because the applicants were deprived of the opportunity to effectively challenge the decisions not to prosecute, given they could only have the access to their own statements but not to any other documents from the investigation file (*Anık and Others v. Turkey*, §§ 75-79). Consequently, the Bosnian law does not satisfy the requirements stemming from the jurisprudence of the ECtHR, since the injured party is not entitled to inspect the case file, and the decision not to prosecute rendered in the investigation does not have to be delivered to the injured party, whereby the latter does not have the right to request to be provided with the copy of such a decision.

2. 2. 2. The Decision not to Prosecute in the Indictment Proceedings

After the prosecutor completes the investigation, he is obliged to prepare and refer the indictment to the preliminary hearing judge (Article 226, paragraph 1 of the CPA of B&H). These procedural actions mark the termination of the investigation and the beginning of the next stage of the criminal proceedings - the indictment proceedings. The prosecutor may employ the principle of mutability in the course of the indictment proceedings and desist from prosecution. In this stage of the procedure, the prosecutor desists from prosecution by withdrawing the indictment. The conditions, as well as the consequences of the withdrawal of the indictment, are stipulated in Article 232 of the CPA

of B&H, under which the prosecutor may withdraw the indictment without prior approval before its confirmation, or after the confirmation and before the commencement of the main hearing, only with the approval of the preliminary hearing judge who confirmed the indictment in question. Hence, the prosecutor may desist from prosecution both before the confirmation of the indictment, and after the confirmation of the indictment. However, bearing in mind the cited provision, there is no doubt that conditions for the withdrawal of the indictment are not the same in both cases, considering that the withdrawal of the indictment after its confirmation is conditional upon the approval of the preliminary hearing judge who previously confirmed the indictment in question. Before the confirmation of the indictment, the prosecutor may withdraw the indictment by simply filing the request for withdrawal with the court, without having to provide reasons for doing so. In contrast, after the confirmation, the prosecutor must provide the reasons for withdrawal, since providing reasons enables the preliminary hearing judge to establish whether such a prosecutorial action is in accordance with the law governing criminal procedure (Sijerčić-Čolić, 2012b, p. 79). At first glance, the mandatory review over the decision not to prosecute after the confirmation of the indictment offers significant protection to the injured party. However, on close examination, it can be concluded that this is not the case. Namely, even if the preliminary hearing judge finds that the request for the withdrawal of the indictment is ungrounded and decides not to adopt such a request, the prosecutor may unilaterally desist from prosecution in the course of the main hearing without any restrictions. The consequences of the withdrawal are the same in both cases, since the court issues the decree discontinuing the criminal proceedings, which is delivered to the suspect (if the withdrawal occurred before the confirmation of the indictment), the accused (if the withdrawal occurred after the confirmation of the indictment and before the commencement of the main hearing), the defence attorney, the injured party (Article 232, paragraph 2 of the CPA of B&H). In that case, an interesting situation arises. In this connection, the posed question is whether the injured party has the right to file the appeal against the decree discontinuing the criminal proceedings. According to the provision of Article 318, paragraph 1 of the CPA of B&H, the parties, the defence attorney, and persons whose rights have been violated may always file the appeal against the decree of the court rendered in the first instance unless when it is explicitly prohibited to file the appeal under the CPA of B&H. When it comes to the right to appeal against the first-instance judgment, the injured party may only submit the appeal with respect to on the costs of the criminal proceedings and with respect to the decision on the claim under property law (Article 293, paragraph 4 of the CPA of B&H). For this reason, it would be difficult to argue that the injured party has more extensive rights regarding the appeal against the decree of the court discontinuing the criminal proceedings than in the case of appeal against the first-instance judgment. Hence, the injured party does not have the right to appeal against the decree discontinuing the criminal proceedings in view of the fact that the law in question does not recognize such a possibility (Halilović, Adžajlić-Dedović & Budimlić, 2019, p. 85). Therefore, with regard to the injured party, the purpose of the delivery of the decree discontinuing the criminal proceedings is only the notification of the final outcome of the proceedings (Pivić, 2017, p. 40).

2. 2. 3. The Decision not to Prosecute in the Main Hearing

The principle of mutability also applies in the course of the main hearing, that is to say, the trial as the main and the central stage of criminal proceedings (Sijerčić-Čolić, 2012b, p. 101). Consequently, the prosecutor may desist from criminal prosecution before the end of the main hearing (Article 38 of CPA of B&H) by dropping the charge. In such a case, the court has no other option but to hand down the judgment rejecting the charge (Article 283(b) of the CPA of B&H). Therefore, given that the prosecutor has the right to desist from prosecution during the main hearing, the posed question is when this stage of the criminal procedure commences and ends. While the main hearing commences with the reading of the indictment (Article 260, paragraph 1 of the CPA of B&H), the end of this stage of the criminal proceedings is associated with the closing arguments. Upon the completion of the evidentiary proceedings, the judge or the presiding judge shall call for the prosecutor, injured party, defence attorney, and the accused to present their closing arguments (Article 277, paragraph 1 of the CPA of B&H). When all closing arguments are completed, the judge or the presiding judge shall declare the main hearing closed, and the court shall retire for deliberation and voting for the purpose of reaching the verdict (Article 278 of the CPA of B&H). Considering the provisions of the criminal procedural legislation of Bosnia and Herzegovina dealing with the commencement and the closing of the main hearing, the prosecutor may desist from criminal prosecution after reading the indictment and before presenting his/her closing arguments (Sijerčić-Čolić *et al*., 2005, p. 726). Hence, the prosecutor may desist from criminal prosecution in the closing arguments, since the main hearing is still not closed in this procedural moment (Simović & Simović, 2014, p. 160).

In addition to having the right to desist from prosecution in each stage of the first-instance criminal proceedings, the prosecutor may also desist from prosecution in the course of the second-instance proceedings (Sijerčić-Čolić *et al*., 2005, *loc. cit*.). Turning back to the provision of Article 38 of the CPA of B&H governing the principle of mutability, the prosecutor may desist from criminal prosecution during the proceedings before the second-instance panel, when so envisaged by the CPA of B&H. Nevertheless, the CPA of B&H does not offer a clear answer when it comes to the right of the prosecutor to desist from prosecution during the second-instance proceedings. However, the provisions applying to the main hearing in the first-instance proceedings also apply to the hearing in the second-instance proceedings (Article 317, paragraph 1 of the CPA of B&H). Hence, the prosecutor may drop the charge during the second-instance proceedings upon the condition that the hearing is being held in this stage of the criminal procedure.

If the prosecutor desists from criminal prosecution during the main hearing, the court does not have any possibility to proceed with the main hearing, since one of the main prerequisites for the conducting of criminal proceedings - the request of the authorized prosecutor is missing. In that case, furthermore, the accused also does not have the right to request the further conduct of proceedings. Last but not least, the injured party does not have any procedural instruments at his/her disposal to prevent the prosecutor from dropping the charge. Therefore, speaking of the considered provisions, it is unclear why the withdrawal of the indictment after its confirmation is conditional upon the approval of the

court, while the dropping of the charge that has the same consequence is not susceptible to any restrictions or control even though it comes into play immediately after the reading the indictment (Grubač, 2005, p. 540).

In addition, according to the well-established case-law of the ECtHR, the procedural requirements derived primarily from Article 2 and Article 3 of the the ECHR oblige national authorities to institute and conduct an investigation capable of leading to the establishment of the facts and identifying and – if appropriate – punishing those responsible (*Sabalić v. Croatia*, § 96). Furthermore, in the case when the official investigation has led to the institution of criminal proceedings in the national courts, the proceedings considered as a whole, including the trial stage, must satisfy the requirements of Article 2 and Article 3 of the ECHR (*M.C. and A.C. v. Romania*, § 112; *Sabalić v. Croatia*, § 96). Accordingly, the requirement of effective investigation developed in the jurisprudence of the ECtHR is not exclusively confined to the investigation, but is applicable in the entire criminal proceedings, including indictment proceedings, the main hearing, and proceedings before the court of the second instance, that is to say, appeals proceedings (Đurđević, 2014, p. 75). Hence, taking into account the above considerations, the possibility of the prosecutor to unilaterally withdraw the indictment during the indictment proceedings and to drop the charge during the main hearing without any form of external control is contrary to the requirement stemming from the positive procedural obligation of an effective investigation that applies during the entire criminal proceedings (*Öneryildiz v. Turkey*, § 95), including the trial stage (Seibert-Fohr, 2009, p. 137). Having regard to this, it is worth pointing out that the victim cannot realize his/her legal standing in the criminal proceedings if the prosecutor can unilaterally make the decision not to prosecute that is not susceptible to any review mechanism, as is the case in the criminal procedural legislation of Bosnia and Herzegovina during the indictment proceedings, the main hearing, and the hearing (the trial) before the second-instance panel.[309]

3. THE CONTROL OF CRIMINAL PROSECUTION IN THE REPUBLIC OF CROATIA

3. 1. The Decision to Prosecute

The CPA of Croatia adopted in 2008 is still in force, albeit it has gone through significant amendments with the purpose of correcting its many flaws stemming from its contradictoriness to the Constitution of the Republic of Croatia and the ECHR (Đurđević, 2012, pp. 409-438). With regard to the institution of the investigation, the Croatian legislator at first adopted the same procedural solution, according to which the state attorney had

[309] According to Myers (2003, p. 253), among other things, the elimination of prosecutorial discretion coupled up with the strong victim participation in the criminal procedure, as well as an active judicial role in pre-trial decision-making process expressed in the power of the court to control the criminal proceedings in sense that the court may investigate when the prosecutor declined to do so, and the power of the court to exercise the review of the decision not to prosecute, can contribute to effective criminal prosecution of serious human rights violations while they offer the protection to the victim at the same time. As we have seen in the above analysis, all these procedural instruments are missing from the criminal procedural legislation of Bosnia and Herzegovina.

the right to unilaterally assess the legal and factual requirements for criminal prosecution without any form of external control. Nevertheless, such a construction of the investigation that left the accused without any protection against groundless and unlawful criminal prosecution in the course of this stage of criminal proceedings encountered harsh criticism as being unconstitutional (Đurđević, 2010, pp. 7-23). Therefore, with the aim of rendering the criminal procedure legislation compliant with the decision of the Constitutional Court of the Republic of Croatia that struck down numerous provisions of the CPA of Croatia, the original text of the CPA was comprehensively amended in 2013 (Novokmet, 2017, p. 382). The significance of the adopted amendments consists in the fact that they present the constitutionalization and the judicialization of the pre-trial proceedings considering that they have reintroduced judicial control of criminal prosecution (Đurđević, 2013b). In so doing, the Croatian legislator has abolished the monopoly of the state attorney in terms of criminal prosecution on the one hand, while returning the investigation in the framework of the criminal procedure in the narrow sense, on the other hand. In the abovementioned decision, the Constitutional Court of the Republic of Croatia has confirmed that judicial protection from unlawful criminal prosecution is inherent to the spirit of the Croatian Constitution, thereby constitutionalizing the right to judicial protection during the entire criminal proceedings (Đurđević, 2012, p. 425).[310]

According to the amendments of the CPA of Croatia in question, the investigation commences with the decree on the investigation (Article 217, paragraph 1 of the CPA of Croatia). Rendering of the decree on the investigation is within the competence of the state attorney (Article 217, paragraph 1 of the CPA of Croatia). Under the present solutions of the criminal procedural legislation with regard to the conducting of the investigation, the state attorney may initiate and conduct the investigation only against the identified individual against whom there is a reasonable suspicion that he/she has committed the criminal offense (Article 217, paragraph 1 of the CPA of Croatia). What is more, unlike its Bosnian counterpart, the Croatian legislator took care that the individual subjected to criminal proceedings has the right to be notified of the initiation of criminal proceedings, that is to say, of criminal charges understood in a substantive sense. More precisely, the public prosecutor is under the obligation to provide the suspect with a decree of investigation accompanied with the information on his or her rights within 8 days after the issue of the decree, and the suspect may lodge an appeal against the decree and submit it to the investigative judge within the subsequent 8 days (Article 218, paragraphs 1 and 2 of the CPA of Croatia). Consequently, the appeal against the decree on the investigation ensures judicial control over the legality of criminal prosecution in the investigative stage of criminal

[310] It is worth emphasizing that the Constitutional Court of the Republic of Croatia relied on many constitutional provisions when it established the requirement of judicial control of criminal prosecution during the investigation, which had been absent from the domestic criminal legislation since the adoption of the original CPA of Croatia. Among other things, the Constitutional Court of the Republic of Croatia has derived the requirement of judicial protection from criminal prosecution from the rule of law as one of the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution of the Republic of Croatia), the principle of constitutionality and legality (Article 5 of the Constitution of the Republic of Croatia), the general guarantees of Article 29 of the Constitution of the Republic of Croatia and those of Article 6 of the ECHR (Đurđević, 2012, p. 426).

proceedings, since it enables the court to establish whether the state attorney has properly assessed the existence of the assumptions for criminal prosecution - reasonable doubt and procedural impediments (Novokmet, 2017, p. 383).[311] In other words, this legal remedy enables judicial control over the function of the criminal prosecution in the investigative stage of criminal proceedings, at the beginning of the investigation. Besides, it is an undeniable fact that such an approach of the Croatian legislator is in accordance with the requirements stemming from the right to a fair trial, considering that the accused must be notified about the criminal charge having in mind that the decree on the investigation is the criminal charge understood in substantive sense.

Therefore, taking into account the provisions of the criminal procedural legislation of Croatia relating to the control of criminal prosecution in the course of the investigation, it is clear that the Croatian legislator has succeeded in reconciling the prosecutorial investigation, as one of the defining features of criminal procedure, with the legal requirement of strong judicial control of the legality of criminal prosecution, derived from the letter and the spirit of the Constitution of the Republic of Croatia. Consequently, on the one hand, the control over the initiation and conduct of the investigation has remained in the hands of the state attorney, that is to say, the public prosecutor, while, on the other, the person affected by the criminal proceedings gained the right to request the judicial control of the legality of criminal prosecution if he/she considers that some legal or factual assumptions from criminal prosecution are missing. Accordingly, in terms of the decision to prosecute made during investigation, Croatian criminal procedure satisfies the requirement of effectiveness while, at the same time, it prevents the state attorney from being a monopolist with regard to the function of the public criminal prosecution, thereby shielding the accused from unlawful and ungrounded criminal prosecution during the investigation.

3. 2. The Decision not to Prosecute

If some of the factual or legal assumptions for the institution of criminal prosecution stipulated by the CPA of Croatia are missing, the state attorney shall desist from criminal prosecution. Consequently, the state attorney may desist from criminal prosecution in different stages of criminal proceedings, until the completion of the main hearing before the criminal charge is consumed by the decision of the competent court (Pavišić, 2013, p. 192). However, the Croatian legislator has protected the victim from the arbitrariness of the state attorney when it comes to his/her right to desist from prosecution. It is worth observing that Croatian law provides the victim with broad possibilities to participate in the course of criminal proceedings in different roles. The victim may participate in the course of criminal proceedings in the role of the injured party, the role of the subsidiary

[311] The court shall revoke the decree on the investigation if: (1) the offense the defendant is charged with is not an offense subject to public prosecution; (2) there are circumstances that exclude the defendant's culpability unless he or she committed the offense in the state of diminished mental capacity; (3) the period of limitation for the institution of prosecution has expired, the offense is amnestied or pardoned, or other circumstances exist barring prosecution, and; (4) there are no reasonable grounds that the defendant committed the offense (Article 218, paragraph 3(3) of the CPA of Croatia).

prosecutor, or the role of the private prosecutor (Pavišić, 2013, p. 195). As we can see, Croatian law has retained the institution of the subsidiary prosecutor that enables the victim of the criminal offense to acquire party capability on the side of prosecution and to become the authorized prosecutor during criminal procedure. According to the provision of Article 2, paragraph 4 of the CPA of Croatia, if the state attorney finds that there are no grounds for the institution or the continuation of criminal prosecution, the victim may assume the role of the authorized prosecutor in the capacity of the injured party as the prosecutor on the condition of satisfying certain requirements. Hence, in Croatian law, the review of the proceedings of the state attorney is exercised through the institution of the subsidiary prosecution (Tomašević & Pajčić, 2008, p. 835). Accordingly, the possibility of the injured party to assume the role of the authorized prosecutor has been introduced with the aim of ensuring supervision over the decision-making of the state attorney with regard to the decision not to prosecute or the decision to desist from criminal prosecution (Krapac, 2015, p. 226). Thus, the injured party is entitled to institute or to continue criminal prosecution in the course of the preliminary proceedings, the process of accusation, and judicial review of the indictment, as well as in the course of the main hearing (Novokmet, 2016, p. 103). With the aim of enabling the injured party to exercise the role of the prosecutor properly, the Croatian legislator has provided the injured party with adequate procedural instruments. Among other things, the injured party has the right to inspect the case file (Article 51, paragraph 1(7) of the CPA of Croatia). Also, the injured party has to right to be notified of the outcome of criminal proceedings (Article 51, paragraph 1(11) of the CPA of Croatia). If the state attorney decides that there are no grounds for the institution of criminal procedure and consequently desists from criminal prosecution, he/she must notify the victim of such a decision (Article 55, paragraph 1 of the CPA of Croatia). The same obligation arises when the court discontinues the criminal proceedings by its decree on the basis of the state attorney's desistance from criminal prosecution in other cases (Article 55, paragraph 1 of the CPA of Croatia). In such cases, among other things, the state attorney and the court must notify the victim of his/her right to take over the prosecution from the state attorney in the role of the subsidiary prosecutor (Article 55, paragraph 1 of the CPA of Croatia). The victim may undertake or continue criminal prosecution within eight days from receiving such notification (Article 55, paragraph 2 of the CPA of Croatia). Therefore, the request of the injured party becomes the procedural assumption for the initiation or the continuation of the criminal procedure in the case of the decision not to prosecute rendered by the state attorney.[312]

Upon assuming the role of the authorized prosecutor, the victim acquires the possibility to independently and autonomously prosecute the case before the competent criminal court, regardless of the opinion of the state attorney in terms of the groundedness of criminal prosecution in that particular case (Kamber, 2017, p. 469). It follows that in such cases

[312] With the aim of preventing possibly vindictive prosecutions on the part of the injured party, the CPA of Croatia restrains his/her right to assume the prosecution in two ways: 1) by fixing the time period (generally, eight days) within which he/she ought to overtake criminal prosecution (if he/she fails to do so, he/she is deemed to have desisted from prosecution; and 2) by providing that the court must agree with the injured person's overtake of criminal prosecution (Krapac, 2002, pp. 160-161).

the function of criminal prosecution is entirely in the hands of the victim, who, unlike the state attorney, is not bound by the principle of legality of prosecution (Kamber, 2017, *ibid.*). Hence, the procedural solution that turns the injured party into an authorized prosecutor functions as a counterbalance and corrective of the monopoly of the state attorney over the criminal prosecution (Krapac, 2015, *loc. cit.*). What is more, on assuming criminal prosecution from the state attorney, the victim becomes a party to criminal proceedings in the capacity of the subsidiary prosecutor, with all the rights of the state attorney except for those belonging to him/her as a body of state authority (Article 55, paragraph 1 of the CPA of Croatia). In so doing, the injured party becomes an ally of the state to whom the state entrusts the execution of the public function of criminal prosecution, for the reason that the state attorney was not willing to do so even though he/she was obligated to undertake prosecution in accordance with the principle of legality of criminal prosecution (Novokmet, 2015, p. 420).[313] Consequently, it is clear that the institution of the subsidiary prosecutor, to some extent, contributes to the observance of the principle of legality of criminal prosecution. In summary, the right to participate in criminal proceedings in the capacity of the subsidiary prosecutor provides the victim with the right to realize the right to punishment independently of the state attorney who has previously decided that the given case did not require criminal prosecution. With regards to this, the ECtHR holds the view that the possibility of the victim to act in the capacity of the subsidiary prosecutor may fulfil the requirements of an effective investigation; hence, in so doing, the victim, through his procedural activity in the role of the authorized prosecutor, may assist the state in the realization of its procedural obligation under the ECHR, on the condition that the victim has adequate procedural instruments at disposal when pursuing criminal prosecution (*Otašević v. Serbia*, §§ 34-37). Following this line of thought, the institution of subsidiary prosecution abandoned in 2003 should be reintroduced in the criminal procedural legislation of Bosnia and Herzegovina.

On the other hand, the review model of the decision not to prosecute based on the concept of the injured party as a prosecutor (the subsidiary prosecutor) has certain shortcomings. Specifically, the reason for this lies in the fact that the criminal procedural legislation of Croatia, when it comes to the control of the negative decisions of the state attorney, places the burden on the victim, given that there are no other mechanisms to control or review of the decision not to prosecute. Thus, it seems that the Croatian legislator expects that the victim will regularly make the right assessment in terms of the groundedness of criminal prosecution if the state attorney, who is a professional bestowed with significant authority over law enforcement agencies, which enables him to properly assess the facts of the case,

[313] However, in criminal proceedings conducted upon the request of the victim acting in the role of the subsidiary prosecutor, the state attorney is entitled to assume and to represent criminal prosecution prior to the conclusion of the main hearing (Article 55, paragraph 2 of the CPA of Croatia). Hence, the possibility of the state attorney to change his initial opinion and assume criminal prosecution from the injured party, depriving him/her of the role of a party to criminal proceedings is an argument in support of the view that the right to punish is not a right of the victim but the right of the state, exercised through the state attorney or other authorized prosecutor (Novokmet, 2016, p. 104). If that is the case, the victim loses his/her position as the subsidiary prosecutor, but may continue to participate in the proceedings by performing other victim participatory rights (Kamber, 2017, *loc. cit.*).

desists from criminal prosecution without grounds. Nonetheless, such an approach leaves room, to some extent, for the actual privatization of criminal prosecution, which is a public function belonging to the state itself, and which should be consequently exercised by the bodies of the state authority. The argument presented above is in line with the views taken in the jurisprudence of the ECtHR. For instance, the ECtHR emphasized in the case of *Remetin v. Croatia* that the investigation and prosecution of serious human rights violations is primarily the task of the bodies of state authority (*Remetin v. Croatia*, § 112). Besides, the state should not expect from the victim to overtake criminal prosecution if the prosecutor desists from criminal prosecution since the latter is by all accounts better equipped to perform the function of criminal prosecution, having in mind his expertise and the powers which he possesses as the body of state authority (*Otašević v. Serbia*, § 25; *Stojnšek v. Slovenia*, § 79). What is more, the ECtHR has made it clear that the omissions or inactivity on the part of investigating authorities or criminal prosecuting authorities can impede the possibility of the victim to realize criminal prosecution in the capacity of the subsidiary prosecutor (*Aksoy v. Turkey*, § 98; *Jasar v. "the former Yugoslav Republic of Macedonia"*, § 59). Hence, in light of the above considerations, the Croatian legislator should reconsider the aptness of its review model of negative decisions of the state attorney, which is entirely based on the concept of subsidiary prosecution. Therefore, in the future, the victim should be provided with additional procedural instruments in the case when the state attorney decides not to prosecute or desists from criminal prosecution in the course of criminal procedure, such as the introduction of the possibility of judicial review of the above mentioned decisions at the request of the victim.

4. CONCLUSION

Bearing in mind the above considerations, it is clear that criminal prosecution in Bosnia and Herzegovina has become the monopoly of the prosecutor who completely independently and autonomously decides whether and when to open the investigation, as well as against whom the investigation will be opened and conducted. Therefore, the suspect, as a person against whom the investigation is being conducted, is left without judicial or any other protection from unlawful criminal prosecution in the investigatory stage of the criminal proceedings. Such a construction of the investigation opens the possibility for the arbitrariness of the prosecutor when it comes to the initiation and the conducting of criminal prosecution, which is unacceptable from the perspective of the principle of the rule of law and principle of legal certainty which are incorporated in the Constitution of Bosnia and Herzegovina. Besides, the prosecutor is also empowered to unilaterally decide not to undertake criminal prosecution, or to desist from criminal prosecution in the course of criminal procedure. As we have seen, such power of the prosecutor violates the requirements derived from the jurisprudence of the ECtHR in terms of the notion of an effective investigation, which is a fundamental right of the victim of serious human rights violations under the ECHR.

Therefore, all things considered, the Bosnian legislator should follow the example of the criminal procedural legislation of Croatia, and reintroduce judicial control of

the initiation of the investigation. Additionally, the criminal procedural legislation of Bosnia and Herzegovina should be amended to enable the victim to undertake or take over criminal prosecution in the capacity of the subsidiary prosecutor in the case when the (public) prosecutor desists from criminal prosecution. As it has been demonstrated, the ECtHR took the view that the possibility of the victim to proceed in the role of the subsidiary prosecutor is an effective procedural mechanism for the purpose of correcting the flaws of prosecuting authorities when the latter decide not to prosecute. All in all, as regards the criminal procedural legislation of Bosnia and Herzegovina, the rejudicialization of the investigation expressed through the ability of the court to control the existence of assumptions for criminal prosecution during the investigation, coupled with the reintroduction of the institute of the subsidiary prosecutor would bring a number of benefits. First and foremost, in so doing, criminal prosecution would no longer be the monopoly of the prosecutor. Secondly, the suspect would gain protection from the arbitrariness of the prosecutor in terms of the initiation of the investigation. Thirdly, the right of the victim to an effective investigation as a requirement stemming from the jurisprudence of the ECtHR would not be susceptible to the discretionary assessment of the prosecutor regarding the decision not to prosecute. Fourthly, the principle of legality of criminal prosecution, which is currently degraded and devalued, would be restored. Last but not least, the proposed amendments would make the criminal procedural legislation in line with the provisions of the Constitution of Bosnia and Herzegovina and jurisprudence of the ECtHR as well.

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MEMORY LAWS IN HUNGARY AFTER THE HOLOCAUST

In line with the Hungarian post-holocaust memory-laws I would like to ask some questions about the connection of the Hungarian laws and our memories: about the commemorate and the remembrance, about the legal ways of the commemorate or about it how the law can influence our memories. Memory laws can be examined by jurisprudence and also by psychology. The consequence of this two-fold situation is that the research is interdisciplinary. I have to approach the problem of the normativity (as the sine qua non of the law) and the weight of commemorate, or remembrance. I would like to demonstrate the relation between genocide and law and try to explain what the expression „memory law" means. The questions of memory laws can be examined from the standpoint of the practice of law, not only analysing the methods of legislation or the semiotics problems. On the one hand, I find the Holocaust is a starting point in this traumatic-commemorate-fold. I do not want to make a distinction between genocide and genocide; I do not say the holocaust (capitalised or not) is more outstanding than other genocides. But I claim that in the 20th century, it had a huge effect on the postmodern thinking in law, in literature, philosophy, psychology, and in historiography. With the help of this effect, the people are able to think about their life in other dictatorships. On the other hand, the history of Central Europe is unique: the region experienced two opposing dictatorships one after another– and hence, the remembrance of the genocides is different than in Western Europe or in the USA. In the region, Hungary included, the politics of the remembrance is stacked up with various feelings.

Keywords: memory laws, remembrance, legal philosophy, postmodernism, Holocaust.

1. INTRODUCTION: MEMORY LAWS IN GENERAL: IS IT A REAL LEGAL PHENOMENON?

The following thought seems a fitting introduction : „Pierre Nora claimed that by the 1990s, we were living in an „age of commemoration" – society's naturally integrated commemoration of history via oral stories and legends had disappeared, replaced by

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artificially engineered narratives of collective memory. .... Nowadays, commemoration has become an obligation, further inviting the question of whether selected tragedies in history imply a duty to remember. In other words, asking whether instrumentalisation of state-sponsored history can possess different, mandatory moral connotations. … [*the studies*] provide insight and initiate crucial questions on the relationship between state control over historical narratives, deteriorating democracy, and rule of law around the world."[314] Memory law as a legal phenomenon is a concept that is rather difficult to explain. In the light of the above words, and the holistic concept contained therein, I consider memory laws to be a link between the historical narratives and their legal obligations.

1.1. The ambivalent connection between memory and law

Memory laws can be examined by jurisprudence and also by psychology. The consequence of this two-fold situation is that the research is interdisciplinary. I have to attend to the problem of the normativity (it is the *sine qua non* of the law) and the difficulty remembrance. In my thesis I try to demonstrate the connection between the Holocaust and law. This source has the most basic, the most eventual questions, like this:

- The remembrance can be atrophic. How can this deformation be eliminated under the commemorate? Should the legislation take into account this deformation, or is it irrelevant?

- The Holocaust must not be narrowed only to the genocides against the Jewish people, but here I will focus only on the Jewish victims. In the Jewish tradition there is an order – the *Zachor*, the command of the remembrance. It is known that Hungary is a largely Christian country, whose religious tradition is the order of forgiveness. How could we connect the order of the *Zachor* with the order of the forgiveness? This main difference of the interpretation is understandable in the context of Jewish or Christian religions, where the mentioned differences result in misunderstanding.

- Normativity is a main feature of law. But how can a norm regulate something that is substantially a psychological procedure? Moreover, any such norm has to make a distinction between commemoration and remembrance. Generally, a law can prescribe how to keep events and stories in the common memory; this can only relate to a celebration or a memorial. On the other hand, there is the problem of the remembrance days: remembrance means keeping these happenings in one's mind and recalling them at will. But whose will is relevant here? The will of the one reminiscing, or the will of the state?

- What kind of legal opportunity has to commemorate? Is it possible to influence the commemorate by the law? Which fields of law have a role in this question?

1.2. Various meanings of memory laws

Providing a clear definition memory laws is not an easy task, and various definitions or explanations are offered by different stakeholders.

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[314] Bán, 2020. p. 1226-1227., 1229.

For instance, Council of Europe[315] indicates in a 2018 factsheet the following:

„'Memory laws' enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past, by banning, for example, the propagation of totalitarian ideologies or criminalising expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law. Because of the dangers such laws represent for freedom of speech, member states should ensure that the restrictions to the freedom of expression entailed by such a legal framework are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria." [316]

The above paragraph illustrates of the difficulties in defining and adopting „memory laws"

Another contextualisation of memory laws is offered by the MELAPROJECT.[317] „Our questions are: When do memory laws conflict with values of democratic citizenship, political pluralism, or fundamental human rights? Are the punitive laws inevitably abusive? Are the non-punitive ones mostly benign? Are there optimal ways for states to propagate historical memory?"[318]

2.THE HOLOCAUST AS A POINT OF DEPARTURE

2.1. „Camp-poker"

Hungary had only one Nobel-prize winner in literature, Imre Kertész, who was a Holocaust-survivor. His Nobel prize was not awarded in recognition of his Holocaust-related experiences described in the novel *Fatelessness*, but rather for the trauma-language which he had created to be able to talk about these experiences. In one of his novels entitled "Kaddish for the Unborn Child" one cannot read the expression „camp-poker", rather, the term „game" is used. In the novel's exposition, many people did not talk about their suffering in the camps, instead only referring to the name of the camp. It is as if they are bidding or betting – and the (poker) game persisted until someone calls „Auschwitz". And this name – just like in poker – takes everything…[319]

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[315] Council of Europe activities are related to genocide in a general manner, in the general context of the European Convention of Human Rights (ECHR), adopted in Rome in 1950, and the subsequent establishment of the European Court of Human Rights in Strasbourg.

[316] https://rm.coe.int/factsheet-on-memory-laws-july2018-docx/16808c1690 (20.05.2020.)

[317] MELAPROJECT is an abbreviation for 'Memory Laws in European and Comparative Perspective's. It was awarded in 2016, as a four-nation consortium comprising jurist, linguists and historians , who examine the remembrance of the state, of the national and the international dimension.

[318] melaproject.org (25.06.2020.)

[319] „… I see the gloomy faces around me, but only as so many theatrical masks bearing their various roles, … were still drawing the final lesson, and someone came up with the melancholy idea that everyone should say *where he had been* at which the names began to drop with a wera spattering, like rain from a passing cloud which has long ago soent its force: Mauthausen, the Don Bend, Recsk, Siberia, the Transit Center, Ravensbrück, Fö Street, 60 Andrássy Avenue, the internal resettlement villages, the post-56 jails, Buchenwald, Kistarcsa, … but now I was dreading it would be my turn, but fortunately I was preempted: 'Auschwitz', said somebodyin the modest but self-assured tones of a winner, and the whole gathering nodded furiously: 'Unstrumpable',

It seems evident that the 20th century, Holocaust[320] has had an immense effect to the postmodern thinking in law, in literature, in philosophy, in psychology, or in historiography, in the determination of collective identity and in remembrance politics. The reason of this elemental effect is that the Holocaust was – in terms of the systematic method used and in terms of its quantity – the most remarkable 'mass-murder'. This claim does not mean that other genocides are less remarkable, quite to the contrary: the Holocaust does not shadow these muss-murders, it rather also hold them in focus. This symbolic extension is also corroborated in practice. Another reason lays in the fact that: „The collective trauma does not have geographical or cultural borders."[321] The trauma of the Holocaust became globalized; but there is an elemental doubt: can remembrance be globalised too? Before the Holocaust, Jewish identity was based on the free-will of 'togetherness'. In the ages of the Holocaust, it became a base for a forced identity, which also had legal base. This problematic identity is alive nowadays as, but „from the other side": the memory laws could be globalised this trauma remembrance. According to Reinhart Koselleck (Assmann 170. o.) a forced, unified model never becomes effective; moreover it could be counterproductive. Koselleck underlines that there is a need to integrate the experience of the Holocaust in the national historical narratives. I strongly support this opinion: the remembrance of the Holocaust is up to the nations and is paradigmatic as well. It is a form of a cultural trauma – and the responses to this trauma considerably influenced the national remembrance-politics. In section 2.3. of this paper, the change of the opportunity of the remembrance after the change regimes will be analysed. However, there is one more changepoint too. In the 1990s, and especially in the 2000s the technological change in mass communications had a seminal role in the structure of the remembrance-time-culture' axis. Moreover, in the age of the globalization, the electronic media get the most prominent function – due to them, self-identification with others is not limited by geographical borders, and what is more. In the area of the memory laws, the development of new technologies contributed to progress, because the acts became comparable, and, based on various cases, researchers can analyse different answers to the question „how can the national law influence the inter-/trans-/national remembrance". This was an extraordinary change on the global scale, of course with local characteristics.

Hungary's Holocaust-experience has its own geographical specificity.. In Hungarian history the 19th March 1944 is considered as a turning point. The German Army occupied Hungary. „We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order."[322] Although before this occupation

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as the host himself admiteed, half enviously, half grudgingly, and yet, when all is said and done, with a wry smile of acknowledgment." Kertész, I: Kaddish for an unborn Child. Translated by Wilkinson, Tom. chrome-extension://jhhclmfgfllimlhabjkgkeebkbiadflb/reader.html (12.09.2021.)

[320] This does not mean that the relevance of other genocides is minimized or neglected.

[321] After my words in Hungarian: „A kollektív traumának nincsenek földrajzi vagy kulturális határai." Jeffrey C. Anderson. In: Assmann, Aleida, 2014. p. 169

[322] The Fundamental Law of Hungary https://njt.hu/translation/TheFundamentalLawofHungary_20201223_FIN.pdf (02.09.2021.)

there was legal deprivation, the establishment of the ghettos and the entrainment had begun after this date. About 600.000 people died in the Hungarian Holocaust. Each country has his own narrative about this genocide: in Hungary, this narrative is characterised by the enormous number of victims and the 'must-be-citizen' perpetrator too.

2.2. 1945 as a symbol

Year 1945 is an ambivalent symbol: it marks the end of the Shoah, but also the beginning of the division in Europe and the beginning of the Stalinist dictatorships in Central-East-Europe. Being a symbol means an inability of the articulation too. After 1945, a duality can be identified in the way in which historical traumas are remembered and integrated in the national identity. The countries on the east side of the Iron Curtain have a more fragmental, more imperfect remembrance-politics and memory law. The situation is quite converse in the countries to the West of the Iron Curtain. Moreover, in 1947, another dictatorship had begun in Hungary, characterised by failure to remember.

2.3. 1989 and 2004 as milestones

I consider 1989 is a caesura in the Hungarian memory laws. The case of this extraordinary change is the further chronological reason, meaning that the political regime changed, the last dictatorship was over too and the other reason is that the commemoration of the two dictatorships were possible.

Between 1989 and 2004 in Europe, more specifically, in the European Union, a special way to face the traumatic happenings of the 20th century came into life. Based on this theory the postmodern Europe's founding-myth would be the Holocaust. But in 2004, when the EU was enlarged, and most of the post communist countries became its members, the EU had to face another historic trauma of the 20th century, the communism. This dual or competitional identity-generating remembrance-politics became a real transnational need to understand the past.

The reasons of the duality or a 'so-called competition' is that the west-European countries had their own strategy for confronting their own past. Before the fall of the Iron Curtain it was forbidden to the East to remember the WW II or the Holocaust or any traumatic happenings of this era. These countries considered themselves as victims of the Stalinist dictatorship – therefore their memberships status in the EU had the result of reconstitution of the postmodern founding myth.

Imagine this victim's/perpators's narrative, which proved to be acceptable in the last 17 years in the post communist countries and the European Union. Showing the possibilities for the constructional way to identity. That's because the Central-European countries see themselves from this special „victim narrative": they were the victims of the Stalinist dictatorship. This victim narrative has to be positioned in the „Holocaust-focused' memory politics. This is a daunting, because the meaning of „victim" has undergone a semantic recoding: being a victim, which was earlier a desired (almost a hero)'role' changed into a suffering 'role'.

There was a change of the discourse: being a victim is more acceptable like being a hero. The alteration shows the way in which the concept of the individual 'victim' turned away from the concept of the public 'victim'. It is a passive victim identity: but it has other aspects in the post- Soviet countries and in those on the west side of the Iron Curtain. In the Eastern region, the method of memorisation, which could appoint the position of the self-reflection, did not evolve. These nations had to build in their self-image the experiences both of the dictatorships. This „had-to-build-in" became a political problem in Europe, because the suffering from the Stalinist dictatorship had an ethnical basis.

As a the result of this ethnical-based suffering-meaning the chance to establish their own national perpetrators-narrative was lost; in fact, entire countries permeated this victim-position. The transnational level of remembrance begun after 2004, marking the era of the rival victim-narratives. This legal/normative way is one possible method: I think it could be the answer in the questions of the competitive victim-narratives. Under the said normative method, memory laws can be a part of the development of national self-identity. We have to be conscious of that by becoming a member of the EU in 2004, these countries also became the part of a transnational remembrance, of an own narrative of the European Union narrative too.

The normative method can help avoid the binary code, which operates on the „Gulag"-„Auchwitz" symbolic axis. The politics of the acknowledgment can also be found in the post communist countries national practices, rather than the acknowledgment of the communism's sins could be found global.

In other words, a new dichotomy was established: „It was, therefore, undoubtedly a rather noble paradigm that guided their legislators at the time, leading to the adoption of so-called self-inculpatory memory laws, in the words of Eric Heinze. Central to that paradigm was the dignity of Holocaust victims. The recent wave of mnemonic constitutionalism in CEE, to the contrary, underlines the victimhood of national States and majority nations. Such – in contrast, self-exculpatory – memory laws serve as both a shield and a sword in the context of memory wars unfolding in the region."[323] This two-folded paradigm need to be a self identification detail as well.[324]

3.HOW CAN MEMORY LAWS BE SEARCHED FOR?

In this section of the paper, I will attempt to summarize the methodological points of searching relevant memory laws in my national legal system. After presenting the aim I will present the relevant tools. In my opinion, in order to identify the best method one should have a comprehensive knowledge of the system of the legal databases of one's country: finding the relevant results, being familiar with the entire software, knowing the other possibilities: the official legal database and the market-based databases as well. Using the relevant legal database enables a comparison of the text of the laws before and after the amendments or

[323] Belavusau, 2020, p. 4.

[324] See more Soroka & Krawatzek, 2019, pp. 157-160., Heinze, 2019, https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/ (10.08.2021.); de Bates, 2019, https://freespeechdebate.com/2019/12/self-inculpatory-laws-do-not-exist/ (10.08.2021.)

identifying the former and future text as well. For example, on 10th of September 2021, a total of 241 588 'documents' can be found in a given database: they are not only laws, because not every of them have legal obligatory. There are 50 419 acts in force. How can relevant data be extracted from these? I decided to use the „word for word" but this raises more dilemmas. For instance, should I opt to search for the word 'holocaust' or genocide or remembrance? Should I pay attention to writing holokauszt (in Hungarian) or search for Holocaust? Whose responsibility is the result? In fact, it seems that the best way forward is to apply a broad approach, since even seemingly irrelevant documents can include valuable information. In terms of the research method, I analyse not only the acts in force, but also examine the questions in the aspect of legal philosophy, legal politics, which have the same relevance of being in force or annul an act. From these I can find conclusions referring to the remembrance politics.

4. EXAMPLES OF THE HUNGARIAN, POST- HOLOCAUST MEMORY LAWS

In this section, I chose some of the Hungarian memory laws in order to illustrate some questions or having brainstorming areas. As a PhD-researcher, I analyse in my dissertation these laws semiotically, so I have to focus on the sociolinguistic significance too.

4.1. The Fundamental Law of Hungary[325]

Before 1949 Hungary did not have a written constitution. While there were some „base laws" in force, the constitution was missing. It was the extended era of the „historical constitution" in Hungary, which was also connected to the medieval doctrine of the „Holy Crown"; it has sacred and symbolic meaning in the guarding the independence of Hungary. In 1949, Hungary a written constitution, a unified constitutional text was adopted: this constitution was utilized for the building up of the communist regime. Independent of the change of the political regime in 1989, the Hungarian Constitutional Law was in force until 2010. The new Fundamental Law is a truly unique constitutional text, which starts with the National Avowal. It refers „to King Saint Stephen I as founder of the Hungarian state, proclaims Christianity as historically central", „in the preservation of nationhood" and, most importantly, reinforces the narrative of Hungarian victimhood following the post-World War I Treaty of Trianon. This contradictory account of national division helps justify Hungary's role in the protection of „Hungarians beyond the borders". In addition, the Avowal praises the "achievements of the historical constitution" and the Holy Crown as symbols of the independence and continuity of the Hungarian State, while condemning the Nazi and communist occupations of the country. It also claims that the State lost its self-determination on 19 March 1944, the date on which Hungary's German occupation began, and regained it after the fall of the communist dictatorship on 2 May 1990, the day of assembly of the first freely elected Hungarian parliament. This characterizes the 1949 constitution of Hungary as unlawful and as the basis for „tyrannical rule"."[326]

[325] See more Könczöl, M. & Kevevári I. 2020. pp. 161-175

[326] Belavusau & Gliszczynska-Grabias, 2020., pp. 1239-1240.

As indicated in section 2.1 I also illustrated the dates between which Hungary was divested of its own self-determination.

In 2013, the Hungarian government adopted Article U as a constitutional provision, stating that the era before 1989, the Communist Party (formally: the Hungarian Socialist Workers' Party) and its satellite organisations were "criminal organisations". The leaders carry – according to the text- a liability that is "without a statute of limitations". The Fundamental Law's Article U) proclaims that the Communist party has responsibility for several domestic historical event, such as the post WW2 era of unlawful persecutions, suppressing the Revolution; establishing a legal order built on the exclusive exercise of power and unlawfulness, depriving private property, creating national debt and subordinating Hungary's economy, national defence, diplomacy and human resources to foreign interests.

4.2. Remembrance days

I collected some normative rules relating to the remembrance of the Holocaust. Currently, two such dates are in place in Hungary. The first one 27th of January, as of, which is established by the UN. It is the international remembrance day after the liberation of the Auschwitz camp. The second one is the remembrance day of the Hungarian Holocaust, 16th of April, from the year 2000.[327] It is the day that the Ghetto in Budapest was created. It is also a part of the Hungarian remembrance narrative. However, there is a relevant question – these remembrance days are envisaged in legal acts,[328] but is the method of the remembrance mandatory as well? The Hungarian national remembrance days is regulated in the Fundamental Law: for instance, the 20th of August establishment our state, or 15th of March marking the Revolution of 1848, or 23rd of October marking the revolution of 1956, or the days of Christmas and many others. However, the Holocaust remembrance days are a part of these national holidays, so on these days there aren't any obligations in terms of labour law, of educational law etc. You can find nothing in our legal system about that how to remember on these days. In word or in thought the citizens, the teachers, the simple people, the actors are the ones that make the decision about it. You can find more films, more talkshaws on the TV or more plays at the theatres about this, but nothing else.

4.3. Educational area

There is also a close link with educational. On the one side, there are some instructions to remembrance on the Holocaust remembrance day and on the remembrance day of the victims of the Communist dictatorship (in Hungary there is a remembrance day on the 25th of February). But these are only instructions, only recommendations, there are no obligations.

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[327] See more: a nemzeti rendezvények megszervezéséről szóló a 1190/2020. (IV. 30.) Korm. határozat. The unofficial translation would read: 'Goverment Resolution 1190/2020. (IV. 30.) on the organisation of national events'. https://njt.hu/jogszabaly/2020-1190-30-22 (01.06.2021)

[328] For instance, the remembrance day of the Gypsy Holocaust cannot be found in the legal acts. This is because the 2nd of August as a day of remembrance of this holocaust is established by the World Organization of the Gypsyies, but it is not regualted by law in Hungary.

On the other hand, in these acts a further connection between memory and the education can be identified: the remembrance of the Holocaust has to be the part of the system of Hungarian secondary education's final exam.[329] And this obligation applies to the History exam, but not to other subjects. For example, Hungary had the previously mentioned Nobel-prize winner, but the students do not have to study his novels.

4.4. Criminal law

The fourth and perhaps the largest group of acts are those in the field of criminal law. This applies to a broad spectrum of these laws: from the Hungarian Criminal Code to the cooperation of law enforcement agencies, or even regulations governing international criminal legal assistance. The relevant issue at hand is the collision between using the symbol of a dictatorship and the freedom of speech. The most evident illustration of this is the following provision of the Hungarian Criminal Code:

„Use of symbols of despotism

Section 335

A person who, in a manner capable of disturbing public peace or, in particular, violating the human dignity of or the right to respect for the deceased victims of despotic regimes,

a) disseminates,

b) uses in front of a large audience, or

c) displays in public

a swastika, SS insignia, arrow cross, hammer and sickle, five-pointed red star, or any symbol depicting such signs is guilty of a misdemeanour and shall be punished by confinement, unless a criminal offence of greater gravity is established."[330]

Where are the borders of this legal phenomena? The most notable cases against Hungary brought before the ECtHR are the Fratanolo-, the Vajnai and the Fáber-cases.[331] All cases concern the factual using symbols of earlier dictatorships the red star and the famous red and white striped flag named after Arpad chieftain. In Hungary it will be a punishable offence to use the swastika, the cross of the so-called „nyilas"-era or SS-insignia. That is the point of interpretating law semiotically or simply linguistically. In this article there are symbols; the interpretating of a symbol (like a langauge too) is problematic. It is up to the interpreter, the context, the historical experience etc. What is to be done in this situation: the basic of the legal studies is the being obligatory. How can we talk about obligations in line with symbols? They cannot have only one meaning, and this is the difficulty of collective memory, and its beauty of it too.

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[329] In the Hungarian educational system, most students take a final exam when they are 18-19 years old.

[330] Act C of 2012 on Criminal Code https://njt.hu/translation/J2012T0100P_20210708_FIN.pdf (10.08.2021.)

[331] Case of Fratanoló v. Hungary (Application no. 29459/10); Case of Vajnai v. Hungary (Application No. 33629/06) and Case of Fáber v. Hungary (Application Number 40721/08)

4.5. Budgetary law

Finally, I found a lot of budgetary laws – in this regard I can demonstrate rather political issues than real legal facts. As a general rule, the budgetary laws are not relevant themselved, but only with regards to something else - for example, the establishment of Holocaust Museum, etc.

5.SUMMARY

„The Holocaust (Shoah) fundamentally challenged the foundations of civilization. The unprecedented character of the Holocaust will always hold universal meaning."[332] As the Stockholm Declaration said, the experience of the Shoah changed the whole thinking about the world. It has a huge effect to the philosogy, to the literature, to the theology, to the law. I think to each fields of the human sciences. According to the fourth and the sixth point the members of the International Holocaust Remembrance Alliance pledge to strengthen their efforts to promote remembrance about the Holocaust and share a commitment to commemorate the victims of the Holocaust. I regard that declaration as a warning sign tot he future: never like this genocide. The lawsystem with the memoty laws can guarantee that we never forget these happenings.

[332] https://www.holocaustremembrance.com/about-us/stockholm-declaration (08.11.2021.)

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ACQUISITION OF COMPETENCIES FOR ADVOCACY IN SOCIAL WORK

Under Art. 3 of the Social Work Activity Act (NG 16/19) in the Republic of Croatia, representation, advocacy and empowerment are defined as the individual or group-oriented professional procedures in the social work activity. Representation, advocacy and empowerment are strategic processes of working with or on behalf of beneficiaries to achieve an equal position in society, the right to social services, or some other form of assistance that would not be available without them, which includes advocating for better social policy, better social legislation and social justice in society. Social workers can carry out different types of advocacy, such as legal and legislative advocacy, self-advocacy and advocacy systems. According to the principle of active participation, social workers represent clients' best interests. One of the essential principles on which advocacy is based is empowerment. In the integration of understanding of the legal framework and advocacy through the academic year 2020/2021 at the Graduate School of Social Work at the Faculty of Law in Osijek, the course "Social Welfare Systems and Advocacy" was delivered for the first time. The course aimed to provide to students' knowledge about different social welfare systems, critical analysis of these welfare systems, their evaluation and comparison with the social welfare system in the Republic of Croatia, and the acquisition of theoretical and practical knowledge and skills to represent clients' interests in social work. This paper represents the advocacy process in social work that students worked on during the lecture. In addition to the concepts of advocacy in social work, this paper will show students' self-assessment of acquired competencies for advocacy through education.

Keywords: advocacy in social work, empowerment, social justice, learning outcomes, competencies of social workers.

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1. INTRODUCTION

The global definition of social work of the International Association of Schools of Social Work (IASSW) states:

"Social work is a practice-based profession and an academic discipline that promotes social change and development, social cohesion, empowerment and liberation of people. The principles of social justice, human rights, collective responsibility, and respect for diversity are keys to social work. Based on theories of social work, social sciences, humanities, and indigenous knowledge, social work engages people and structures in solving life's challenges and improving well-being" (International Association of Schools of Social Work, 2014). Social work engages people and structures to improve people's well-being at both the global and national levels. The Code of Ethics for Social Workers in Social Work (2014) of the Republic of Croatia states that social workers are obliged to assess carefully, following the profession's rules, whose interest should be primarily represented in the performance of their professional duties. The vital role of social workers in public relations and their influence on political and legal arrangements is further emphasized. In this regard, social workers are obliged to publicly point out to practice and policy that deviates from the principles of social justice, discriminates against members of society based on their characteristics, prevents or hinders access to social resources and services.

One of the ways of promoting and enhancing the program of social justice in social work is advocacy. The word "advocacy" in the linguistic sense means to officially represent an individual or a group in a state institution, citizens in parliament, a party in court and to express a position; a different opinion (Birtić et al., 2012). The word advocacy is often used instead of the word representation, which in the Croatian language means "to fight for whom or what", "to work in whose favour" (advocate for the rights of the weaker) (Birtić et al., 2012). In linguistic terms, representation and advocacy put the representatives or advocates in an active role. Still, the process of representation is the co-creation of relationships and processes between social workers and clients.

There are many definitions of advocacy in social work. According to Brkić (2010, p. 22), "advocacy is the process of planned and by social workers guided activities, which are designed and implemented in collaboration with clients, aimed at changing the circumstances that are frustrating or preventing them in meeting individual and collective needs, developing potential and taking control of one's own life as much as possible." The ultimate meaning of advocacy is that clients develop their potential to represent their interests authentically and make decisions that would ultimately be independent or less dependent on the social welfare system (Brkić, 2010, p. 23).

Advocacy is an element of social work that significantly distinguishes it from other helping professions (Cox et al., 2018, p.56). Therefore, during the formal education of future social workers, it is necessary to implement an educational program to acquire representation competencies.

To integrate and understand the legal framework and the representation process through the academic year 2020/2021 at the Graduate School of Social Work at the Faculty of Law in Osijek, a course entitled "Social Welfare Systems and Advocacy" was conducted for the

first time. According to the Curriculum of the Graduate School of Social Work for the academic year 2020/2021 (2020), the course aimed to enable students to acquire theoretical and practical knowledge and skills to represent clients in social work, to gain knowledge about different social welfare systems and undertake critical analysis, evaluation and comparison of these systems with the social welfare system in the Republic of Croatia. It was assumed that after completing the course, students would be able to:

1. Compare different social welfare systems;
2. Critically analyze and evaluate the social welfare system in the Republic of Croatia;
3. Explain the meaning and content of representation in social work;
4. Practically identify the goals of representation;
5. Select the most appropriate types, strategies and tactics to represent the target group whose interests they are to represent;
6. Explain professional and ethical dilemmas in the representation.

This paper presents the results of self-assessment of 56 students in terms of achieving the outcomes of the aforementioned course, after they have attended it.

It also aims to present the process of case advocacy from practical exercises modelled on Schneider and Loster (2001), described in the book Social Work Advocacy: A new framework for action, commenting on the possibility of using an empowerment approach in individual phases of advocacy.

2. REPRESENTATION AND/OR ADVOCACY IN SOCIAL WORK

According to Brown et al. (2015), there are currently two identities of social work: one that refers to working on cases through the provision of therapeutic services and another that focuses on social reform, social justice and community organization. Social workers need to understand policies that affect their clients, how to access resources and potential barriers to accessing resources for their clients (Brown et al., 2015). Although there are many articles on advocacy in social work, most of them focus on strategies and tactics for social workers working in particular environments and less on leading the advocacy process (Bliss, 2015, p.1). Based on the distinction between who controls the goals or outcomes of representation and who controls the means or process, Freddolino, Moxley, and Hyduk (2004) point out that legal advocacy, advocacy, social work, and social networking are essential for advocacy.

Schneider and Lester (2001) developed a universal definition of social work advocacy by emphasizing exclusivity and joint representation of beneficiaries and their interests to influence systematically the decision-making in an unjust and irresponsible system. They state that the specificity of advocacy lies in the efforts that social workers make to represent beneficiaries or to bring to the changes in decisions, especially those that involve controlling resources and thereby reduce or eliminate injustice.

According to Schneider and Lester (2001), the advocacy process takes place through a circular process consisting of data collection, defining goals and making a plan, identifying

decision-makers, forming a coalition, fundraising, defining messages, sending messages / implementing actions and monitoring and evaluations. The activities carried out in individual phases of the advocacy process will be explained in the case report below.

The advocacy model emphasises support to the empowerment of clients in the advocacy process. Over the last few decades, social workers have embraced empowerment as a key feature of the practice (Schneider and Lester, 2001).

In the context of advocacy, it refers to the ability of clients to influence decisions made about themselves, determine the best outcomes for themselves and make life-changing decisions themselves. According to Jugović and Brkić (2013, p. 102), social work through empowerment starts from the idea of "communicating understanding and the non-existence of absolute knowledge where the social worker is the one who has power and knows".

In addition to empowerment theory, a competency-oriented approach is essential for acquiring knowledge and skills for advocacy. Competent social workers are expected to integrate professional values, understand the role of social work in different contexts, invest in the development of profession by participating in professional associations and help in the professional socialization of younger colleagues (Buljevac et al., 2020). The modern view of professional competencies is based on the triangle of knowledge, skills and values, where the personal attitude of experts towards the profession is important, as well as the personal dimensions that need to be strengthened (Drisko, 2014). In general, professional competencies are composed of interrelated competencies that can be defined at the generic level or explicitly defined in a particular work area (Buljevac et al., 2020). Buljevac et al. (2020) analysed the sources focused on the areas of professional competencies in the documents of professional organisations and pointed to eight areas of professional competencies of social workers, of which one area is an area of process competencies and seven areas dedicated to meta-competencies.

The competency-oriented approach makes it easier to align formal education with practice. According to the Council of the European Union (2017) recommendation, qualifications are a formal result of completing an educational program that guarantees learning outcomes. Learning outcomes describe what an individual knows and understands and what he or she is capable of, while competencies are a proven ability to use acquired skills. Thus, it is concluded that the framework of professional competencies serves as an agreed standard about what it means to be a social worker and what his or her social role should look like (Buljevac et al., 2020).

According to Brkić (2010), a social worker in the field of advocacy should be a pragmatic, action-oriented person who can be aware of his power in relation to clients to decide when and how to use it. Brkić (2010) also cites some generic characteristics of a social worker conducting advocacy: patient and optimistic, self-disciplined, one who is empowering, willing to compromise, one who can set priorities. The social worker conducting advocacy should also have specific knowledge of the legislative framework in working with the beneficiary, know social welfare sytems and the political processes in the community. It is also essential that he has the skills of negotiation and lobbying and cooperation skills in public relations.

3. ACQUIRED COMPETENCIES FOR REPRESENTING STUDENTS OF THE FIRST GENERATION OF GRADUATE STUDIES IN SOCIAL WORK AT THE FACULTY OF LAW IN OSIJEK

After the implementation of the course "Social Welfare Systems and Advocacy" at the Graduate School of Social Work at the Faculty of Law in Osijek, 45 full-time and part-time students out of a total of 56 students completed a two-part questionnaire. In the first part, some questions examined students' socio-demographic characteristics (age, gender, employment, manner/type of study). The second part of the survey questionnaire assesses students' achieved learning outcomes defined by the earlier mentioned Implementation Plan through statements of agreement/disagreement. Students were thus assessed regarding the competencies related to knowledge of the scope of different systems, knowledge of goals, strategies and tactics for advocacy, ethical dilemmas that arise in the process and their characteristics. The assisment was conducted through the use of a Likert-type scale of 1 to 5 where 1 means "I do not agree at all" and 5 means "I totally agree".

Most respondents have agreed that after the course they acquired the knowledge and skills to represent clients in social work. They have also agreed that through the practical exercises they were introduced to the skills of lobbying and negotiating in the advocacy process. According to Brkić (2010), these skills are essential because they do not occur spontaneously but as planned, and the process itself consists of preparation, implementation and evaluation. A total of 52.1% of respondents confirmed that they agree with the statement that they are familiar with the availability of services in the community, obligations, scope of work, organizational structure and decision-making in the advocacy of individual client groups. However, as many as 47.6% of them estimated that they are not ready to communicate with the media to represent clients and client groups although the media are an important ally to the representative in causing desired changes, and that it is important that the representative knows how to attract public opinion (Brkić, 2010). Here we see room for a more improved curriculum and for empowering students to involve the public media in implementing the advocacy process through formal education.

Students generally agree that they can critically analyse and evaluate and compare social welfare system in the Republic of Croatia. The most significant percentage of respondents, 98.9% of them, agrees that they can identify advocacy goals, select appropriate types, strategies and tactics for advocacy. As many as 82.2% of respondents estimates that they can explain professional and ethical dilemmas in advocacy after completing the course. It is imperative to know that 95.6% of respondents recognise the need to involve clients in advocacy, while 88.9% of them believe in positive changes.

According to Brkić (2010, p. 61), it is impossible to help without involving those we help. Partnership (cooperative relationship) with the client, according to Schneider and Lester (2001), and according to Brkić (2010, p. 62), is explained by the terms "exclusivity" and "reciprocity". Exclusivity means that responsibility is central to the relationship between the beneficiary and the social worker, while reciprocity implies reciprocity and the sharing of responsibilities in the relationship. As soon as we are in a relationship, there is the responsibility of the other party, so once the relationship is established, the client is also responsible.

Also, the cooperative relationship is sustainable if we rely on the perspective of power by seeking the power and resources of clients, on the ethics of participation where no one has the last word, empowerment and involvement arising from respect for the human need to be responsible (Čačinović-Vogrinčić, 2006). In the self-assessment questionnaire, students assessed that they generally believed in positive change as an outcome of advocacy. By believing in change, the social worker becomes an important role model for the client through his or her personal example of composure and authenticity. Sometimes a person feels unprepared for the change, "lulled" into the current way of life and might be pessimistic regarding the chances for change. Through their own example, social workers show the client how self-confidence and self-control can influence the change desired to be instigated for the client's benefit.

4. ADVOCACY OF SOCAL JUSTICE

An integral part of social work is the principle of advocating for social justice. Advocating for social justice can play, for example, an essential role in children's education (Nilsson et al., 2013). Social injustices (e.g. poverty, racism, insecure living environment, schools with poor performance) exist in a particular student population. They can affect students' ability to work academically in school and reduce their commitment to school completion. In particular, the COVID-19 pandemic and online teaching created an unfair environment and impacted negatively availability of education in general which shall be guided by the motto of equal opportunities for all, as not all children have personal computers or online internet access. While delivering online classes in the course "Social Welfare Systems and Advocacy", we witnessed that some students had difficulty attending classes due to the interruption of the Internet connection. Sanders and Scanlon (2021), in their paper "The Digital Divide Is a Human Rights Issue: Advancing Social Inclusion Through Social Work Advocacy", stated that in line with the human rights approach to social work, the 2016 United Nations General Assembly proclaimed access to the Internet a basic human right. Social workers can thus engage in advocating for Internet access, in order to improve policies and programs to bridge the digital divide (Sandres and Scanlon, 2015). Throughout the recent pandemic it has become increasingly apparent that access to information and communication technology (ICT) and the broadband infrastructure that supports it are the necessary human rights that enable participation in today's society. However, there is currently relatively little literature on social work which deals with the topic of policy advocacy for closing the digital divide (Kuilema 2012; Queiro-Tajalli et al. 2003, Sandres and Scalon, 2021). The importance of advocating for access to electronic services becomes part of the commitment of social workers to social justice because social worker, unlike some other professions, cares about the client's environment, which gives him the strength to represent the client. Below is an example of case representation focused on the fight for social justice in a non-digital environment of a mother with a child with disabilities.

5. EXAMPLE OF CASE REPRESENTATION

Graduate social work students represented the case according to the model of Schneider and Lester (2001, and according to Brkić 2010) and the process of representation through all phases of advocacy is shown below.[333]

5.1. Case description and data collection

Danijela is a single mother who has been unemployed for four years and lives in a rented apartment with her underage son diagnosed with Asperger syndrome (ADHD), who is attending the first grade of a primary school in accordance with a customized program and, yet has many difficulties in attending classes. The family refrains from exercising the right to a guaranteed minimum allowance in the monthly amount of up to HRK 800.00 and child allowance of HRK 375.00 monthly. The city of Osijek pays part of the utilities. The minor son has had no contact with his father for three years. The father lives in Germany and does not pay alimony for the son. In addition to dealing with unemployment, the owner is selling an apartment and Danijela is forced to move out of it. She fears that she will not find affordable accommodation that would meet her son's needs. She is afraid she will end up on the street and her son in a foster family.

As we called it for the purposes of this paper, the case of housing was a representation of a case where multiple violations of the rights of one parent (mother) and a child living with the mother were identified. In the first phase of data collection, Payne (1986, according to Brkić, 2010) listed the issues that could help the representative argue the reasons for representation. These are the following questions: Was the decision based on procedures? Were the regulations applied impartially? Were the legal norms in laws and bylaws correctly interpreted? Did the services use the available information? Are the arguments for making decisions logical? Is the decision based on discriminatory characteristics? Who made the decision? According to Art. 91 of the Family Law (2015, 2019), the parent cannot waive the right to parental care. Parents are obliged to discuss and communicate with the child about the individual contents of parental care according to his age and maturity. In this case, the father completely deviates from his duties, does not talk to the mother, and violates the provisions of Art. 92 of the Family Law (2015, 2019), and in terms of rights and duties to protect the child's personal rights such as health, development, care and protection, upbringing and education, establishing personal relationships, and determining the place of residence. It can be concluded that the father stepped down from his role as a parent. Since the child's parents do not live together, the father does not participate in the joint and consensual realisation of parental care in accordance with Art. 104 of the said Family Law. Also, in accordance with Art. 111 of the Family Law (2015, 2019), parents do not exchange information on maintaining the child's health and consistency in upbringing and information related to school and extracurricular activities.

[333] In case representation client's identity is fully protected.

According to the Convention on the Rights of the Child (1989), it has been established that the child's right to an adequate standard of living has been violated. According to Article 64 of the Constitution of the Republic of Croatia (1990, 1997, 1998, 2000, 2001, 2001,2010, 2010, 2014), parents are obliged to raise, support and educate their children and have the right and freedom to decide and raise their children independently. They are also responsible for ensuring the child's right to the full and harmonious development of his personality, which the child father in represented case is violating.

5.1.1. Options

1. According to Art. 1 para. 3 of the Ordinance on teaching assistants and professional communication intermediaries (NG 87/08, 68/18), a minor child has the right to a teaching assistant.

2. According to Art. 22 of the Law on Allowance (2001, 2006, 2007, 2008, 2011, 2012, 2015, 2018), there is no information to the mother about the possibility of exercising the right to an increased allowance for a child with a severe or severe disability.

3. According to Art. 46 of the Housing Act in assisted areas (2018, 2019), if an individual or family is left without a single housing unit conditional on housing in which he resides, he may be provided with the housing care in the area of application of this Act also if the beneficiary is as well entitled to housing and is the beneficiary of the right to a guaranteed minimum compensation. His rent is HRK 1.00 per square meter monthly for the duration of the established right to a guaranteed minimum compensation.

4. Under Art. 319 of the Family Law (2015, 2019), the Center for Social Welfare (CSW) is obliged to warn the parent of its duty to inform CSW if the alimony payer does not fulfil his obligation regularly and in whole, inform the parent about the child's right to temporary alimony and the possibility of criminal charges against a parent who does not pay maintenance within 15 days from the day of learning that the maintenance obligation is not fulfilled regularly and in full.

5.1.2. Reasons for advocacy

One of the reasons for advocacy is the ignorance of the beneficiary about the rights she can exercise through the social welfare system which relate to housing, ensuring the quality of life for her and her son, the rights of the child and financial assistance. Also, the services offered are limited, do not fully meet her and her son's needs and they concern financial status and living. Furthermore, the beneficiary does not know what is the amount of social assistance she can request for her son. He has specific difficulties and is attending school according to a customized program (ADHD, Asberger's syndrome).

In this first phase, development of process competencies focused on the assessment dimension is important for social work students who will conduct advocacy. According to Buljevac et al. (2015), in the assessment phase the competencies for collecting and integrating data from different sources and at the same time conducting field visits, direct interviews and meeting administrative requirements are generally emphasised. Suppose we

connect the theory of empowerment in the practice of advocacy in this particular case. In that case, it is clear to us that this mother has encountered structural obstacles that prevent her from accessing the social resources necessary for her and her son's overall health and well-being. According to Kletečki-Radović (2008, p. 220), "the theory of empowerment is not only interested in the process of empowerment, but also in the result that brings a change in a more significant approach to social resources and greater social power of disenfranchised individuals, groups or communities".

5.2. Defining goals

Answers to the following questions, which Reish considers necessary for advocacy (1990, according to Brkić, 2010), will help us define the advocacy goals.

Table 1: Questions to define goals

Question:	**Answer:**
What is the problem?	A mother with a child with difficulties has to move out in a month, and there is no possibility of paying rent in a new tenant apartment.
Since when do problems happen?	The problem is happening now. Three years ago her income was drastically reduced. Father of the child no longer contributes to his maintenance.
Who is responsible for the problem?	Parents; System;
Where does the problem manifest?	At home (inadequate space and relocation request), at school (inability to attend classes), in society (maternal unemployment and participation in the social welfare system).
How does the problem manifest itself?	Through the mother's fear that she would become homeless and have to bring her son to the CSW to provide him with temporary accommodation. Through a sense of helplessness.

Taking empowerment theory into account, when defining goals, it is important to assess who has control over social resources. A significant aspect of empowerment practice is working with disenfranchised clients to reduce or eliminate helplessness, which in this case is reflected in the fears of the client. Goals tell us what will change, when and how, and one of the techniques that can help us to reconcile possibilities and desired goals is the gap analysis (Goodstein, Nolan, & Pferiffer, 1993, and according to Brkić, 2010). The gap analysis consists of a process of identifying advocacy goals by finding answers to the following key questions:

Table 2: GAP analysis

Question:	**Answer:**
What is the current position of the client/ group?	Danijela is unemployed, has low-income.
What will be her position if appropriate changes in the environment do occur?	The client will be integrated into the work system, the child will exercise the material and other rights provided by the Family Law.
What kind of change do we want to cause?	We want to empower the client to apply for rights for herself and the child and integrate her into the work system.
Determine the gap between the desired goals and the existing situation.	Impossibility of employment.
Define goals to fill the gap.	Creating a coalition with the Employment Bureau and involving the mother in the "*Wish*" program through retraining her to work with older people in the community.

5.2.1. Defining short-term goals

By Art. 3 of the Law on Social Work (2019), a social worker prepares and provides information relevant to the field of social work. The first goal is to inform Danijela about the possibility of exercising the rights provided by the city of Osijek, and refers to the right to compensation of housing costs that are recognized to the client of the right of guaranteed minimum compensation under Art. 30, para. 1 of the Law on Social Welfare (2013, 2014, 2015, 2016, 2017, 2017, 2019, 2020, 2020). The next step is to inform her about the possibility to apply for a free meal for students in primary schools, which is recognized to a student who is a member of the household of the beneficiary of the housing allowance. The goal is also to submit a request to secure a city apartment according to the Decision to rent city apartments from 2008. The next goal is to invite the father to the CSW to inform him about the obligation to support his minor child and warn him that a criminal complaint might be filed against him before the relevant institutions. If the father does not fulfil the provisions of Art. 319 of the Family Law, a criminal report will be filed against him, and a request will be submitted to the CSW for exercising the right to temporary maintenance for the child. From the short-term goals defined in this way, it is evident that they address the consequences, not the causes of the crisis situation and that they are realized over a short period of time which would last up to one month.

5.2.2. Defining medium-term goals

Furthermore, the goal of working with the client is to empower her to submit a request for repeated expertise under the provisions of Art. 3 of the Law on the Single Body of Expertise (2014, 2015), to determine the psychophysical condition of the child in exercising rights in the educational system, as well as exercising rights in other areas for a minor son to exercise the right to an increased child allowance and the right to a teaching assistant.

Given that in the Republic of Croatia it is possible to apply for exercising the right before three public bodies, depending on the type of procedure, it is necessary to contact the institution of the Croatian Pension Insurance Institute (CPII), the State Administration Office, SWC and the Croatian Health Insurance Institute (CHII). The procedure of providing expertise lasts about one year, by which time the realization of the rights and the fulfilment of medium-term goals are expected.

5.2.3. Defining long-term goals: (maintaining the desired condition)

1. Establishing the child's relationship with the father. The parent must care for the child's health and well-being and the child has the right to maintain personal relationship with both parents (Family Law, 2015, 2019).

2. Employment of the mother. The client must be employed to function independently and be integrated in the society and meet the needs of herself and her family. There is also the option of retraining Danijela, depending on her wishes and abilities, in order to facilitate her employment according to the needs of the labour market.

General goal: To realize the child's right to a standard of living appropriate to his physical, mental, moral and social development under Art. 26 of the Convention on the Rights of the Child. Recognition of the right to education following the child's needs according to the Convention on the Rights of the Child under Art. 28.

To set general (long-term) and specific (short-term and medium-term) goals in advocacy, it is necessary to create a cooperative relationship with the client, whereby contracting is based on joint goal setting with defining measurable outcomes and clear explanation of how goals are related to planned interventions in the real time-frame, which is a feature of general process competencies according to Buljevac et al. (2020).

5.3. Identifying decision-makers

In the described example, the decision-makers are the City of Osijek, the Center for Social Welfare Osijek, the Institute for Expertise, Vocational Rehabilitation and Employment of Persons with Disabilities, the Croatian Employment Service, the Croatian Pension Insurance Institute, the Croatian Institute for Public Health and the State Attorney. Therefore, in line with the competence-oriented approach, a critically structured approach and advocacy for human rights and social, economic and environmental justice is one of the meta-competencies that a social worker should have. The social workers thus should know the sources of social inequality and who the key decision-makers are. Furthermore, competent social workers are expected to keep abreast of political, economic, technological and environmental processes to spot the disruption of marginalized social groups on time.

5.4. Forming coalitions

Given that the stated goals require continuity in action, it is necessary to form a permanent coalition, which implies the existence of clear roles and responsibilities

between the coalition partners (Brkic, 2010). The coalition's purpose would be to inform the mother about the rights and duties that coalition members have and help her achieve her goals. Coalition members will meet twice a month to discuss the most important items and issues. During the other days, they will be in contact via mobile phone. The coalition coordinator is a social worker from the Department for Children, Youth, Marriage and Family of the Center for Social Welfare. This coalition must cooperate with the school, Croatian Employment Service (CES), Croatian Institute for Public Health (CIPH), the city, CPII and CHII. The decision-making process can take place through a communication in person or in a Zoom meeting.

5.5. Fundraising

The most important means for the coalition mentioned above are human resources, i.e. their knowledge and skills. For example, in the case of housing, the application is to be submitted from 1 January to 31 January of the current year to the competent state administration office in the county. The call is published on the website of the Central State Office (Law on Housing in Assisted Areas (NG 106/18, 98/19). It is crucial to agree, for example, if the mother does not have the Internet, who will monitor the opening of the call and inform her, in which case it will be proposed that this can be an official from the Administrative Department of the City of Osijek.

5.6. Defining a message

The message is a clear and convincing statement of the goals of advocacy in which we explain what we want to change, why and how. Therefore, when composing and sending a message we must take into account the following questions: Who is the target group for which the message is intended, what ideas we want to communicate, what words we will use to ensure clarity and efficiency of the message, in what format we will send it and what is the best time to transfer it? For example, a message for representation in the case under analysis could suggests:

"A mother with a child with disabilities from the street is looking for an apartment!"

We are sending the message to the city of Osijek to exercise the right to housing, more precisely to the Administrative Department for Urbanism and Construction, Communal Housing, Transport and Environmental Protection, and local self-government and the Department for Housing. To enable the exercise of the rights of Danijela and her minor son, we will argue the message, with the consent of the client, with family history and support it with laws that indicate a violation of the rights of the client. The most efficient outcome will be a meeting with the competent persons in the mentioned institution since this option is the fastest and it is not necessary to wait long for an answer. In addition, we will send an email to have a written track of the steps taken. The best time to act is right away, as the mother needs to move out with the minor child and has no other option.

5.7. Sending messages/realization and action

Realization of actions includes informing the mother to apply for an apartment to the City of Osijek, referring the child for the expertise and psychological assessment and filing criminal charges against the father who does not participate and does not contribute to the maintenance, is not informed about the child's growth, development and upbringing. Given that the mother meets the conditions and criteria for determining the order of priority according to the Decision on renting apartments (2008) she has the right to apply. Then, if the tender is not announced within the required time, the representative should contact an authorized person to put the family on the priority list. After the mother has submitted a request to the CPII and the Center for Social Welfare, CSW further contacts the Institute for Expertise and then instructs the mother to take the child to the institution to conduct an expert examination with the child and determine the degree of damage, to determine the need for program and the amount of child allowance that can be increased up to HRK 831.50 (Act on Amendments to the Act on Child Allowance, OG 58/18). The Social Welfare Center also files a criminal complaint with the State Attorney's Office (in writing, orally or by other means) against a father who does not contribute to maintaining a minor child. The report should contain personal data about the perpetrator, all information about the event, citing an article in the law, evidence and facts that are known, personal data of the injured person and data about the person filing the criminal report if it was not anonymous.

5.8. Monitoring and evaluation

It is necessary to conduct monitoring and final evaluation to achieve the effectiveness of the intervention. Through monitoring, we check whether steps have been taken towards achieving the set goals, whether what is set is being done so that corrective measures can be designed and introduced, if necessary. In this way, we can answer the question about whether we are doing what we said we would do in closing the case?

In terms of evaluation, it can be carried out in the way presented by Berkowitz (1982, according to Brkić 2010) in seven key steps. We will first define the obligation to evaluate the planned steps and have feedback for further action. Then we will specifically identify the goals of advocacy related to finding accommodation for the mother and minor son, the child's contacts with the father, payment of alimony, exercising the right to adequate child allowance and employment of the mother. In the third step, it is essential to specify the purpose of the advocacy process, i.e. in this case, lead the family to the desired results, the mother's employment, father's involvement and do everything for the benefit and welfare of the child and ultimately lead to changes in family circumstances and independence. Indicators through which the outcomes could be monitored are a contract for renting a city apartment, a call for expertise, the results of expertise, evidence of active job search or proof of enrollment for retraining. Indicators are proof of meeting goals. After all, the results will be analysed and conclusions and recommendations will be made, which will be used in further practice.

6. INSTEAD OF A CONCLUSION

When social workers defend or represent others to ensure social justice, they challenge the people and special interest groups in power to exercise their authority to help and benefit those who are less powerful. However, the representation procedure is impossible without knowledge of legal regulations and their application, as seen in the presented example of case representation.

Students of the first generation of the Graduate School of Social Work at the Faculty of Law in Osijek assessed that they agree that client representation is vital in working with clients and assessed that after completing the course "Social Welfare Systems and Representation" they have generally acquired knowledge and skills to lead the advocacy process. However, students assess that they do not have specific knowledge and skills in terms of cooperation and public relations. In further developing a learning program on advocacy in social work, new technologies could be introduced through exercises in the advocacy process and thus enter into public relations, increasing students' sense of competence to work with the media and in practice. This form is consistent with advocacy advocates such as Brawley (1997) and Brueggemann (2006). They were the first to notice the importance of teaching students how to engage in advocacy through media and technologies that are close to them and that they use in their daily communication.

Also, students should be continuously encouraged to think critically and distinguish between personal and professional boundaries so that the advocacy process does not turn into a personal struggle of the social worker. To do their job effectively, social workers who represent and apply empowerment methods in social work practice must first identify and analyze their sources of power at the personal, professional and institutional level to which they belong (Kletečki-Radović, 2008). Empowerment practices mean equipping clients with resources to take responsibility and take action to make changes. To implement it through advocacy, social workers themselves must be "equipped" with specific knowledge, skills and traits that they continue to upgrade after formal education.

As this is the first generation of social work students at the the School of Social Work at the Faculty of Law in Osijek which acquires competencies for representation within formal education, we have yet to follow how they will apply them in working with clients in social work.

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GUARDIANSHIP FOR MINORS AND ADULTS IN THE SOCIAL WELFARE SYSTEM OF CROATIA

Croatia has extensive legal framework for guardianship system for minors and adults, regulating situations in which court or other competent institution has a duty to appoint a guardian to safeguard interests of either a child deprived of parental care or where the holders of parental responsibility cannot ensure the child's best interest and/or represent the child, unaccompanied child migrant, minor victim of trafficking of adult person who is due to mental disability unable to protect his/her own interests. Article 12 of the Convention on the Rights of Persons with Disabilities stipulates obligation of States Parties to ensure that persons with disabilities have the right to recognition everywhere as persons before the law and that they recognize their legal capacity on an equal basis with others in all aspects of life, along with support they may require in exercising their legal capacity. As the role of guardian is often unclear and insufficiently regulated, practical implementation of guardianship is difficult or even impossible in some cases, thus affecting fundamental rights of a minor or adult under guardianship system. In social welfare, this is particularly concerning as persons under guardianship are usually in serious social risk and very vulnerable to exploitation of all kinds. Social workers are thus in a position to represent interests of the most deprived and disempowered and they should do it in an empowering manner, ensuring their social and legal equality. The paper provides analysis of the current legal regulation of guardianship for minors and adults in Croatia, looking into the main challenges of the guardianship system for both categories of beneficiaries. It emphasises inconsistencies of current legal regulation with international human rights law and points out the main areas where the system needs to be changed in accordance with the advanced models of guardianship system. Paper also provides examples of guardianship systems for unaccompanied minors in selected European countries which differ depending on whether they appoint professional guardians (usually Social Workers or Lawyers) or volunteer guardians without power to represent children before the courts. The aim of the paper is to contribute to legal discussions on the national guardianship system which

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is effective and protects the interests of beneficiaries in the best possible way and in line with the international human rights law, possibly providing guidance on managing and strengthening guardianship systems in Croatia.

Keywords: guardianship, unaccompanied minors, disabled adults, social welfare system.

1. INTRODUCTORY REMARKS

Discussion about guardianship system and role of social workers in representing minors or incapacitated adults often assumes that it is a clear-cut case of unavoidable necessity to provide legal protection to those who need it, where a professional makes so-called surrogate decisions.[334] In reality, we have numerous legal challenges, starting from legal justification of deprivation of legal capacity from an adult person, the question whether deprivation of legal capacity could be replaced by an adequate decision-support system, possible abuses of legally incapacitated persons in business dealings and of admission to institutional care decisions, challenges related to the implementation of international legal instruments regulating rights of persons with disabilities and children, incompatibility of certain roles of Social Workers with guardianship, particularly gerontological Social Workers working in institutional care of elderly or Social Workers working in inclusion housing units with persons of impaired mental health, inability of Social Workers to handle the large caseload of guardianship cases, problems with representation of interest of unaccompanied minor migrant children and many more challenges. If we assume that guardianship's major goal should be promotion of social justice and human rights, we need to look into the legal gaps in present regulation of guardianship and for that purpose, we will use Croatia as a case study.

The paper analyses the roles and responsibilities of Social Workers in guardianship of children and adults. Persons under guardianship are usually in serious social risk and are especially vulnerable to exploitation. Social Workers are consequently in a position to represent interests of the most deprived and disempowered, and they should do it in an empowering manner, ensuring their social and legal equality and ultimately, social justice.

The paper is divided into five parts, starting from Chapter 2. In the second Chapter, I set out the principles of legal capacity and minor and adult legal guardianship, outlining the position of guardianship system within the social protection scheme, followed by a description of guardians' basic roles and functions, including the role of a guardian as a link between different actors and presenting comparative solutions for appointment of guardians. The third Chapter focuses on child guardianship in general, the fourth Chapter deals with child guardianship in Croatia, while the fifth Chapter focuses on the roles and responsibilities of appointed child guardians (usually Social Workers) to unaccompanied minor migrants, outlining current issues in implementation of this institute. In Chapter 6, the focus is on legal incapacitation due to disability. This Chapter seeks to answer the question whether deprivation of legal capacity is (ab)used to compensate for a lack of appropriate supported-decision, co-decision, and other forms of support disabled persons need in their daily life.

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[334] Crampton, A., 2004, The Importance of Adult Guardianship for Social Work Practice, Journal of Gerontological Social Work, 43:2-3, 117-129, DOI: 10.1300/J083v43n02_08.

The main research question is whether Croatian social policies regulating guardianship, as the most invasive legal intervention to protect children without parental care or incapacitated adults, are designed to promote supported decision-making, rather than substituted decision-making. I explore whether guardianship in Croatia is currently used to fill the gaps in insufficient legal, social and other support in decision-making for mentally impaired persons, so that national legislation is more aligned with the international legal standards, providing sufficient safeguards to protect fundamental human rights of persons under guardianship.

2. PRINCIPLES OF LEGAL CAPACITY AND GUARDIANSHIP

In order to understand the institute of guardianship, we need to clarify the notion of legal capacity. Council of Europe defines legal capacity as a person's power or possibility to act within the framework of the legal system, to be subject of a law and to enable people to have rights and obligations, to make binding decisions and have them respected.[335] It further distinguishes between the capacity to have rights and capacity to act or exercise these rights Notably, the Convention on Rights of Persons with Disabilities [336] vests persons with disabilities with both of these aspects of legal capacity, stating that "the capacity to be both a holder of rights and an actor under the law." Convention further clarifies that "Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal.[337] The UN Committee on the Rights of Persons with Disabilities describes legal capacity as "the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships."[338] Therefore, the Committee explains that "legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)."[339]

Guardianship was initially developed as a legal and social tool to protect vulnerable persons, either adults who cannot adequately protect their own interests and well-being

[335] Council of Europe, Commissioner for Human Rights, 2021, Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, pp. 10-11.

[336] Convention on the Rights of Persons with Disabilities Official Gazette - International Agreements, No. 06/07, 03/08 and 05/08.

[337] Dhanda, A., 2007, Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?, 34 Syracuse Journal of International Law & Commerce, p. 429ff; Bach, M., Kerzner, L., 2010, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity', prepared for the Law Commission of Ontario, p 16; Minkowitz, T, 2007, The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions, 34 Syracuse Journal of International Law & Commerce, p. 405f.

[338] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, p. 3, point 12.

[339] Ibid.

and for whom a legal intervention is used through the appointment of a surrogate decision maker[340] and children deprived of parental care or in a legal position where parents cannot participate in decision making for the well-being of children.

Guardianship of an adult is a legal court order which gives an individual (the guardian) the legal authority and responsibility to make or assist in making decisions about personal matters on behalf of another adult.[341] We have to understand that adult persons under full guardianship are invisible in society, unable to make any legally enforceable decision and legally non-existent. This is why we need to engage in serious considerations of the applicability of guardianship for adults, the process for the selection and appointment of guardians for children and adults, roles and responsibilities of guardians and legal implications of guardianship decisions. It is of utmost importance to have precise and human-rights-based legal regulation of the scope of guardianship, including skills and necessary professional competencies of Specialized Guardians, among which Social Workers are most frequently appointed as specialized guardians to both children and adults. If guardianship system is abused to circumvent involuntary institutionalization or hospitalization, conclusion of a legal contract or any other task of importance for a future life of an adult beneficiary, if child's wishes and opinions are not taken into consideration, or if specialized guardian simply does not have the opportunity to meet a child under his guardianship, it is evident that the main purpose of guardianship is not being achieved in practice, despite comprehensive international human rights standards and national legislation, which can be excellent in formal regulation of guardianship.

Different types of guardianship are applicable, depending on the legal system where the guardianship takes place. The main difference that can be identified is that between permanent guardianship, where, for example, permanent mental impairment is assessed to justify appointment of a permanent guardian, and temporary guardianship, which is usually reserved for special situations where, for example, legal guardians (such as parents) are temporarily prevented from performing their legal duties. There is also emergency guardianship that can be used in crisis situations, where the health or safety of a person is endangered.

Further, we have a crucial distinction between plenary and partial guardianship for adults. The Committee on the Rights of Persons with Disabilities clarified in 2014 that substitute decision-making regimes can include plenary (permanent) guardianship, judicial interdiction and partial guardianship. The Committee explained that "in all cases of substitute-decision making a legal capacity is removed from a person, a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."

Adult legal guardianship is activated in all cases when an adult is deprived of legal capacity, either partially or fully. This is mainly applicable in cases of mental illness or a similar state in which a person cannot make the necessary decisions and cannot

[340] Burningham, S., 2009, Developments in Canadian Adult Guardianship and Co-Decision-Making Law, 8 Dalhousie J. Legal Stud. 119.

[341] Government of Alberta, Canada, https://open.alberta.ca/publications/guardianship-general-overview.

comprehend his/her own best interests. In all cases of partial or full deprivation of legal capacity of a person with mental disability, the appointed legal guardian implements so-called substitute –decision making.

In 2012, the Council of Europe Commissioner for Human Rights recommended "abolishment of mechanisms providing for full incapacitation and plenary guardianship." This recommendation is in line with the provisions of the Convention on the Rights of Persons with Disabilities, according to which States should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law and full and effective participation and involvement in society, with plenary guardianship or any other form of substitute-decision making being considered to be among such deprivations. Convention requires the signatory states to accept that persons with disabilities have the legal capacity on the same basis as other persons in all aspects of life, and signatory parties are obliged to take targeted measures to provide assistance to persons with disabilities to exercise their legal capacity, including the right to supported decision-making procedures. The shift from substitute-decision making to supported-decision making is a key legal development for persons with disabilities and presents the human rights-based model of disability.

Application of supported-decision making model would, naturally, never imply full abolition of deprivation of legal capacity for persons who are medically assessed as unable to protect their own interests and understand implications of their decisions. Instead, it would provide opportunities to those disabled persons who are able to protect their own interests and well-being and to become fully recognized members of society.

Appointment of a guardian for adults is always linked to the assessment of mental and legal capacity. When it comes to children, it is linked to the assessment of their particular situation, where the professionals have to decide whether the child's interest would be best protected by the legal substitute to their parents – guardians.[342]

While we often assume that a guardian needs to be able to legally represent an adult or a minor, this is not always the case. Sometimes guardians are indeed legal representatives, but in many other cases they are just "guards of special interests" and have no power to represent their wards legally, but instead decide on a whole range of personal issues. Thus, we have a group of European countries where legal guardians are always professional caregivers –in Germany, the United Kingdom and countries of South-East Europe, including Croatia, they are mostly social workers appointed *ex officio.*[343] In Italy, we have an interesting practice that legal guardian is usually the mayor of the city where the minor is located, but if another person apart mayor is appointed, there is no legal requirement on who that can be – the only requirement is that a guardian is a person of good conduct and suitable for the job.[344] In the Netherlands, children's legal guardians are so-called youth protectors.

The second group of countries establishes child guardianship as a volunteer task, except for legal representation. In Belgium, child guardianship is currently a combination of

[342] Burningham, S., 2009, Developments in Canadian Adult Guardianship and Co-Decision-Making Law, 8 Dalhousie J. Legal Stud. 119.

[343] NIDOS Foundation, 2005, Towards a European Network of Guardianship Institutions, pp. 29-32, https://www.nidos.nl/en/home/nidos-en-europa/european-guardianship-network-egn/

[344] Ibid. pp. 39-43.

gratuitious and professional guardianship.[345] Interesting solution exists in France where there are three types of guardianship: *tutelle*, *educateur* and ad-hoc administrator.[346]

Various practices in this regard are the result of a lack of commonly agreed definition of guardianship for children in the European Union.[347] This poses a problem because it is difficult to compare various legal solutions in different Member States.

Canadian law requires guardians to act in the adult's best interest, to be diligent and act in good faith, to encourage the adult to be as independent as possible, to act in the least intrusive and restrictive manner (that is effective), to inform the adult of important decisions that are made and to keep a record of the decisions that are made. A guardian has a responsibility to only access information that has been authorized and is needed for a given decision and keeps personal information about the adult safe from unauthorized access, use or disclosure.

A Canadian co-decision maker shares legal authority with the adult, must consent to an adult's reasonable decisions and is statutorily required to minimally interfere in the adult's life and decision- making process and he is required to act in a manner that protects the adult's civil and human rights.

3. LEGAL GUARDIANSHIP OF CHILDREN

According to the UN Committee on the Rights of the Child:

> "A guardian is an independent person who safeguards a child's best interests and general well-being, and to this effect complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents his or her child."[348]

Without commonly agreed definition of legal guardianship, we are deriving the current concepts of legal protection of children from the principles from the United Nations Convention on the Rights of the Child.[349] The Convention regulates key principles related to the guardian's work, primarily through Article 2 governing non-discrimination, Article 3 defining the best interests of a child and Article 12 prescribing the right of a child to express his/her views and to be heard in any judicial and administrative proceedings

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[345] Ibid. pp. 12-16.

[346] Ibid. pp. 23-27.

[347] European Union Agency for Fundamental Rights, 2014, Guardianship for children deprived of parental care, A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, p. 13.

[348] UN Committee on the Rights of the Child General Comment No. 6 CRC/GC/2005/6 and the UN Alternative care guidelines A/HRC/11/L.13, cited in: European Union Agency for Fundamental Rights, 2014, Guardianship for children deprived of parental care, A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking.

[349] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Child legal guardianship needs to be based on common fundamental principles, including quality, child participation, non-discrimination, sustainability, independence, impartiality and accountability.[350]

When considering the main functions of a legal child guardian, we can distinguish three main functions: insuring child's overall wellbeing (including undertaking of risk assessment, individual needs assessment, provision of support in maintaining the family links, making sure the child has an adequate standard of living, healthcare, education and training), safeguarding the child's best interest and legal representation and complementing the child's limited legal capacity.[351]

The child guardian should act as a link between the child and specific professionals working in various systems important for the healthy development of a child, such as education, justice, welfare and health systems; further the guarding is a link between a child and community and family.[352] A guardians should ideally facilitate child's full participation in all above mentioned systems, in accordance with the age and maturity of the child. In cases of unaccompanied children, a guardian should assist in identifying a durable solution that is in the child's best interest, which might include foster family care, adoption or return to the country of origin if family members are known and able to undertake care duties over child.[353]

4. LEGAL GUARDIANSHIP OF CHILDREN IN PRACTICE IN CROATIA

Legal guardianship in Croatia is regulated by the Constitution of the Republic of Croatia (through protection of social rights and guarantees for social welfare state). Article 58 provides legal basis for state protection of weak, disabled, incapacitated and persons otherwise without proper care, with particular focus on children and youth in general (Article 63 of the Constitution) and children without parental care in Article 64.[354] Additionally, legal guardianship is regulated in several laws, but the most important provisions related to the legal guardianship of minors and adults are found in the Family Law.[355]

Croatian Family Law prescribes that the court will deprive the parent of the right to parental care in proceedings when it finds that the parent is abusing or grossly violating

[350] FRA, p. 13.

[351] Ibid.

[352] Ibid.

[353] Ibid.

354 Constitutional of Republic of Croatia, (Official Gazette Number 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14).

[355] National legal framework for the guardianship in Croatia:
Family Law (Official Gazette Number 103/15, 98/19),
Law on Center for Specialized Legal Guardianship (Official Gazette Number 47/20),
Law on Protection of Persons with Mental Disabilities (Official Gazette Number 76/14),
Law on Social Work, (Official Gazette Number 16/19),
Law on Social Welfare (Official Gazette Number 157/13, 152/14, 99/15, 52/16, 16/17, 130/17, 98/19, 64/20, 138/20).

parental responsibility, duty and rights.[356] If parents are unable to engage in protection of child's interests, Article 218 of the Family Law is activated, triggering appointment of a legal guardian[357] Guardianship protection should be adequate, individualized and in accordance with the well-being of the child, taking particular interests of the protection of health, education, personal and property rights of a child.[358] This, depending on the circumstances, can take a form of definite or indefinite representation of child's interests.[359] If the Centre for Social Welfare initiates proceedings in the name and on behalf of the child for the purpose of establishing paternity and for the maintenance of the child, it has the position of the child's legal representative in that procedure.[360]

Croatian law recognizes appointment of a guardian to children (nationals or foreigners) to represent them before the court or other state bodies. This legal representation is regulated by the Law on Centres for Specialized Legal Guardianship. The Specialized Guardian for Court representation is a jurist with a right to legal representation. If a child needs a guardian for other non-legal representation tasks, one can be appointed by the Centre for Social Welfare; these are usually social workers, psychologists, social pedagogues or jurists employed by the Centre.

Croatian law further stipulates three main tasks of the Specialized Child Guardian: to represent the child in the proceedings for which he/she has been appointed, to inform the child about the subject matter of the dispute, the course and outcome in a manner appropriate to the child's age and, if necessary, to contact a parent or other person chosen by the child.[361]

Family Law stipulates that a Specialized Guardian will be appointed in all matrimonial disputes and in proceedings in which maternity or paternity are challenged, in proceedings in which parental care, scope of parental care and personal relations with the child are decided on, when there is a dispute between the parents or child care-givers, in the procedure of imposing measures for the protection of personal rights and welfare of the child within the jurisdiction of the court, in the process of making a decision that replaces the consent to adoption, when there is a conflict of interest in property proceedings or disputes, when concluding certain legal transactions or in a dispute or conclusion of a legal transaction between the child and the parent or other person exercising parental care over the child, to a foreign citizen or a stateless child who is found in the territory of the Republic of Croatia unaccompanied by a legal representative and in all other cases when it is necessary to protect the rights and interests of the child.[362]

Ombudsperson for Children reported several issues with the implementation of above-mentioned legal provisions of the Family Law. Namely, in the Annual Report for 2020, she

[356] Ibid. 170.

[357] Family Law (Official Gazzette Number 103/15, 98/19).

[358] Ibid, Articles 221 and 227.

[359] Ibid. Article 178.

[360] Ibid. Article 335.

[361] Ibid.

[362] Ibid. Article 240.

reports a lack in number of appointed Specialized Child Legal Guardians and consequently their inability to cover all guardianship cases due to distances between the regions and cities where children live and where the Courts are located.[363] This leads to insufficient number of contacts with children to establish trust.[364] Another concern raised is over the skills and professional competencies of jurists to communicate with children in vulnerable situations and the necessity to communicate with children through professionals (psychologists, social workers, or other experts) which has not been done in all legal procedures ,due to lack of available time or resources.

Finally, Ombudsperson raised a concern over the role of Specialized Legal Guardians in representation of children as to whether they represent child's opinion or his/her own opinion on the best interest of a child.[365] The survey showed that the majority of Specialized Legal Guardians require from the Court what they consider to be the best interest of a child, without taking into consideration child's opinion which they are obliged to do, according to the Convention on Rights of the Child.[366]

5. LEGAL GUARDIANSHIP OF UNACCOMPANIED MINOR MIGRANTS IN CROATIA

The second aspect of child guardianship in Croatia is related to the appointment of specialized guardians to children who are foreign nationals and can find themselves in Croatia either in transit towards another country, as asylum applicants, victims of child trafficking or other categories of minor migrants without parental care. In this paper, I will refer to all categories of such children as unaccompanied minors.

The European Union Member States have a legal obligation to provide legal or other form of representation to unaccompanied minor migrants. This obligation was set in 2003 by Article 19.1 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers:

> "Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organization which is responsible for the care and well-being of minors or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities".

Still, since the adoption of Directive 2003/9/EC up to date, we still do not have a common definition of legal guardianship of unaccompanied minors in Europe, which poses numerous problems, because there is a variety of legal solutions across the EU. Thus, migrant unaccompanied child might receive different forms of legal representation across the

[363] Ombudsperson for Children, Report on Work of Ombudsperson for Children for 2020, p. 196.

[364] Ibid.

[365] Ibid.

[366] Ibid.

EU.[367] As indicated in the report entitled "Towards a European Network of Guardianship Institutions", one form of representation is the one provided in the sense of Article 19 of Directive 2003/9/EC, while the other one is providing guardians as independent representatives responsible for the well-being of the child.[368] The same report outlines that a guardian for unaccompanied minor should ensure that a separated child's welfare needs are be properly safeguarded within the context of the asylum determination and immigration process and that their support and care needs are be met by all responsible agencies.[369]

Croatian appointment of legal guardianship to unaccompanied minors is regulated by the Family Law and by the Protocol on Procedure with Unaccompanied Minors.[370] The Protocol establishes the national system of proceedings by defining the duties, methods and deadlines for dealing with unaccompanied children, in order to provide timely and effective protection of their rights and interests.[371] The Protocol sets the following tasks of Social Worker/appointed Guardian: establishing communication (via interpreter) and allows the child to express needs, conducting an initial assessment of the needs of an unaccompanied child, informing the unaccompanied child of all facts and circumstances in an appropriate manner, suitable for child's age, maturity and understanding (especially on rights, obligations, available services and access to international protection) and ensuring the child's right to express opinions and needs, actively participating in the identification process in support of the child, informing the unaccompanied child of the rights and obligations during and after the procedure of identification, the right to a special guardian, as well as access to all other rights, ensuring that the procedure is conducted in a manner adapted to the unaccompanied child, representing the unaccompanied child in the proceedings for which he is appointed: taking care that procedures and all decisions are made for the benefit of the unaccompanied child, possibility to express an intention on behalf of the child if, in the return procedure he/she assesses that international protection is necessary with regard to the child's personal and other life circumstances. Further, in the case of suspected age claim, the Social Worker addresses suspicion as to the child's age, introduces him/her to age assessment procedures (including medical age testing) and possible consequences. The Social Worker pays special attention to risk indicators in terms of whether the unaccompanied child is a victim of trafficking in human beings and declares any justified suspicion in order to initiate the procedures of the national referral mechanism for cases identification of victims of trafficking.[372]

The Protocol stipulates that Specialized Guardian needs to participate in initial assessment of child's needs, health examination, age assessment, has accommodation related tasks (unaccompanied children in Croatia are accommodated in social welfare institutions) and

[367] NIDOS Foundation, Towards a European Network of Guardianship Institutions, 2005, https://www.nidos.nl/en/home/nidos-en-europa/european-guardianship-network-egn/

[368] Ibid. p. 10.

[369] Ibid, p. 7.

[370] Protocol was adopted in 2018 by the Government of Republic of Croatia, available at: https://mrosp.gov.hr/istaknute-teme/obitelj-i-socijalna-politika/obitelj-12037/djeca-i-obitelj-12048/djeca-bez-pratnje-12060/12060

[371] Ibid. p. 3.

[372] Ibid. pp. 8-9.

subsequent visitation duties, selects legal aid provider and has other related numerous tasks.

As we can see from the above list, the tasks of a Specialized Guardian (usually Social Worker) are very extensive and almost impossible to undertake if there is no permanent translation service provided. Currently, Croatian guardianship system for migrant children relies on traditional live interpretation services (also used by the Courts) which are expensive and impractical - in other countries they are, in fact, being replaced by phone or Web-based live translation services. This unavailability of translation is one of the major obstacles in Social Workers ability to communicate with a child and thus, being able to undertake all the necessary tasks.[373]

The second obstacle to effective provision of above mentioned services prescribed by the Protocol is case-overload by Social Workers, due to which they are unable to dedicate necessary attention and time to unaccompanied minor migrants and effectively resolve all the issues they have.[374] Interviews with unaccompanied minors in Croatia conducted in 2019 demonstrated that, in some cases, unaccompanied minors did not even have a chance to meet their Specialized Guardians, which can most probably be attributed to work overload of Social Workers.[375] The same concern has been raised by Ombudsperson for Children, who pointed out that "it seems the role of Social Workers as Specialized Guardians is purely formal, as appointed guardians are "not in regular contact with minors, often meet them only when required by law for expression of requirement for international protection and thus, cannot fully protect their interests and rights."[376] Ombudsperson further reports that during Covid pandemic, Specialized Guardians did not have online or phone contacts with unaccompanied minor migrants.[377]

The third obstacle to effective protection of rights of unaccompanied minors in terms of specialized guardianship lies in the weak coordination of various aspects of their legal protection. Current insufficient coordination between education, health care and social welfare systems prevents them from enjoying their fundamental rights, particularly important as for the access to schooling, full health care coverage and current practice of accommodation of unaccompanied minors in Centres for Children with Behaviour Disorders, which should be replaced by foster care accommodation (currently stipulated by the law, but not implemented in practice).[378]

The fourth obstacle to effective guardianship protection of minors is insufficient professional training and lack of supervision of Social Workers appointed to be Specialized Guardians.[379] This involves their unsatisfactory knowledge of rights and procedures stipulated in Protocol, leading to violations of the child's best interest standard as

[373] NIDOS, Centar za nestalu i zlostavljanu djecu, Foster Care for Unaccompanied Minors, Report on Croatia, Stitching Nidos, The Netherlands, 2019, p. 17.

[374] Cf. Ombudsperson for Children, Report on Work of Ombudsperson for Children for 2020, p. 156.

[375] Ibid. ft. 33.

[376] Ombudsperson for Children, Report on Work of Ombudsperson for Children for 2020, p. 157.

[377] Ibid.

[378] Cf. ibid. and Ombudsperson for Children, Report on Work of Ombudsperson for Children for 2020, p. 156, https://dijete.hr/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/

[379] Ombudsperson for Children, Report on Work of Ombudsperson for Children for 2020, p. 156.

stipulated by the Convention on Rights of the Child.[380] Consequently, the Ombudsperson's recommended the professionalization of unaccompanied minors' specialized guardianship role, so as to facilitate full recognition of their internationally recognized rights.[381]

Finally, there is legally unjustified and even unlawful practice in Croatia to appoint a specialized guardian from the group of people with whom unaccompanied minor arrived to the country, and who claim to be a relative of the child.[382] As those claims are not verified prior to appointment, Ombudsperson emphasized that nine of such appointments in 2020 were contrary to the Protocol and can be engendering a child's safety due to the fact that accompanying adults can be traffickers, people smugglers or simply do not have sufficient knowledge and skills to undertake guardianship role in the child's best interest.[383]

6. ADULT LEGAL GUARDIANSHIP IN PRACTICE: ARE MENTALLY DISABLED PERSONS IN CROATIA INCAPACITATED OR SIMPLY INSUFFICIENTLY SUPPORTED?

Until recently, Croatia applied a full incapacitation approach through legal incapacitation of persons with mental or intellectual disabilities without engaging in proper assessment procedure as to whether the person could indeed jeopardize his/her interests. This practice was mainly used to allow others to consent to the placement of mentally ill person in institutional settings or to facilitate involuntary hospitalizations or involuntary medical treatments.[384] This was done in spite of the legal provision stating that "deprivation of legal capacity does not mean inability to give consent, so, before the application of a medical procedure, the ability to give consent must also be determined in the case of a person deprived of legal capacity.[385] Legal incapacitation of mentally impaired persons in Croatia used to circumvent beneficiary's resistance to institutional accommodation or medical treatment [386] constituted a severe violation of human rights of a person with disability, being one of the most serious violations of international human rights framework. The line Ministry initiated review procedures for all decisions of legal incapacitation of mentally

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[380] Ibid, p. 157.

[381] Ibid.

[382] Ibid.

[383] Ibid.

[384] "Committee on the Rights of Persons with Disabilities in General Comment No. 1 (2014) of Art. 12. Convention on rights of persons with disabilities states that… "*Segregation of persons with disabilities in institutions and further a ubiquitous and dangerous problem that violates a number of rights guaranteed by the Convention. The problem is exacerbated by widespread deprivation of legal capacity of persons with disabilities, which allows others to consent to their placement in institutional settings. (…)* ". In the Guidelines on Art. 14. of the Convention on the Rights of Persons with Disabilities states that coercive detention of persons with disabilities on the basis of the danger or threat they pose, the alleged the need for care or treatment, or other reasons related to impairment or medical diagnosis, is contrary to the right to liberty and constitutes arbitrary deprivation of liberty," cited in: Ombudsperson for Persons with Disabilities Annual Report for 2019, p. 58.

[385] Article 12, p. 3 of the Law on the Protection of Persons with Mental Disabilities (Official Gazzette Number 76/14).

[386] Ibid. pp. 212-21 and cf. „Placement in closed settings without the consent of the individual concerned should always be considered a deprivation of liberty and subjected to the safeguards established under Article

impaired persons brought between November 2015 and November 2020.[387]

The right to legal capacity is a prerequisite for the exercise of all other rights, some of which are particularly relevant for the persons with disabilities, such as the right to independent living in the community with the support and decision on placement in a psychiatric hospital, or the right to decide on treatment and all procedures performed for the purpose of treatment.[388] Ombudsperson's for Persons with Disabilities recommended the promotion of "their empowerment, self-advocacy, independence, autonomy and, above all, maintaining control over one's own life also by making decisions about it". This Ombudsperson had previously called for an urgent legislative changes to implement international legal obligations whereby the human rights of persons with long-term physical, mental, intellectual or sensory disabilities would not be restricted, but instead, their legal capacity would be preserved and respected.

Legal incapacitation of disabled persons in Croatia was clearly used to fill the gaps in service provision necessary for independent living in community and social inclusion, such as transportation, rehabilitation, personal assistant, community nurse, etc. Therefore, the Ombudsperson pointed out the necessity to develop and expand existing services to support the quality of life of people with disabilities in their own homes, preventing their separation, including comprehensive mental health care in the community.[389]

Another troublesome aspect of legal incapacitation in order to facilitate institutionalisation of beneficiary lay in the inability of a person deprived of legal capacity to submit a request for judicial review of such decision or appeal it.[390] Incapacitated persons are only entitled to require a review of the decision on deprivation of legal capacity , but are not authorized appellants against a decision on the involuntary accommodation submitted and approved by their guardians. This is a clear-cut case of denial of access to justice and deprivation of freedom.[391]

In Croatia, another problematic issue related to incapacitation of disabled persons, is the fact that, in institutional settings, a considerable of beneficiaries are under the guardianship of service provider employees. The Ombudsperson reported on as many as 19 persons being under the guardianship of one employee who cannot adequately protect the interests of persons deprived of legal capacity.[392] Guardians who are service providers are also in a conflict of interest and should not be appointed to that role, in order to avoid the possible abuses of Art. 248 of the Family Law.[393]

Finally, there is a need to urgently introduce safeguards to prevent abuse of persons with mental disabilities for unlawful, fraudulent contractual dealings and loan agreements

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5 of the European Convention on Human Rights, Council of Europe, Commissioner for Human Rights, 2021, Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities.

[387] Ombudsperson for Persons with Disabilities Annual Report for 2019, pp. 54-55.

[388] Ibid.

[389] Ibid.

[390] Ibid. pp. 213-214.

[391] Ibid.

[392] Ibid. p. 60.

[393] Ibid.

without the approval of a guardian, given legal incapacitation is visible only in the birth certificate, but not in other ID documents. Ombudsperson thus recommended the introduction of a safeguard through a supported decision-making system, so as to protect incapacitated beneficiary in conclusion of legal transactions and/or disposal of property rights from becoming a debtor of the loan agreement.[394]

In 2017, the Croatian Government made a formal step forward by committing to make a shift from substitute decision making to supported decision making by way of adoption of the Strategy for Equal Opportunities for Persons with Disabilities[395] in line with Art. 12. of the Convention's obligation of the state to ensure the right to support independent decision-making. In the time of writing of this paper (September 2021), Croatia still has substitute decision-making for mentally impaired beneficiaries, provides summary legal incapacitation of mentally impaired individuals and still has not effected a single legislative change or otherwise introduced support-decision mechanism for disabled adults.

7. CONCLUSION

Legal representation of children and adults is a theme which should constantly be under close scrutiny and review of legal scholars, jurists, judges and lawyers, because it is the area where we can legally allow gross violations of human rights under the pretext of the "best interest" of the beneficiary. If a child or a mentally impaired adult cannot represent his/her interests and has no possibility to have his/her voice heard, we are preventing them from accessing justice and violating primarily the Convention on the Rights of a Child and the Convention on Rights of Persons with Disabilities, and also numerous other international human rights conventions. This paper points out the most urgent gap areas in legal regulation of guardianship for children (domestic and foreign nationals) in Croatia, as well as the key problem issues related to the protection of the most fundamental right of persons with disabilities – right to legal existence and ability to decide on one's life choices– which is being annulled by legal incapacitation and appointment of a guardian.

The paper identifies several groups of long-standing issues linked to legal gaps and gaps in provision of safeguards to facilitate meaningful, rights-based representation. In the area of child representation, there is insufficient number of appointed Specialized Child Legal Guardians and subsequently, insufficient contacts are effected with children. Furthermore, skills and professional competencies of appointed guardian jurists to communicate with children in vulnerable situations and necessity to communicate with children through professionals (psychologists, social workers, or other experts) is not practiced all legal procedures due to lack of available time or resources. Concerning survey results show that the majority of Croatian Specialized Legal Guardians require from Court what they consider to be the best interest of a child, without taking into consideration child's opinion, thus violating the Convention on Rights of the Child.

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[394] Ibid.

[395] Government of Republic of Croatia, National Strategy for Equal Opportunities for Persons with Disabilities for the Period 2017-2020, Official Gazette Number 42/2017.

In terms of legal representation of interests of unaccompanied minor migrants, five areas of concern obstructing effectiveness of guardianship were outlined in the paper: overly extensive list of tasks of child guardians coupled with unavailability of translation services which prevents communication between a Social Worker and a child; work overload of guardians and inability to meet with unaccompanied minors; weak coordination of various aspects of their legal protection (access to schooling, full health care coverage and current practice of accommodation of unaccompanied minors); insufficient professional training and lack of supervision of Social Workers appointed to be Specialized Guardians and legally unjustified and even unlawful practice in Croatia to appoint a specialized guardian from the group of people with whom unaccompanied minor arrived to the country and who claims to be a relative of a child.

When it comes to persons with mental disabilities, there are also numerous areas of concern. In Croatia, full legal incapacitation was applied almost by default for all persons with mental disability, often without proper assessment of level of understanding and ability to make decisions, often without proper explanation to the beneficiary and his/her family of the legal implications of such incapacitation. This practice was used to circumvent involuntary institutionalization or medical treatments of mentally impaired persons, which constituted a gross violation of Convention on Rights of Persons with Disabilities. Four years after the adoption of Croatian Strategy for Equal Opportunities for Persons with Disabilities, desk research revealed that no progress was made in terms of necessary shift from substitute-decision making to support-decision making for disabled persons. Nonetheless, there is hope that this paper might shed some light on the most important safeguards necessary to provide effective legal representation of children and adults, with a prospect that adult representation in Croatia will soon transform from surrogate –decision making to supported-decision making. For the moment, incapacitation is still used to compensate for the lack of available support services for disabled persons.

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LABOUR LAW STATUS OF PLATFORM WORKERS – BETWEEN AUTONOMY AND SUBORDINATION***

The paper deals with the theoretical and fundamental conceptual foundation of new forms of work arrangements, i.e. so-called "platform work", considering its practical application. The idea of matching the supply and demand for paid work through an online platform in the era of "platform capitalism" creates several legal discrepancies calling for urgent policy and legal answers. In the paper, we aim to analyse the so-called "platform work", which is staying halfway between traditional subordinate work and self-employment, by applying the legal normative and comparative method, along with the holistic approach to the research subject regarding the identification of its legal nature. The standard elements of the employment relationship – a contract-based relation, the performance of work on another's behalf, payment of remuneration and subjection to direction and supervision i.e. subordination – need to be considered in terms of the technological changes, transformations in the organisation of companies and, consequently, the flexibility of work arrangements. The importance of adjustment of the labour law theory and practice to a new reality by addressing the "products" of the gig economy represented in new digital forms of work supports the principles of social justice, equity, and dignity at work. The labour law needs to follow changes in the economy and society by expanding the scope of its core concepts to address the regulatory gaps and perform its mission of protection of employment-related rights and freedoms.

Keywords: gig economy, platform work, legal status, subordination, autonomy.

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1. INTRODUCTION AND BACKGROUND OF THE STUDY

Considering the lack of normative regulation in most legal systems, the issues of platform work definition and its legal nature are undoubtedly linked to the constitutional grounds of basic labour law principles, on the one hand, and the juridical interpretation on the case-by-case basis, on the other. At first glance, it could be further considered as a theory dichotomy between the supremacy of "rules" over "principles" and vice versa. According to some scholars, the legal nature of new forms of work, such as, certainly, platform work, need to be discussed in the light of particular socio-economic facts i.e. current politics of labour law (Pietrogiovanni, 2020, p. 323), for the reason of which the Dworkin's theory of law will be particularly analysed in the article. It means the interpretation of basic constitutional provisions of labour relations in the context of "their best political moral light" considering the overall system i.e. "totality of laws as legal sources, institutions, moral standards, and goals of society" (Nalbandian, 2009, p. 373-374). Inevitable changes in economy and society call for a redefinition of the traditional labour and social institutions and for providing adequate protection to all subjects concerned. The so-called "gig" or platform economy emerged along with the transformation of the organisation of work, where the non-standard, flexible job arrangements have been promoted over the traditional full-time, stable work. Economic, demographic and sociological changes, followed by globalization and technological development, led to profound changes in the world of work. It presupposes the holistic understanding of most contemporary legal relationships, including the labour ones.

The article aims to address the issue of a new form of work, the so-called "platform work", particularly in the context of the question of how the new technologies and economic changes impact on standard structure of employment relationship and the basic workers' rights. After all, do we need the redefinition of the standard employment relationship and could we identify the adequate concept for understanding the nature of the threefold relationship between the online platform, service providers, and clients? The highlighted advantages of platform work, such as life-work balance and inclusion of vulnerable workers in the labour market over the disadvantaged presented as undefined legal status, particularly regarding the labour rights protection mechanisms (wage and dismissal protection, social security and union rights), call for an urgent regulation of this form of work. After the overview of international i.e., the International Labour Organization insights into platform work, regional (EU) and comparative standpoints regarding platform work towards policy and legal framing, theoretical and conceptual grounds of the core element of employment relationship, i.e. subordination, will be analysed in terms of determination of legal nature of platform work . Additionally, the existence of consequences i.e. sanctions to the service provider regarding its autonomy of working hour arrangement (flexibility of work schedules) and the possibility to reject the job demand might also be the question to address in this regard. Along with the holistic interpretation, the method of conceptual analysis, accompanied by the normative and comparative approaches to the research subject, will be applied.

2. CONCEPT OF PLATFORM WORK AND THE GIG ECONOMY CHALLENGES

The so-called "gig economy" became a mainstream term, closely linked with technological development on the one hand, and sociological changes, on the other. Pulignano's definition of gig-economy seems to be the most precise one, where gig economy comprises a distinctly new set of economic relations that depend on the Internet, computation and data (Pulignano, 2019, p. 631). It has been grounded on the increasing of non-standard or independent work that has been supported by technological development (Nikolić&Petrović, 2018, p. 494), particularly with the emergence of IT platforms used as digital job markets matching supply with demand for, usually, short-term services. App-based "gig" platforms offer temporary, flexible jobs to independent contractors and freelancers, providing autonomy to those workers who value independence and flexibility while representing an "alternative safety net" to traditional job seekers (Oyer, 2020, p. 2). Furthermore, the platform work model could serve as the model of labour market inclusion of vulnerable workers - workers with firm family commitments, people with disabilities or health conditions, youth, older workers, retired, long-term unemployed, those with a migrant background (Pulignano, 2019, p. 630). However, in general, the concept of non-standard/independent platform labour offers the potential for providing a work-life balance, stressing the contemporary values of individuality, autonomy and freedom. Flexibility in the work arrangements schedules reduces the employer's management power but leaves the worker unprotected from traditional job risks, such as work accidents and injuries, as well as social risks i.e. unemployment, old age and illness. Among the disadvantages of platform work which are stressed in the literature are less predictable work hours, lower pay, fewer protections against social risks and job insecurity. The main advantages emphasised are autonomy and flexibility for high-skilled workers and the first step of labour market inclusion for vulnerable and informal workers (Drahokoupil, Piasna, 2019, p.22). The efficiency of platform work has been highlighted as another advantage of this model, but it is limited to the market efficiency by lowering transaction costs, not to the worker's productivity itself (Collier, et al., 2017, p.7). Given that, platform work could be considered a business model focused, primarily, on economic goals by maximising profit, neglecting the social dimension of productivity and human-centred i.e. worker-centred approach.

Platform work comprises a very different type of services that could be classified in broadly two categories considering the nature of job and qualifications required: a) services performed digitally by mostly high-skilled workers, usually cross-border, through web performed tasks such as IT programming, web development, clerical and data entry, translation, etc.; and b) services performed on location by informal, vulnerable and low-skilled workers in the delivery, transport and housekeeping sectors (Lane, 2020, p. 5). The labour law status of each of these categories differs in terms of labour rights protection and work conditions. While high-skilled workers, so-called freelancers, are considered self-employed workers in general, satisfied with their autonomy in performing work tasks, the workers who provide services on location enjoy the status of false self-employed, experiencing precarious working conditions. In both cases, greater autonomy in work task setting and tax evasion for providing services throughout an online platform result in adverse working conditions.

Addressing the platform work concept presupposes regulation of the triangular relationship between online platform, service providers and clients, where the platform company in most of the cases would argue to have the status of an intermediary, and not the status of the employer. Consequently, the service providers are considered as independent contractors, i.e. self-employed, instead of employees. In most cases, the studies show that the platform workers experience lower labour protection, lack of social security benefits provided by the employer, as well as unfavourable working conditions and representation rights (Berg et al., 2019, p. 106). On the other hand, there have been some suggestions for framing platform work according to the regulation of temporary agencies work considering the three-fold relationship between parties involved (Lane, 2020, p.8). In this regard, the service providers enjoy the status of employees. Notwithstanding, there is no universally accepted concept or internationally agreed framework regarding this new form of work/employment.

The COVID-19 pandemic deeply impacts labour market activities and the nature of the job performing, by implementing social distance policies, where platform work became the dominant work model. The self-employed and workers in the informal sector have been mostly affected by the crises, so governments agreed to adopt specific protection measures to improve access to social security benefits for all categories of workers. Additionally, the national governments are focused on providing support to the most disadvantaged and vulnerable groups in the labour market to avoid a further rise in inequalities. This support included revisiting existing regulatory frameworks to ensure equal treatment of workers, regardless of their employment status, to secure adequate working conditions for all workers, both those in standard and nonstandard employment (ILO, OECD, 2020, p. 5). In this regard, at the international level, the consensus has been reached regarding the development of the post-Covid socio-economic model, where all workers regardless of their employment status should be an integral part of the "building back better" concept, with special reference to fixed-term employment, part-time and on-call work, temporary agency work and other multiparty employment relationships, as well as disguised and dependent self-employment (ILO, OECD, 2020, p. 41). It certainly would include workers who perform jobs through the digital labour platform, and whose expansion has further been prompted by the Covid 19 pandemic and public health crisis. Thus, it could be inferred that the international policy consensus has been reached, and it represents the policy ground for the further legal framing of platform work model in national jurisdictions.

3. TOWARDS REDEFINITION OF TRADITIONAL WORK ARRANGEMENTS: INTERNATIONAL, REGIONAL (EU) AND COMPARATIVE APPROACHES

Advocated "flexibility" and "autonomy" in most forms of legal relationships, including the labour ones, along with the processes of globalization and digitalization, caused the spread of new forms of employment. The new business model was established where new technologies offered a way to hire one category of workers (mostly IT specialists), while all other company services have to be provided through independent contractors, representing a form of extreme outsourcing (Todolí-Signes, 2019, p. 4). On the other hand, along with

this phenomenon, the notion of the so-called "crowdsourcing" was formed as well, which involves recruiting the outside workers but with the implication that a call goes out to a large group of potential "virtual workers" (Lyutov&Voitkovska, 2021, p. 95). The recruiting process has been carrying out by an online platform. The work concept presupposes multi-fold relationships where the rights and obligations of all parties concerned are not clear and some of them could be characterised as "grey zones" in the law. This business model was aimed at the introduction of a new legal relationship lagging far beyond the standard subordinate labour.

The new forms of employment turn out to be difficult to classify through the traditional dichotomy between a clear contract employment and labour or self-employment model. The reason is the fact that the workers' status lies halfway between subordination and autonomy. However, there are some attempts in international discourse to extend the labour protection to the so-called "dependent self-employed workers"[396], where the focus is on the elements that need to be achieved in order to determine "genuine worker status" (De Stefano, et al., 2021, p. 5). Additionally, the notion of disguised employment[397] was highlighted as important for this determination. In this regard, the International Labour Organization, as the part of the Future of Work Centenary Initiative, prepared in 2015 the Report tacking the issue of non-standard forms of employment that includes temporary employment, part-time work, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment (ILO, 2015, p. 1). The declared aim was to address decent work deficits in non-standard employment by plugging the regulatory gaps, particularly regarding equality of treatment, prevention of employment misclassification, and regulation of the obligations and liabilities in contractual arrangements involving multiple parties. Although there is no universally defined regulatory concept in terms of overcoming the decent work gaps in the field of non-standard employment, there are some theory suggestions, represented in the concept of "Universal Work Relation" (Countouris, 2019, p. 2). The idea was to overcome the worldwide accepted division between contract subordinate employment and independent self-employment by broadening the scope of labour law protection to cover other less visibly subordinate labour relationships. This concept has been grounded on the broader definition of worker, meaning that the key element for qualification is the engagement of personal labour by another, where the protection is excluded for those who perform "genuine own-account business" (Countouris, 2019, p. 15). The elements of subordination and contract-based relationship are considered less important for the qualification and labour protection, stressing the importance of the performance of work on another's behalf. Furthermore, advocating through the International Labour Organization, some legal scholars proposed several approaches to reform the contemporary labour law in order

[396] Dependent self-employed workers are defined as workers who provide work or perform services to other persons within the legal framework of a civil or commercial contract, but who, in fact, are dependent on or integrated into the firm for which they perform the work or provide the service in question'. (Böheim & Mühlberger, 2009, p. 183).

[397] According to the ILO, disguised employment lends "an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by law". (ILO, 2016, p. 3).

to provide increased protection to workers currently falling outside the scope of labour law: a) to expand the notion of subordination with broader interpretation, b) to introduce a new form of the employment relationship, so-called "quasi-subordination", in order to include a vast number of non-standard forms of work where the degree of protection is varying and, c) to extend labour rights beyond the subordinate contract of employment (Countouris, 2019, p. 11-14). Also, there are suggestions of labour law reform regarding the degree of protection by advocating the extension of all or most labour rights beyond the contract of employment/determined worker status or by limiting it to some labour rights, such as anti-discrimination, health and safety rights (Countouris, 2019, p. 13).

On the other hand, in the regional, i.e. European Union law, the Directive 2019/1152 on Transparent and Predictable Working Conditions has been adopted recently, aiming to provide broader protection to workers in non-standard forms of employment, including those in new forms of work, such as platform work. The focus has been on the obligation to inform the workers regarding their working status and working conditions. Article 11 stipulates the obligation of Member States to prevent abusive practices when applying on-demand or similar employment contracts by limiting the use and duration of employment contract and by setting the rebuttable presumption of the existence of an employment contract with a minimum number of paid hours based on the average hours worked during a given period. Moreover, right to training, right to redress, protection against adverse treatment or consequences, and protection from dismissal have been also foreseen in the EU Directive 2019/1152. However, the unclear employment status of most non-standard workers, particularly platform workers, still stay challengeable in the European Union (EU) policy and practice, where the uniformly accepted concept of "worker" in the EU is dominantly missing. The same is for the concept of "self-employed persons" and the recently stressed concept of "economically dependent self-employed". The suggestion to tackle the issues of the gig economy and its job derivates, including the platform work, in the long run is presented on the need for a uniform and broader definition of "worker" across the EU (Hauben et al., 2020, p. 1). The protection needs to be provided considering the determined status of "worker", regardless of the employment contract form, where the elements of worker qualification have to be determined broadly. In the meantime, in the middle run, the scholars agreed to take the legislative measures in this regard by proposing a single directive to ensure equal treatment in all forms of work, both standard and non-standard, or by adjustment of the Temporary Work Agency Directive for online platform work (Hauben et al., 2020, p. 1). Besides these approaches, there is also the proposal to adopt the special regulation of platform work on the EU level by setting some fundamental rights and obligations for all parties concerned (Hauben et al., 2020, p. 1).

At the national levels, currently, there is an ongoing scholarly and policy debate regarding the status of workers in atypical i.e. non-standard labour relationships. The increase of digital/online platform work in the time of COVID-19 pandemic invoke the attention of policymakers and social partners regarding the actual conditions in which platform workers perform their work tasks. In most national legal systems, platform workers are considered as independent contractors, i.e. self-employed, where their status has been determined in advance by the platform's terms and conditions, which caused poor protection of their

basic socio-economic rights, particularly in terms of predictive working hours, decent remuneration, health, and safety protection, protection from dismissal, social benefits, collective and union rights. The platform itself has been presented as an intermediary and the relation between the online platforms and service providers has been regulated by commercial/civil law contracts. The unregulated and dominantly precarious work conditions have become the subjects of litigation in some states in order to fill the regulatory gaps and make adjustments to a new digital reality in socio-economic relationships. In France, for instance, the Paris Court of Appeal in 2019 made the decision where the Uber-taxi drivers, who were driving for a company for a significant period of time have been considered as workers – economically dependent and, after all, in a subordinate position to the Uber company which was entitled to set the remuneration for the trip (Lyutov&Voitkovska, 2021, p. 100). Furthermore, in March 2021 the Supreme Court of the United Kingdom ruled that the platform Uber drivers are workers and entitled to labour law protection associated to their status (Adams-Prassl et al., 2021, p. 7). In the judgment it has been highlighted that the flexibility of working hour arrangement and the possibility to deny the work task does not influence the status of the worker in the period when the job is being performed (Adams-Prassl et al., 2021, p. 8). After the Supreme Court in Madrid in September 2020 ruled "the presumption of employment" for the platform and delivery workers, in July 2021, the Spanish Congress approved the new "Rider Law", which considers riders to be employees and set an obligation for platform companies to inform works council regarding rules and instructions on which the algorithms or artificial intelligence systems are based in terms of a decision-making process that may affect working conditions, access to and maintenance of employment (Aranguiz, 2021). In Russia, the legislative labour reform has been taking place in the context of the COVID-19 crisis, by setting the standards of remote work. In this regard, different types of remote work have recently been presented in the Draft Labour Code – standard remote work, temporary remote work, and combined remote work (Lyutov&Voitkovska, 2021, p. 91). Along with this, the need to regulate the online platform work has been stressed as important to handle. Scholars suggested several models to approach the issue, such as the one of applying the legislative standards of remote work to certain types of platform work or to revise the Labour Code in a way to include the new category of workers, i.e. economically dependent contractors, which would also cover the category of platform workers (Lyutov&Voitkovska, 2021, p. 109-110).

In Serbia, approximately 2.6 per cent of the labour force are platform workers (Team Gigmetra, Jun 2020). The labour status of these workers remains unclear, considering that the Labour Act regulates only the relationship between two parties concerned, based on certain types of employment contracts stipulated by the law. The type of employment contract that could be applied to platform workers is the one that regulates remote work. According to the Serbian legislation, a remote work contract contains the provisions regarding the organisation of working hours, supervision model, work equipment provided by the employer or employee itself, as well as the mechanisms for compensation of employee's costs for performing remote work (Labour Act, Article 42). On the other hand, as it has been stressed in the literature, the significant difference between platform work and remote work is the involvement of one more party – an

online platform that connects the parties (Lyutov&Voitkovska, 2021, p. 96). Given that, the platform workers are classified as independent contractors, and the type of remote work stipulated by the Labour Act has not been applied to the engagement of workers through an online platform. However, the possible model of applying the domestic remote work concept on platform workers presupposes the interpretation of online platform, i.e. software as work equipment, not the intermediary, and the owner of the platform application as an employer. It means, if the owner of the platform application is the company that develops the software, it will be consider as an employer, and if the owner is the company/person that provides the service and enters into a legal relationship with the clients, it will be classified as an independent contractor. In order to tackle the issue of platform work, while unions advocated the importance of mitigating the risks of precarious work conditions, the Serbian Government announced the adoption of a new law in 2022 regarding the flexible forms of employment in which the focus will be on the tax treatment of freelancers, meaning that the labour status of a very heterogeneous group of platform workers would not be the subject of the regulation.

4. LEGAL NATURE OF THE PLATFORM WORK: BLURRING OF THE BOUNDARIES BETWEEN SUBORDINATION AND AUTONOMY

At the beginning of the 21st century, globalisation and technological development caused the change of patterns in business and work organisation by introducing the model of decentralisation of production, i.e. outsourcing. Outsourcing is a phenomenon that corresponds to the model of production where the main company transfers to a third-party production resources, such as labour force, part of the production process, know-how, special equipment, etc. In the following phase the company uses the third-party results as part of the whole production process. In practice, at the bottom of the pyramid are workers whose status is mainly unclear and unregulated, engaged as independent contractors or as non-standard workers. In the era of the digital revolution, many large companies shifted their production from goods to data and information and developed novel economic activities, such as market management, innovation and research. As has been pointed out in the literature, the decentralization of production has two dominant forms – outsourcing of production and services and staff leasing (Bronstein, 2009, p. 64). Together with the expansion of the Internet, the third form emerged, the so-called "crowdsourcing". Crowdsourcing implies the usage of the Internet to attract and divide the work tasks among participants in order to achieve determined results, i.e. to gain knowledge, goods, or services from a large group of people and to complete the "production" process. In labour law doctrine, the intervention of third parties in the employer-employee relationship creates the intermediary relationship (Bronstein, 2009, p. 65), where the rights and obligations of all parties concerned are of vague nature and some of them could be classified as disguised employment relationships. In that regard, since decades ago, in practice, many employers used to engage workers through the intermediation of the other entity. This was the case with labour cooperatives in Latin American countries that have claimed to be intermediary, but the cooperativists were actually subordinated

workers, which has been confirmed in the rulings of the courts in Brazil and other Latin American countries (Bronstein, 2009, p. 58). On the other hand, besides this "negative" practice, the cooperative model of economic activities has been used as an alternative option for workers and enterprises in the informal sector to legalize their status and reclaim some rights and benefits that are otherwise lacking. This practice became common for self-employed, including "gig" workers, who create the special form of the contemporary cooperative model, so-called "platform cooperative" – a worker-owned cooperative which enable sharing of risks and benefits, negotiation of better contracts and work conditions and designing of their own app-based platforms through worker cooperatives (Esim & Katajamaki, 2017, p. 5-6). The platform cooperative model could serve as the concept of doing business to eliminate the intermediary company, which is often responsible for the "creation" of the unregulated market with non-standard employment relationships, increase of self-employment and deterioration of work conditions.

In the relationships formed as part of the contemporary decentralization production process, it is challenging to determine the element of subordination. The subordination is a key element in defining the standard employment relationship along with employment contract, the performance of work on another's behalf and payment of remuneration, which could also exist in other forms of civil/commercial contracts. In general, the element of subordination has been defined as the performance of work for and under the authority of the employer in terms of applying normative, management and disciplinary provisions that are set by the employer itself. By setting the neoliberal concept of economy and production, and with the expansion of digital markets and the fourth industrial revolution, the mechanism of employer's power and control is exercised de facto through the market (Digennaro, 2020, p. 11). In these circumstances, the online platform could be defined as the online market for matching the demand and supply for services and also as work equipment and/or service-control tool, while the entity/company that owns the online platform/the application and its algorithm could be considered as an employer. In this regard, the application by its algorithm connects clients and service providers, assigns the work tasks, calculates prices, and also sets sanctions for service providers if the clients negatively evaluate the performance of work of a particular service provider. The normative elements of subordination in platform relationship exist because the service provider needs to accept the terms and conditions for performing the work tasks when he logs into the application, management power of the platform owner also exists all the time when the provider is on the platform, and disciplinary sanctions could be applied when the service provider has been negatively evaluated several times. The fact that service providers could log in and log out "freely" by autonomously setting working hours, i.e. enjoy the organizational flexibility concerning the time and place of work, does not preclude the other undoubtedly determined elements of subordination in relation to the platform. Furthermore, in standard employment relationships, when workers are managed by objectives, the control of the expected outcome, which is the case here, instead of direct supervision, may be also found.

In labour theory, the concept of subordination is mainly defined and universally accepted as a system of employer's control over employees with the differences regarding

the scope and degree of control that have been determined differently in different national jurisdictions. Contrary, the notion of worker's autonomy has not been the focus of labour law theorists while it gets the importance in contemporary moral, political and legal philosophy. To discuss the principle of justice, including the social justice as its integral part, on the one hand, and nature of the liberal state, on the other, many philosophers used the concept of autonomy as the basis for their normative philosophical discussion in terms of interpretation and implementation of legal norms. Among eminent political philosophers that influenced the concept of law and justice, Ronald Dworkin's standpoint will be particularly stressed as a possible model of discussing the nature of autonomy and, consequently, the nature of autonomy in platform work. According to Dworkin, the autonomy of individuals means "to treat people as equals" (Dworkin, 2015, p. 7), wherein the context of platform work presupposes equal treatment of all workers regardless of their employment status/employment contract. Moreover, the issue of platform work comes down to the problem of applying legal norms in terms of interpretation of traditional labour law institutes in light of societal, political, and economic changes. Dworkin developed the original legal interpretative theory that overcomes the dichotomy between Natural Law and Legal Positivism, arguing for the "law as integrity". In his most prominent work, The Model of Rules, he defended the thesis of rights and obligation interpretation as an integrated system of "Rules, Principles, and Policies". Dworkin argues that when lawyers and judges interpret the law they use standards not only as the function of rule but also as principles, policies and other sorts of standards (Dworkin, 1967, p. 22). In the context of platform work definition and legal nature shaping, Dworkin's "policy standards" are of crucial importance. From his point of view, the so-called "policy" standard "sets out a goal to be reached, generally the improvements in some economic, political or social feature of the community" (Dworkin, 1967, p. 23). On the one hand, the goals of contemporary community/society emphasized in the international and regional documents are the decrease of inequality, improvements in working conditions and sustainable economic and societal development. On the other hand, however, the interconnection is mutual – economic growth largely depends on policies related to intellectual property rights, labour market regulation, competition, economic openness, business barriers, research, education, democracy, etc. (Petrović&Nikolić, 2018, p. 9). Furthermore, the anti-discrimination practice was stressed as a goal to be reached, particularly in terms of inequality elimination among different categories of workers, including those engaged in non-standard employment relationships. Having said that, Dworkin's theory of law, where he claims that "the general theory of law must be normative as well as conceptual" (Flores, 2015, p. 160) could be used as a starting point for the policy and legal framing of platform work, i.e. by redefining the traditional labour institutes (concept of the standard employment relationship, particularly the element of subordination) according to current economic, political and societal reality. Law, including labour law, must follow these changes, and according to Dworkin's "policy standard model" of interpretation of the constitutional and legislative labour norms, the new non-standard employment relationships could be also covered by the traditional labour institutes.

5. CONCLUSION

Generally, the employment-related laws have not protected platform work - certainly not at the same level as the standard work relationship. Platform workers' status is one of the most pressing issues from a policy, as well as from the legal theory and jurisprudential standpoint. The legal gap in most national jurisdictions still remains – the mainly unclear definition of "self-employed", particularly in respect to the subcategory of "economically dependent self-employed", as well as differences in the scope and degree of employer's control over the employees represented in the concept of subordination as an element of the standard employment relationship. Therefore, the policy and legal answer to the platform workers' status currently is grounded on the determination of the existence of the employment relationship by the supranational and national courts, i.e. "on the basis of a case-by-case assessment". The era of the digital revolution profoundly changed employment and industrial relationships. The new business model along with the changed work organization represented in production decentralization, particularly "crowdsourcing", emerged while new forms of employment relationships, the so-called "non-standard" forms of employment, rapidly became the new reality in the labour market streaming to replace the standard employment relationship. Empirical studies have shown that crowdworkers/platform workers face the same vulnerabilities as traditional workers, while labour protection is dominantly lacking, so the aim of this article has been to contribute to the ongoing debate on digital labour platforms and the status of platform workers. Pietrogiovanni (2020, p. 323) argues the reciprocal relationship between the socio-economic facts and norms by encouraging labour law theorists and practicians to use "alternative heuristic tools" when interpreting legal norms. Given that, the article points to Ronald Dworkin's theory of law as suitable enough to approach the issue of platform worker status in terms of redefinition of the traditional labour institutes. Dworkin's policy standards as an element of interpretation of legal norms along with rules and principles and partially his understanding of autonomy as equality have been emphasized as a possible ground for legal nature shaping and framing of platform work in legal doctrine and jurisprudence.

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UNILATERAL TERMINATION AND ADJUSTMENT OF THE CONSUMER CONTRACT ON DIGITAL CONTENT

Unilateral termination and adjustment of the business to consumer contract in the perimeter of digital content continuously raises new questions for legal practitioners. The study approaches the intricacies inherent to the consumer's right to seek the judicial termination of the modified contract, in the case of the unilateral adjustment of the contract for the supply of the digital content by the seller. According to Article 19, para. 2 of Directive (EU) 2019/770, the termination of the contract remains open to the consumer, who is entitled to terminate the contract in the circumstances when the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content, unless such negative impact remains to have only minor repercussions for him/her. Our analysis insists on the fact that in the case of a minor lack of conformity, the consumer's request for the termination of the contract is legally unacceptable. On the other hand, in cases in which the impact of the unilateral modification significantly affects the consumer's rights, the consumer is entitled to terminate the contract in a non-onerous manner within 30 days of the time when the digital content has been modified. We argue that the consumer's anticipatory renunciation of the right to termination of contract represents unfair terms, as are the contractual clauses which are imposing the consumer's unilateral adjustment relating to the supply of digital content.

Keywords: consumer, digital products, termination of contract, unilateral adjustment.

1. INTRODUCTORY REMARKS

Perceived (most often) as being the "central piece" of the legal protection recognised to consumers in online-concluded B2C contracts, the mechanism of the withdrawal right on consumer consent not only sequentially describes one of the stages of progressive formation of the online B2C agreement, but also coagulates other subjacent protectionist mechanisms, such as the one represented by the informative formalism in the B2C distance-formed contracts or the one represented by the specific content of the pre-contractual information

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obligation incumbent on the professional traders. As resulting from the provisions of the second paragraph of Article 19 of Directive (EU) 2019/770, the option for termination of the contract is limited to the consumer, who is entitled to terminate the contract under the hypotheses that the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content. Consumers will be able to opt out of objective requirements for conformity only if the deviation from the technical standards of conformity is made known to them explicitly beforehand, since the professionals have an autonomous duty of pre-contractual information, especially pertaining to the fact that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity specified in Article 8 of the Directive (EU) 2019/770[398], as long as the consumer expressly agreed to a specific deviation from the objective criteria of conformity of the digital content in the pre-contractual stage while implementing the mandatory rules aiming to avoid the consumer's disadvantage in the field of digital services contracting.

From the perspective of the professional trader' liability, the duty of informing the consumer in the pre-contractual stage is, on the segment represented by the formation of distance B2C contracts (including the digital version of the business-to-consumer contract formation), doubled or seconded by the obligation to deliver certain pieces of information at the moment of the concluding of the contract. The latter revolves around the idea that the consumer needs timely information, inserted in the distance contract, which is meant to warn the consumer about the existence of specific rights and obligations, the importance of which the legislator has assessed as being central, such as those relating to the right of consent withdrawal that may be exercised within 14 days (or 12 months and 14 days, in cases where the professional has not complied with the requirements of the information formalism) from the moment of the contract formation. In terms of its intrinsic purpose, the obligation of the professional to provide the consumer with certain information at the pre-contractual stage is primarily intended to enable the consumer to compare the various offers received in order to select the most appropriate one for the consumer's specific needs. Nevertheless, as regards the obligation to provide consumers with certain information at the time of acceptance of the offer (incorporation of mandatory clauses, as an expression of the informative formalism in B2C contracts), its regulation aims to enable consumers to become aware of their rights and obligations under the distance-formed contract, thus ensuring the communicating to consumers of adequate information necessary for the exercise of their rights, particularly on the existence, the limits and the timeframe of the right of withdrawal from the B2C contract.

The premises for the situations in which a consumer's right to withdraw the original consent[399] exist do not include, specifically, the cases in which the ordered digital content/ contracted digital services were customised at the consumer's request. Nevertheless, in practice, the gradients and valences of the notion of „product customisation" remain

[398] Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32019L0770.

[399] See Pusztahelyi, R.: Abuse of the Right of Unilateral Termination in Contract Law, In: Acta Univ. Sapientiae, Legal Studies, Vol. 7, No 1 (2018), p. 49–60.

difficult to determine for the court of law, which remains sovereign in determining whether or not it is in the presence of a genuine „product customisation" involving the configuration of aspects that deviate from the standard content of the sale offer. In these hypotheses, it is important to note that the analysis implies the necessary delimitations between the contracts of sale (or of sale of future goods) and those of enterprise (personalised manufacture of products, according to the specifications / preferences stated by the customer, involving, for the professional, a customised performance), in order to determine whether, in those cases, personalisation services have been provided which expel the B2C contract concluded within the perimeter of the agreements formed online in respect of which the consumer's right of withdrawal subsists.

In this regard, the characteristic informative formalism, which is incident in the formation of B2C distance contracts[400], implies for the professional the obligation to restate the information delivered in the pre-contractual stage to the consumer, in the form of expressed provisions introduced in the contract text (or in digital format), which are meant to highlight, for the consumer, the essential aspects related to the existence, limits and modalities of the exercise of essential rights, respectively, the consequences of non-performance of specific obligations incumbent on the consumer, the purpose being, at the time of contract formation, to ensure the expressing of an informed consent[401] (a purpose that characterises the pre-contractual obligation to inform), while allowing the consumer to become aware of the existence of essential rights / obligations the legal substance of which would be neglected, in the absence of adequate information, especially on the timeframe applicable to the consumer's right of withdrawal. Firstly, in situations where the formation of the B2C contract involved the use of a means of distance communication which allowed a limited space or time for the display of information, communication to the consumer of the standardised model withdrawal form in clear and intelligible language remains possible for the professional, through a source other than the original means of distance communication (which, by hypothesis, involved space constraints or time limits).

Secondly, it is important to note that the mentioned right of withdrawal is intended to compensate for the informational disadvantage resulting from the consumer – professional trader informational imbalance in the pre-contractual stage of a B2C distance-formed contract, while allowing the consumer to benefit from an appropriate period of reflection during which the consumer enjoys the opportunity of examining and testing the digital content or the delivered product (as stated in the CJEU decision in case *Messner*, C-489/07, from September 3rd, 2009[402], as well as from the CJEU decision in case C-430/17, from January 23, 2019[403]).

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[400] Grundmann, S. Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture, In: European Review of Contract Law, vol. 13 (2017), p. 255-293.

[401] Julien, J. Droit de la consommation. 3rd edn. Paris: L.G.D.J., 2019, p. 81-87; Mohty, O. L'information du consommateur et le commerce électronique. Rennes: Presses Universitaires de Rennes - P.U.R., 2020, p. 56-72; Pellier, J.-D. Droit de la consommation. 3rd edn. Paris: Dalloz, 2021, p. 118-123.

[402] The CJEU decision in case C-489/07, Messner, from September 3rd, 2009 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=73082&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=633991.

[403] The CJEU decision in case C-430/17, from January 23, 2019 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=210175&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=634251.

Thirdly, the study accentuates the limits applicable to the exercise of the consumer's right to adjustment or to termination of the contract, according to the provisions of Article 8 of Directive 2019/770/EU, since any lack of conformity resulting from an incorrect installation of the products presenting digital content will be considered equivalent to a lack of conformity of the products if the installation is part of the contract of sale of the products and the products were installed by the seller or under its responsibility. The provisions contained in Article 8, para. 1 will also apply if the product intended to be installed by the consumer is installed by the customer, and the incorrect installation is due to a deficiency in the installation instructions in terms of informational non-conformity.

2. PROLEGOMENA FOR THE EXERCISING OF THE CONSUMER'S RIGHT TO UNILATERAL TERMINATION OF CONTRACT

As previous scholars have underlined[404], the non-onerous nature of the withdrawal right (thus excluding the costs related to the return of the products) implies *inter alia* that, consequently, the consumer has no obligation to bear other costs, except in the case of the abnormal handling of the returned product, than those necessary to establish the nature / characteristics of the delivered product or its usual inspection, such as unpacking the product, unsealing the package in order to verify its characteristics and functionality, etc. After receiving the consumer's intention to withdraw, on the professional is in turn incumbent the obligation to reimburse to the consumer the amounts paid (yet not having an obligation to reimburse the cost of installing services, if those were delivered), without undue delay and no later than 14 days from the receipt by the trader of the notice on the consumer's withdrawal from the B2C contract. However, the trader may postpone or even suspend the refund of the price until the date of recovering the products or the date of receipt of the proof of shipment from the consumer.

Typically, the formation of the B2C online-concluded contracts on digital content and digital services is not characterised by a withdrawal right of the consumer's consent due to the fact that the digital content is usually already accessed at the moment at which the consumer intends to retract the previous consent. Nevertheless, in the circumstances when the digital content lacks objective or subjective elements of conformity, as described in Articles 7 and 8 of Directive 2019/770/EU, the consumer enjoys the right to unilateral termination of the contract for non-conformity or, alternatively, the right to obtain an adjustment of the contractual obligations. The notion of product conformity designates the manner in which the product sold and delivered to the consumer corresponds to the legitimate expectations of the consumer (a), to any mandatory provisions of the law on the standardization of the manufacturing process (b) or to contractual specifications (c), both materially and procedurally, as being relative to the identity of the delivered product with the one agreed in the sale-purchase contract, to its quality and the delivered quantity (I), as well as from a functional point of view, relative to the functions, attributes, characteristics and technical limits initially agreed (II).

[404] See Picod, N. and Picod, Y. Droit de la consommation. 5rd edn. Paris: Sirey, 2020, p. 94-102; Piedelièvre, S. Droit de la consommation. 3rd edn. Paris: Economica, 2020, p. 71-86.

The legitimate expectations of the buyer regarding the conformity of the product may be incidental, including tacitly, in the case of technical characteristics or qualities of the product that are typical / usual. Instead, the atypical qualities / functions of a product must be expressly agreed in the contract (and must be the subject of express contractual stipulations) so that, subsequently, their absence in respect of the delivered product justifies a consumer's request to repair the lack of conformity.

Comparatively, it should be noted that the warranty of conformity of tangible products, as regulated by Article 8 of Directive 2019/771/EU, operates for two years from the date of delivery of the product and cannot be removed or restricted in contractual clauses, even if those contractual provisions have been accepted by the consumer (since these clauses are considered to be unfair terms). Instead, through express contractual clauses, consumers can be offered a more advantageous guarantee than the minimal legal one (for example, a three-year guarantee for lack of objective conformity). Based on the legal guarantee, the consumer who faces a defect in the product in the first two years after delivery can obtain a free repair / replacement of the product or, if these are no longer possible, a total or partial refund of the price.

Another salient feature characterises the types of compliance in the perimeter of the conformity warranty given that, regarding the delivery of the product, one can firstly signalise a material (objective) conformity, which is implicit or in accordance with the explicit contractual specifications[405] regarding the identity of the delivered good with the one initially established (as being the derived object of the sale than the one ordered), the quantity and quality of the product, as it results from the contractual clauses, from the commercial usages[406], from the imperative norms of the law (if this is the case). Secondly, the delivered product must also have a functional (subjective) conformity, in accordance with the typical attributes of a similar product, respectively with the technical attributes stipulated in the contract. The delivery of a product which proves to be unfit to be used for the destination assigned by the buyer thus can lead to the deficiency compliance.

It is also worth mentioning that, according to Recital (19) of Directive 2019/770/EU, in the objective sphere of incidence of the mentioned regulation and harmonised norms, the Directive address specific issues across different categories of digital content, digital services, and their supply (dematerialised or tangible / durable medium), covering, *inter alia*, computer soft programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, as well as digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media, while addressing the numerous

[405] Narciso, M. 2017. Consumer Expectations in Digital Content Contracts – An Empirical Study, In: Tilburg Private Law Working Paper Series No. 01/2017, available at SSRN: https://ssrn.com/abstract=2954491 , visited on September 12, 2021.

[406] Spindler, G. 2016. Contratos De Suministro De Contenidos Digitales: Ámbito De Aplicación Y Visión General De La Propuesta De Directiva De 9.12.2015 (Contracts for the Supply of Digital Content – Scope of Application and Basic Approach of Proposal of the Commission for a Directive on Contracts for the Supply of Digital Content), In: InDret, Vol. 3 (2016), available at SSRN: https://ssrn.com/abstract=2832162 , visited on September 14, 2021.

ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media. The Directive should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service. However, it should be noticed that the Internet access services are expressly excluded from the sphere of incidence of the provisions of Directive 2019/770/EU on certain aspects concerning contracts for the supply of digital content and digital services.

It is important to notice, however, that, in terms of selecting the remedy of price adjustment and reduction, according to the provisions of Article 14, para. 4 of Directive 2019/770/EU, the consumer is considered to be entitled to either a proportionate reduction of the price in accordance with paragraph 5, in cases which are characterised by the fact that the digital content or digital service has been supplied in exchange for a payment of a price, or, as an alternative remedial measure; to request the termination of the contract in accordance with paragraph 6, under the hypotheses that it was considered impossible to bring the digital content or digital service into conformity or disproportionate from the trader's perspective on objective grounds; the same alternative applies in cases in which the trader has not brought the digital content or digital service into conformity in accordance with paragraph 3 of the mentioned article (i), or in the situations in which there is a lack of conformity despite the trader's attempt to bring the digital content or digital service into conformity (ii); it is worth recalling that the same remedial option remains available to the consumer in situations in which

the lack of conformity has been proven to be of such a serious nature as to justify an immediate price reduction or termination of the contract (iii); or even in cases in which the trader has declared (or it results from the objective circumstances), that it will not be able to bring the digital content or digital service into conformity within a reasonable time[407], or without significant inconvenience for the consumer[408]. Under these circumstances, the consumer is entitled to the proportionate reduction of the price[409], adequately correlated to the decrease in the value of the digital content or digital service which was supplied to the consumer compared to the value that the digital content or digital service would have if it were delivered in plain conformity (while applying concurrently subjective and objective criteria of conformity)[410].

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[407] Clavier, J.-P. and Mendoza-Caminade, A., *op. cit*., p. 81-94.

[408] Julien, J., *op. cit*., p. 68-73.

[409] *Ibidem*.

[410] Clavier, J.-P. and Mendoza-Caminade, A., *op. cit*., p. 82-90. For an analysis of the conceptual impact of the precedent regulation, see Luzak, J. A. 2013. To Withdraw or Not to Withdraw? Evaluation of the MandatoryRight of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers. Amsterdam Law School Legal Studies Research Paper No 2013-21 – Centre for the Study of European Contract Law Working Paper No 2013-04, available at http://ssrn.com/abstract=2243645, accessed on September 12, 2021.

3. UNILATERAL TERMINATION AND ADJUSTMENT OF THE BUSINESS-TO-CONSUMER CONTRACTS ON DIGITAL CONTENT

As specified in Article 11 of Directive 2019/770/EU, in case of non-conformity, the consumer has the right to request the seller to replace the digital content first or has the right to request the replacement of the product or the re-performance of the digital services, in each case free of charge, unless the measure is impossible or disproportionate. It is worth accentuating, however, that a remedial measure will be considered disproportionate if it imposes on the seller certain costs that are unreasonable compared to the other remedial measures which are available, taking into account: (a) the value that the products would have had if there had been no non-compliance; (b) the importance of non-compliance from the perspective of the contractual object.

The plethora of the conditions according to which the consumer may invoke the seller's warranty for lack of conformity includes the exigencies referring to the conformity of the products with specifications[411] included in the sale-purchase contract as regulated by the provisions of Articles 5 and 7 of Directive 2019/770/EU, according to which the seller is obliged to deliver to the consumer products that are in accordance with the sale-purchase contract on digital content[412], a product is considered to be in compliance with the contractual provisions if it:

(a) corresponds to the description given by the seller and have the same qualities as the products which the seller has presented to the consumer as a sample or model;

(b) corresponds to any specific purpose requested by the consumer, a purpose made known to the seller and accepted by him at the conclusion of the sale-purchase contract;

(c) corresponds to the purposes for which products of the same type are normally used;

(d) being of the same type, has normal quality and performance parameters which the consumer can reasonably expect, given the nature of the product and the public statements concerning its actual characteristics made by the seller, the manufacturer or its representative, especially by advertising or by inscribing on the product label. Termination of the contract cannot be requested if the lack of conformity is a minor one[413], which limits the exercise of the consumer's right to the cases in which it has been established the existence of a substantial lack of conformity of the digital content, as described in Article 8 of Directive 2019/770/EU.

From the angle of the warranty term and incidental time bars, the legal guarantee of conformity covers, according to Articles 11 and 13 of Directive 2019/770/EU, the defects / deficiencies manifested in an interval of two years, calculated from the date of delivery of

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[411] Twigg Flesner, C. 2020. Conformity of Goods and Digital Content/Digital Services. In: Arroyo Amayuelas, E. and Cámara Lapuente, S. (dirs.), El Derecho privado en el nuevo paradigma digital, Barcelona-Madrid, Marcial Pons, 2020, available at SSRN: https://ssrn.com/abstract=3526228 , visited on September 12, 2021.

[412] Farinha, M. and Morais Carvalho, J. 2020. Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771, In: Revista de Direito e Tecnologia, Vol. 2, No. 2 (2020), p. 257-270, available at SSRN: https://ssrn.com/abstract=3717078 , visited on September 12, 2021.

[413] Morais Carvalho, J. Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771, available at SSRN: https://ssrn.com/abstract=3428550 , visited on September 14, 2021.

the product. The legislator also established a limitation period (from the right to sue for the corresponding price reduction / in resolution), of two months from the date of finding the lack of conformity by the consumer. Within two months from the date of finding / manifestation of the defect, the consumer must inform the seller about the occurrence of the defect, requesting the involvement of priority extra remedial adjustments (repair / product replacement); if such request is not addressed to the seller within two months, the consumer forfeits the right to sue for the corresponding price reduction / in resolution of the contract[414] (it is presumed that the evidence regarding the origin of the defect has not been brought). It is worth noting, in this context, that according to Recital (20) of Directive 2019/770/EU, these remedies are not only applicable to genuine digital formats, but would also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content. However, as it has been expressly mentioned, instead of the provisions of this Directive on the trader's obligation to supply and on the consumer's remedies for failure to supply, the provisions of Directive 2011/83/EU on obligations related to the delivery of goods and remedies in the event of the failure to deliver will become applicable, as modified by the provisions of Directive 2019/2161/EU. Additionally, it is worth recalling that the provisions of Directive 2011/83/EU on the right of withdrawal and the nature of the contract under which those products are supplied (in the circumstances in which digital content was supplied on a tangible medium), would also continue to apply to tangible media and to the digital content supplied on it, in terms of conformity exigencies and contractual remedies for lack of objective conformity, including the adjustment of reciprocal contractual obligations.

Certain aspects of the burden of proof, under these circumstances, are also worth recalling, given that the burden of proof with regard to whether the digital content or digital service[415] was supplied in accordance with the provisions of Article 5 of Directive 2019/770/EU is primarily incumbent on the trader. Subsequently, in cases referred to in Article 11, para. 2 of Directive 2019/770/EU, the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader, which becomes apparent within a period of one year from the time when the digital content or digital service was supplied. On the other hand, it should be noted that in situations referred to in Article 11, para. 3 of the mentioned Directive, the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service is to be supplied under the contract shall be on the trader for lack of conformity which becomes apparent within the respective period of time. For obvious reasons, the provisions of paragraphs 2 and 3 of Article 11 of Directive 2019/770/EU are not expected to apply in cases in which the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and where the trader informed the consumer of such

[414] Savin, A. 2019. Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context, Copenhagen Business School, CBS Law Research Paper No. 19-35, available at SSRN: https://ssrn.com/abstract=3474289 , visited on visited on September 14, 2021.

[415] Picod, N. and Picod, Y., *op. cit.,* p. 96-101.

requirements in a clear and comprehensible manner before the conclusion of the contract. As it has been noticed, this exclusion depends upon the performance of the professional trader of the duty to deliver adequate information in the pre-contractual stage of the B2C contract. The importance of the duty to collaborate has also been stressed, since it is on the consumer to fulfil a specific obligation to cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in Article 11, para. 2 and para. 3 of Directive 2019/770/EU, as applicable, origins in the consumer's digital environment (intrinsic non-conformity)[416]. Obviously, the obligation to cooperate is limited to the technically available means which are least intrusive for the consumer. Nevertheless, in most of the cases in which the consumer fails to cooperate, and where the premises indicate that the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, in the pre-contractual stage, the burden of proof with regard to whether the lack of objective / subjective conformity existed at the time specified in Article 11, para. 2 and para. 3 lies with the consumer (inversion of the burden of proof).

Nevertheless, as resulting from the provisions of Article 13 of Directive 2019/770/EU, in the circumstances in which the trader has failed to supply the digital content or digital service[417] in accordance with Article 5, the consumer may request from the trader to supply the digital content or digital service and, accordingly, if the trader then fails to supply the digital content or digital service without undue delay, or within an additional period of time, as expressly agreed to by the parties, the consumer will be entitled to the termination of the contract[418].

4. JURISPRUDENTIAL BENCHMARKS ON THE CONSUMER'S RIGHT OF WITHDRAWAL

One of the conceptual issues clarified by the CJEU decision from October 8, 2020 in Case C-641/19[419] was the shaping of the concept of "digital content", which was not seen as monolithic, while noticing, in that regard, that Article 16 of Directive 2011/83, as correlated with the provisions of Article 2, point 11 has been interpreted in CJEU jurisprudence as referring to the fact that the consumer's right of withdrawal subsists in the context in which the main object of the online-concluded B2C contract between the user and the professional trader resided in the performing of intermediating services on the virtual

[416] Cámara Lapuente, S. 2016. El Régimen De La Falta De Conformidad En El Contrato De Suministro De Contenidos Digitales Según La Propuesta De Directiva De 9.12.2015" (Remedies for Non-Conformity Under Contracts for the Supply of Digital Content in the Proposal for a Directive of 9.12.2015"), In: InDret, Vol. 3 (2016), available at SSRN: https://ssrn.com/abstract=2832160 , visited on September 12, 2021.

[417] Julien, J., *op. cit.,* p. 112-116.

[418] Loos, M. 2016. European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content, Amsterdam Law School Research Paper No. 2016-27, Centre for the Study of European Contract Law Working Paper Series No. 2016-08, available at SSRN: https://ssrn.com/abstract=2789398 , visited on September, 14, 2021.

[419] The text of the CJEU Decision in case C-641/19 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=232155&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=628560.

platform, while not implying the delivering of genuine digital content.

In CJEU judgement (Sixth Chamber) from October 8, 2020, in Case C-641/19[420] in which the preliminary ruling under Article 267 TFEU was requested by the Local Court of Hamburg, Germany, in the proceedings *EU vs PE Digital GmbH,* it has been retained that "in order to determine the proportionate amount to be paid by the consumer to the trader where that consumer has expressly requested that the performance of the contract concluded begin during the withdrawal period and withdraws from that contract, it is appropriate, in principle, to take account of the price agreed in the contract for the full coverage of the contract and to calculate the amount owed *pro rata temporis*. It is only where the contract concluded expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which must be paid separately, that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14, para. (3) of that directive". Secondly, the Court underlined that „Article 14, para. 3 of Directive 2011/83/EU, read in the light of recital 50 thereof, must be interpreted as meaning that, in order to assess whether the total price is excessive within the meaning of that provision, account should be taken of the price of the service offered by the trader concerned to other consumers under the same conditions, and that of the equivalent service supplied by other traders at the time of the conclusion of the contract". Thirdly, from the CJUE decision in case C-641/19 results that "Article 16, let. (m) of Directive 2011/83/EU, read in conjunction with point 11 of Article 2 thereof, must be interpreted as meaning that the generation of a personality report by a dating website on the basis of a personality test carried out by that website does not constitute the supply of 'digital content' within the meaning of that respective provision"[421].

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[420] Recitals (42)-(44) of the mentioned decision in case C-641/19 retain that "As stated in recital 19 of that directive, 'digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Article 16(m) of Directive 2011/83, which constitutes an exception to the right of withdrawal, is, as a provision of EU law which restricts the rights granted for reasons relating to consumer protection, to be interpreted strictly (see, by analogy, judgment of 14 May 2020, NK (Planning for the construction of a new single-family house), C-208/19, EU:C:2020:382, paragraphs 40 and 56 and the case-law cited). In those circumstances, a service, such as that provided by the dating website at issue in the main proceedings, that allows the consumer to create, process, store or access data in digital form and allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service, cannot, as such, be regarded as the supply of 'digital content' within the meaning of Article 16(m) of Directive 2011/83, read in conjunction with Article 2(11) of that directive and in the light of recital 19 thereof".

[421] It has been specified that "[t]he market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. Therefore, the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium. Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided" (CJEU judgement (Sixth Chamber) from October 8, 2020 in Case C-641/19, in the proceedings E.U. vs. PE Digital GmbH).

5. CONCLUDING REMARKS

The legal guarantee of conformity is imperative one, while being regulated by mandatory norms and, therefore, it may be seconded by a contractual guarantee of conformity (expressly agreed with the consumer), which would obligatorily be more advantageous for the consumer than the legal one (already imperatively incidental). According to the mentioned provisions, the contractual clauses or agreements concluded between the seller and the consumer before the lack of conformity is established by the consumer and communicated to the seller, and which limits or removes, directly or indirectly, the consumer's rights under the special law being null and void. Disregarding the imperative nature of the legal guarantee of conformity of products (for example, the imposition by the seller of a new product of a warranty period restricted to six months or one year from the date of delivery of the good to the consumer) is contravening to the imperative legal exigencies. Product conformity designates the manner in which the product sold and delivered meets the legitimate expectations of the consumer (a), any mandatory provisions of the law on the standardization of the production process (b), or contractual specifications (c), both materially and in terms of identity, the product delivered with the one agreed in the sales contract, at its quality and the quantity delivered (I), as well as from a functional point of view, relative to the functions, attributes, characteristics and technical limits initially agreed with the consumer (II).

The legitimate expectations of the buyer regarding the conformity of the product may be incidental, including tacitly, in the case of technical characteristics or qualities of the product that are typical / usual. Instead, the atypical qualities / functions of a product must be expressly agreed in the table of contents of the contract (must be the subject of express contractual stipulations) so that, subsequently, their absence in respect of the delivered product justifies a request of the consumer to obtain adequate adjustment or efficient remedies for the lack of conformity. The absence or omission of adequate information on the risks resulting from the typical and foreseeable use of the products, inserted on the package leaflet, the user manual, the information on the label / packaging of the product, represents a defect of the product for which the liability of the producer / importer in the EU space for the physical / patrimonial damage caused to the consumers of the defective product can be retained. Three categories of defects attributable to manufacturers can be identified: (a) manufacturing defects, due to unwanted syncope in the production chain (human errors, failures of production facilities / equipment, etc.); (b) design defects (the way in which the product was designed / conceived involves risks of consumption that far outweigh the benefits of consuming the product); (c) information deficiencies (absence of information on the risks resulting from the normal and foreseeable use of the products, in the package leaflet, the user manual, the information on the product label / packaging). The termination of the contract remains open to the consumer, who is basically entitled to terminate the contract under the circumstances in which the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content, unless such negative impact remains to present minor repercussions.

As resulting from previous CJUE jurisprudence, Article 16(m) of Directive 2011/83, which constitutes an exception to the right of withdrawal, is to be interpreted strictly, as a provision of EU law which restricts the rights granted for reasons relating to consumer protection. Therefore, it has been retained that the consumer benefits from the right of withdrawal even in the circumstances in which the consumer has asked for the provision of services before the end of the withdrawal period. Nevertheless, should the consumer have exercised the right of withdrawal, the trader is entitled to the calculation of the proportionate amount of the price for the service which has already been performed, based on the elements of the price agreed in the B2C contract, unless the consumer demonstrates that that total price is itself disproportionate (CJEU judgement from October 8, 2020, in case C-641/19, *EU vs PE Digital GmbH*), in which case the amount to be paid will be calculated on the basis of the market value of the service provided.

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LEGAL ASPECTS OF DIGITAL ASSET MARKET IN THE REPUBLIC OF SERBIA**

Over the last decade, virtual currencies have captured an increasingly significant role in financial markets, introducing a new class of assets and revolutionizing market notions of issuing, trading, storing and transferring value. Hence, the author considers the legal consequences of financial growth and success of digital assets in the contemporary economy. The wave of general transition on the Internet in 2020 also affected cryptocurrencies, i.e. digital assets, which existed somewhere between two extreme positions: legal regulation and grey area. The unresolved legal status of cryptocurrencies has created vast problems for both legislators and investors. As digital assets and other blockchain applications mature, the global regulatory authorities work hard to keep pace and to adopt legal frameworks pertinent to regulating this new method of exchange. At the end of 2020, Serbia adopted the Law on Digital Assets, thus becoming one of the first countries that legally regulate the field of digital assets. The paper analyses specific features of theoretical comprehension and legal regulation of digital assets in the Republic of Serbia. Using the normative and comparative method, the author will explore the legal status of cryptocurrencies, issuance and trade of cryptocurrencies, emphasizing the similarities and differences with the issuance and trade of securities. Therefore, the main objectives of this article are the regulation of digital asset and the application of securities law to issuance and sale of digital assets. Accordingly, it is of substantial importance to develop a holistic and coherent understanding of digital assets and related market activities rooted in empirical evidence and deeper knowledge of the underlying mechanisms.

Keywords: digital assets; virtual currencies; token; securities law; legal regulation.

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1. INTRODUCTION

Around the world the so-called „Digital Law" or „Blockchain Law" is in the „embryonic" development stage, because the legislative interventions into the sphere of cryptocurrencies is still in its infancy. Lawyers are still in a process of understanding phenomena such as „digital asset", "blockchain" and „virtual space", as well as the opportunities and limits of legal regulation of operating with digital information (Aryamov et al., 2019, p. 2). Over the last decade, digital assets have captured an increasingly prominent role in financial markets, introducing a new class of assets and transforming market notions of issuing, trading, storing and transferring value. Even social media platforms enter into the digital asset market. Facebook launched Libra, a new virtual currency that is globally recognized as a legal tender (Andriotis et al., 2019, p. 1). In the meantime, bitcoin has become one of the most prevalent cryptocurrencies globally. Bitcoin presents fascinating challenges to lawyers and financial market regulators. Bitcoin is the first scheme for a private virtual currency that operates without a centralised steering-mechanism and without direct intervention of central regulator (Kulms, 2014, p. 290). The primary technology – blockchain has transformed capital and credit markets, creating a digital pathway that expands opportunities for raising capital and collateralizing debt obligations (Johnson, Hsu Wilbur & Sater, 2018, p. 115).

At the present time, the key problem is the determination of the legal nature of the digital assets. We cannot foresee at the moment whether the respective digital law and civil law will determine it from the standpoint of the real right, of the non-property right, or otherwise. (Aryamov et al., 2019, p. 2). According to the international financial documents and global experience of legalizing a new class of assets, as a basic civil law concept, it is advisable to concentrate not on the concept of "digital rights", but on "digital assets" and consider them as an independent, *sui generis* object of civil rights. It should be noted, that the term "digital rights" has a well established understanding in foreign literature. However, it does not relate to cryptocurrencies. Instead, it characterizes human rights in the digital space (Inozemtsev, 2020, p. 2). As opposed to classical objects of civil law, objects of digital civil law (digital objects) are intangible objects (e.g. tokens, cryptocurrencies, digital wallets, etc.), expressed in a computer code generated by a computer program using Distributed Ledger Technology (DLT).[422] Based on the analysis of soft law documents of international financial organizations as well as of the introduced models of comparative policy practices, it is evident that foreign regulators incline to concentrate on the DLT as a base when separating new "digital" objects and services from "electronic" objects and services that have long been familiar in the world (Inozemtsev, 2020, p. 3).

The methodology of this paper comprises a comprehensive and systemic approach, including comparative and normative method. Primarily, the author will explore the legal status of cryptocurrencies in comparative law, then the issuance and secondary trading of cryptocurrencies, as well as the OTC trading of cryptocurrencies, emphasizing the

[422] DLT and blockchain can be organized as permissionless or private networks. The software cannot be freely downloaded for private or permissioned DLT and blockchain. In lieu, participants will have to request access from the organisers of the platform, by accepting the terms of operation and the standards of digital trading (Kulms, 2019, p. 309).

similarities and differences with the issuance and trade of traditional securities. The results of this research can be applied for developing models for legal regulation of digital assets in foreign countries as well as for using positive aspects of the considered experience to the Serbian legal system (Inozemtsev, 2021, p. 515).

2. REGULATION OF DIGITAL ASSETS IN COMPARATIVE LAW

In recent years, there has been an incredible boom in the digital assets market. Since 2008, when the first issue took place until now, only a small number of jurisdictions have adopted rules governing issuance and sale of digital assets. Although the market boomed, there were no explicit and predictable rules. The securities laws in place were, and still are, a product of the 1930s, especially in the United States (US). Even though the laws have been permanently updated by the US Securities and Exchange Commission through rulemaking and guidance, this new approach to fundraising didn't fit properly into the regulatory framework. The whole point of crowdfunding was to find a less expensive way of raising money (Henderson & Raskin, 2019, p. 444).

Nowadays, digital assets present both promise and peril, which makes the space analogous to crowdfunding in the early 2010s. In both cases, there has been no absence of investor demand for new classes of assets or ways to participate in capital markets. In the same way, there hasn't been a lack of entrepreneurs who desire to ensure the public with digital assets. However, there is an absence of legal rules and capital market regulations which provide a clear and predictable legal framework for investors and issuers (Henderson & Raskin, 2019, p. 445).

As with any new technology, digital assets have opened a number of questions that need to be answered. Immense amounts of money funnelling into the „extraterritorial" virtual space have created conditions for a get-rich-quick on the part of investors and for cases of complete fraud on the part of promoters (Henderson & Raskin, 2019, p. 447). Due to the fact that the digital assets exist in the „extraterritorial" virtual space and that the payments by digital assets are possible through the registration of a cession with residents of other states, it is meaningless to limit its turnover to the frontiers within a state (Aryamov et al., 2019, p. 8).

Therefore, digital assets pose two crucial problems to capital market regulators. The first is a problem of information asymmetry. Information asymmetry is the animating force behind most securities regulation. The three pillars of modern securities laws are: mandatory disclosure, rigid anti-fraud rules, and insider trading limitations. They are designed to put traders on an equal footing, in spite of whether they are inside or outside of a particular company whose share is being traded. This comes from the reality that capital market will not provide the optimum amount of information so the legislator must instead compel it. The antifraud rules in turn are designed to make any disclosures credible (Henderson & Raskin, 2019, p. 447).

The second problem is regulation of supervisory authority permission. This puts regulatory authorities, such as US Securities and Exchange Commission, in a tough position, specially given the lack of legal rules. The absence of digital assets regulation

may give cover to bad participants, while at the same time the good participants are forced to apply with outdated capital market regulations (Henderson & Raskin, 2019, p. 448). Therefore, it is necessary to amend the existing securities regulations or adopt completely new regulations governing the digital assets market.

In the past five years several states in the US such as Arizona, New York, Tennessee and Vermont have enacted digital assets bylaws. On the other hand, the growing importance of digital assets market hasn't yet triggered legislative activities on the European Union (EU) level. The European Commission only has supported the establishment of regulatory authorities. France is only major jurisdiction in the EU that has moved for rules on trading certain securities via digital asset with *erga omnes*. Conversely, some minor European jurisdictions, like Malta, Gibraltar,[423] Monaco, Liechtenstein, Luxembourg[424] etc. have adopted digital asset rules to enhance their attractiveness as an off-shore centers for digital finance (Kulms, 2019, pp. 318-321).

After becoming one of the first countries to authorize the registration and transfer of unlisted securities using blockchain technology, France has adopted an innovative legal framework on Law on Business Growth and Transformation, the so-called PACTE Law,[425] governing initial coin offerings, digital assets (fr. *actifs numériques*) and digital assets services providers (*DASPs or PSAN, prestataires de services sur actifs numeriques*) with the aim of being at the forefront of the blockchain technology (Praicheux, 2020).

Malta is one of the first countries which adopted digital asset laws. In July 2018, Malta passed the Digital Innovation Authority Act. It was adopted in an attempt to develop the innovative technology sector while protecting investors, consumers, integrity of the financial market, and public interest in general against abuse and non-compliance with mandatory laws intended for such purposes.[426] In addition, Malta adopted the Virtual

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[423] In 2017, Gibraltar passed Financial Services (DLT) Regulations, which specify that DLT may be used for storing and transmitting value belonging to others, as well as the authorization of Authority. Financial Services (DLT) Regulations, *LN 2017/204*, Repealed by Act.2019-26 as from 15.1.2020. Art. 1-4. New Regulation, which adopted in 2020, regulates the position of DLT Providers. Financial Services (DLT Providers) Regulations, *LN 2020/012*, Art. 2.

[424] Luxembourg endeavors to be a leader in the regulation of digital assets markets by continuously amending and updating its securities law. The 2001 Law was amended by the Luxembourg law of April 6, 2013 on dematerialised securities to allow Luxembourg corporations and investment funds to issue securities in dematerialised form and convert existing registered or bearer securities into dematerialised securities. In 2020, the 2001 Law was further amended by the Luxembourg law of March 1, 2019 providing increased legal certainty by expressly permitting securities to be maintained by the account keeper through secured electronic registration mechanisms, involving DLT and blockchain (Bill 7363). The intention of Luxembourg legislator is to enable capital market participants to benefit from opportunities offered by new technologies in the field of the circulation of securities. In particular, this Law enables the use of tokens in the form of digital assets stored in a blockchain (Pascual, Holle & Petit, 2021).

[425] The PACTE law of May 22, 2019 permits entities, under certain conditions, to issue digital assets that may grant certain rights to customers (excluding shareholder rights such as voting rights or dividends). Digital assets involve tokens (except those qualifying as financial instruments) and digitally registered assets, involving cryptocurrencies, that are recognized as a means of exchange that can be transferred, stored or exchanged electronically through DLT or blockchain (Praicheux, 2020).

[426] Malta Digital Innovation Authority Act, Chapter 591 of the laws of Malta, *Act XXX of 2018*. Art. 3(c).

Financial Assets Act, that permits initial coin offerings of digital assets on DLT.[427] Initial coin offerings of digital assets will be accompanied by registered whitepaper which serves as an abridged prospectus (Kulms, 2019, p. 322).

A separate question is the issue of specialized regulation of new activities in relation to digital assets. The existing legal rules sometimes may apply directly to new financial intermediaries that implement tasks related to traditional financial activities. On the other hand, some services on the digital assets market may request additional regulation. For instance, experts from Cambridge Centre for Alternative Finance consider that only a relatively small number of brokerages in the digital asset market to be wholly new (e.g. blockchain analytics, the issue and placement of tokens, etc.) (Inozemtsev, 2021, p. 520).

3. DEFINITION OF VIRTUAL CURRENCY AND DIGITAL TOKEN

The National Assembly of the Republic of Serbia adopted the Law on Digital Assets, which entered into force on December 29, 2020, and shall apply as of June 29, 2021, which will provide enough time to create conditions for its implementation, as well as for all interested participants in the digital assets market to get informed with the provisions of the Law.

The principal objective of this law is to define digital assets and its forms, and to create an explicit distinction between official means of payment recognized in the Republic of Serbia and abroad. The Law on Digital Assets regulates the issue of digital assets for the first time in the Republic of Serbia, which not only sets the rules for market participants, but also regulates the entire process of issuing and trading digital assets, which will certainly result in increased security for investors and businessmen from the potential risks (Božović, 2021, p. 1). The aim of adoption of the Law on Digital Assets is to improve the business enviroment, which will significantly contribute to strengthening the integrity of the capital market, as well as to the financial stability in the country.

The Law on Digital Assets defines digital assets, or virtual assets, as a digital representation of value that can be digitally bought, sold, exchanged or transferred and used as a means of exchange or for investment purposes, whereby digital assets shall not include digital representation of fiat currencies and other financial assets governed by other laws, unless otherwise provided by this Law (Law on Digital Assets, Art. 2). It appears from the Law that digital asset is a good on which a certain person has the right of ownership, and that good is digitally recorded (in a digital database, which can be DLT or any other technology that can serve a purpose), has a certain value, can be digitally bought, sold, exchanged or transferred, and used as a means of exchange or for investment purposes.

The Law on Digital Assets specifies two types of digital assets: virtual currency and digital token. Virtual currency or cryptocurrency is a medium of exchange over a network without having the features of a real currency. Nevertheless, virtual currency has an equivalent value

[427] The Virtual Financial Assets Act defines virtual financial asset or VFA as a means of any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value and that is not: 1) electronic money; 2) a financial instrument and 3) a virtual token. Virtual Financial Assets Act, Chapter 590 of the laws of Malta, *Act XXX of 2018*, as amended by *Legal Notice 106 of 2021 and Act XLVI of 2021*, Art. 2(2).

in real currency or commodities or may serve as a substitute for real currency (Kulms, 2014, p. 292). Virtual currency which is completely used for payment purposes will not exceed the borderline between the property law and contract law (Kulms, 2019, p. 317). Cryptocurrencies function in a manner similar to long-recognized forms of money, such as government-issued fiat or specie. These forms of asset enable market participants to buy and sell valuables or engage in a variety of other financial transactions (Johnson, Hsu Wilbur & Sater, 2018, p. 125). According to the Law on Digital Assets, a virtual currency means a type of digital assets that is not issued or guaranteed by a central bank or public authority, that is not necessarily attached to a legal tender and that does not have the legal status of money or a currency, but that is accepted by natural or legal persons as a means of exchange and that can be bought, sold, exchanged, transferred, and stored electronically (Law on Digital Assets, Art. 2(1)). Therefore, the Law is explicit that cryptocurrencies are not used for payment, i.e., that cryptocurrencies are not money. Instead, the Law on Digital Assets foresee that a transaction in which cryptocurrencies are given for a service or commodities, is treated as an exchange. *De facto*, this activity is a payment, but *de iure* it is not. The concept of exchange was used to satisfy the position of the National Bank of Serbia that cryptocurrencies are not money, and this further affected the legal position, as well as the tax treatment of cryptocurrencies (Motika, 2021, p. 4). On the other hand, a digital token is a type of digital assets and means any intangible property representing, in digital form, one or more property rights, which might include the right of a digital token user to specific services (Law on Digital Assets, art. 2(1)).

The issue of classification of digital assets is legally significant, since such a classification allows regulators to customize tools of legal regulation to the specifics of digital assets. The principal classification in both the US and the EU is that of payment tokens, utility tokens and security tokens (Inozemtsev, 2021, p. 517). In its reports European Securities and Markets Authority (ESMA) uses the categorization of tokens based on their major economic functions introduced by the Swiss Financial Market Supervisory Authority (FINMA). At present, there is no generally recognised terminology for the classification of tokens either in Serbia or internationally. The FINMA categorises tokens into three types, but hybrid forms are possible: payment tokens, utility tokens and security tokens.

Payment tokens or currency tokens are tokens which are intended to be used, now or in the future, as a means of payment for obtaining goods or services or as a means of money or value transfer (FINMA, 2018, p. 3). In fact, payment tokens are cryptocurrencies, among which the most famous is certainly the BTC as the first cryptocurrency, conceptually created in 2008 and first mined in January 2009 (Golić, 2020, p. 234). There are numerous legal opinions as to whether tokens of this kind constitute securities. In the legal and financial literature, some authors assert that all types of tokens, including payment tokens, should be considered as securities, while others disagree. According to the FINMA, the payment tokens will not be treated as securities, since these tokens are designed to act as a means of payment and do not have functions similar to those of traditional securities (FINMA, 2018, p. 4).

Utility tokens or consumptive tokens are tokens which are intended to provide digital access to an application or service by means of a blockchain-based infrastructure. *De facto*, utility tokens are like the means of payment used on certain applications. However, these tokens are not accepted as a means of payment for other applications, and the value of the product or service depends solely of the investor's perception (Golić, 2020, p. 234). Utility tokens issued by a company financing the purchase of prospective customers will not be treated as securities if their sole purpose is to confer digital access rights to an application or service and if the utility token can really be used in this way at the point of issue. In these cases, the underlying function of granting the access rights and the connection with capital markets is missing, although it constitutes a typical characteristic of securities (FINMA, 2018, p. 5). If an utility token additionally or only has an investment purpose at the point of issue, it will be treated as securities (i.e. in the same way as security tokens).

Security tokens or asset tokens represent assets such as a debt or equity claim on the issuer. Security tokens promise, for instance, a share in future company earnings or future capital flows. The owners of security tokens take part of company's ownership by purchasing the tokens in a new issuance. In addition, blockchain technology provides a voting system that allows investors to exercise their rights in the company's decision-making process (Golić, 2020, p. 233). In terms of their economic function, asset tokens are similar to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the blockchain also fall into this category (FINMA, 2021, p. 3). Asset tokens constitute securities if they represent an uncertificated security and these tokens are standardised and suitable for mass standardised trading. In that case, security tokens are subject to the rules applying for securities and, regardless of the technology on which they are recorded, fall under well-known legal regulations. In practice, they are not usually present, because the issuance procedure is regulated, and their issuers are responsible for the potential damage caused to the investors (Motika, 2021, p. 5).

Hybrid tokens are a particular legal issue. For instance, for a security token that is same as a payment token, regulators and courts may ensure different types of legal regulation, such as: 1) integrated: a hybrid token should comply with both securities law and payment regulation. In that case, the requirements are cumulative; the tokens are deemed to be both securities and means of payment. 2) hierarchical: a hybrid token should meet the rigid requirements of the securities law or payment regulation (depending on its prevailing functionality) (Inozemtsev, 2021, p. 518).

As opposed to virtual currencies that are not used as a stake in a company, but may be converted for money and paid into a company as a contribution in money, in-kind contributions into a company in digital tokens are allowed if the digital tokens are not related to providing services or execution of work (Law on Digital Assets, Art. 14). Notwithstanding of this rule, in-kind contributions into a general partnership or limited partnership may be in digital tokens related to providing services or execution of work (Law on Digital Assets, Art. 14(3)).

4. THE ISSUANCE OF DIGITAL ASSET – A CASE STUDY OF SERBIAN REGULATION

The issuance of digital tokens is a way for business entities to obtain capital, i.e. to achieve their business plans and strategies. Therefore, digital tokens are associated with crowdfunding, i.e., the opportunity for start-ups around the world raising fresh capital with facilitated legal procedures. The Initial Coin Offering (ICO) has demonstrated and proved to be both a powerful innovative way of raising funds and a powerful mechanism for stimulating innovative businesses like start-ups, based on DLT or blockchain. Thanks to ICOs, new companies and start-ups raise funds by selling tokens to a large number of both individual and institutional investors around the world without any limit, for a relatively short time and at near zero transaction costs (Golić, 2020, p. 231). The situation reached its peak in 2018 when the number of ICOs started was 1080, while 991 were completed with funds raised of 21.6 billion USD. Despite the incredible amounts of capital raised through ICOs and the growing interest of innovative companies and start-ups, investors, regulators and policymakers, it seems that it is relatively little known about what ICOs are and what its opportunities and benefits are in general (Golić, 2020, p. 232). That uncertainty allows purchasers to be investors in ICO projects and share their later destiny. It directly depends on the success of the start-ups and companies issuing tokens whether investing in a particular ICO product will be profitable.

According to the definition of both the European Securities and Markets Authority (ESMA) and the Organization for Economic Cooperation and Development (OECD), the ICO implies the creation of digital tokens by young micro, small and medium-sized enterprises, i.e., start-ups and their distribution to investors in exchange for fiat currency or, in most cases, the most well-known cryptocurrencies such as Bitcoin (BTC) or Ether (ETH), using DLT or blockchain, which facilitate value exchange without the need for reliable central authority or intermediary (ESMA, 2019, p. 11). Momtaz (2018, p. 5) gives a slightly different definition according to which ICOs or token sales are smart contracts based on DLT or blockchain, that are designed to provide external funding through the emission of tokens. The blockchain records all transactions made in the cryptocurrency chronologically and publicly. The possessor of the token has a key that lets it to create new entries on the blockchain to reassign the token ownership to someone else (Momtaz, 2018, p. 5).

In contrast to Initial Coin Offerings, conventional financing methods are adjusted to specific funding stages. Crowdfunding is used to fund early stages, venture capital covers all stages until a firm goes public, and Initial Public Offerings (IPO) are used to obtain high volume growth capital for established start-ups. As opposed to the aforementioned, Initial Coin Offering can be employed during all funding stages, although entrepreneurial firms dominate the pool of firms raising capital through ICOs (Momtaz, 2018, p. 6). Another significant distinction between IPOs and ICOs is that investors obtain products or equity-like instruments in crowdfunding campaigns, while venture capitalists or IPO investors receive shares. Initial Coin Offerings are used to provide all this and more, i.e. equity shares (security tokens), products or services (utility tokens), and mediums of exchange (payment tokens) (Momtaz, 2018, p. 6).

As can be concluded, the ICO actually is a modified IPO adapted to digital assets and new technologies that are increasingly taking their place in the world of economics and investments. From the perspective of the raising funds and risks, the ICO has a lot of similarities with the IPO. However, the IPO is a process regulated in detail by strict legal regulations, and each company that collecting investment on this matter, must pass under rigorous control of state institutions and fulfil the explicit requirements provided by the Law on the Capital Market. Given that Initial Coin Offering has not been regulated in most countries, many companies have used these legal loopholes and issued their tokens. Therefore, in the light of blockchain technology as a new technological solution, the ICO began to apply globally without defining a legal status and previous regulation. It is one of the main reasons for the uncertainty on the digital assets markets, and large fluctuations in the prices of tokens (Milic Law Office, 2021).

The new regulation governing this area is largely limited to the ICO and bring to order on the primary and secondary market of digital assets. Thus, it turned out that any regulation is better both than the grey zone and the potential prohibition that has been speculated. The recognition of digital tokens as official evidence of the existence of rights or financial instruments has instilled confidence in investors who will make easier to invest in this form of asset, i.e., increasing share in their investment portfolio.

The Serbian Law on Digital Assets differentiates between the issuance of digital assets for which a white paper has been made or approved and the issuance of digital assets for which a white paper has not been approved.

The Law on Digital Assets has taken the position that the initial offering of digital assets for which a white paper hasn't been approved cannot be advertised on the territory of the Republic of Serbia. The exceptions of this prohibition imply that the issuer may advertise an initial offering of digital assets without an approved white paper in the following cases: 1) the initial offering is addressed to fewer than 20 natural and/or legal persons; 2) the total number of digital tokens issued does not exceed 20; 3) the initial offering is addressed to buyers/investors buying/investing in digital assets in the amount of at least EUR 50,000 in the dinar equivalent at the official average exchange rate of the dinar against the euro determined by the National Bank of Serbia on the date of purchase/investment, per buyer/investor; and 4) the total value of digital assets issued by one issuer during a period of 12 months does not exceed EUR 100,000 in the dinar equivalent at the official middle exchange rate of the dinar against the euro determined by the National Bank of Serbia (Law on Digital Assets, Art. 17(2)). The publishing of a white paper, that has not been approved in accordance with the Law on Digital Assets, is allowed only if clearly indicated at the publishing and during the initial offering of digital assets that the relevant white paper has not been approved (Law on Digital Assets, Art. 17(3)). The notion of publishing of white paper refers to the publication on the website of the issuer of digital assets. Hence, in a case when the publication of white paper is not approved by the supervisory authority or the same is not requested, and even in a case when the white paper is not written, the issuance of digital assets is not prohibited. However, the advertising is prohibited under such circumstances.

When it comes to the issuance of digital assets for which a white paper has been made or approved, before the issuance of digital assets, the issuer makes a white paper, the content of which is regulated by Law and which is approved by the supervisory authority (Securities Commission). Prior to the issuance of digital assets, an issuer may draw up a white paper that contains all the relevant data which, having regard to the special features of the issuer and the digital assets offered, enable investors to make an investment decision and to assess the risks associated with investment in digital assets, and that meets all other white paper requirements laid down by this Law. Information in the white paper shall be concise, explicit and comprehensible and its layout conducive to easy analysis. In addition, the content of the white paper must be accurate, clear, complete, and not misleading (Law on Digital Assets, Art. 19). The Law on Digital Assets stipulates key data and information which the white paper should contain (see in detailed Art. 20 of Law on Digital Assets), leaving the powers to both the National Bank of Serbia and the Securities Commission to determine the detailed content and additional elements of the white paper. At this moment, in the absence of bylaws, there is no precise information that supervisory authority can additionally request, but hopefully the future bylaws will be an incentive for the development of this area.

Based on the information contained in the white paper, the future potential investor makes an informed decision regarding the investment (Božović, 2021, p. 5). The white paper shall contain all information about the persons responsible for the accuracy and completeness of information contained therein – name, surname and title of a legal person for natural persons and business name, or name and head office for legal persons. If the white paper contains incorrect, inaccurate or misleading data and information, or significant omissions, the issuer and his/her responsible person or legal representative shall be held liable. In addition to the issuer, the following persons shall also be held liable for the data related to previous statement: 1) independent auditors of the issuer (e.g. audit firm, auditor entrepreneur and/or licensed certified auditor), solely in connection with the information from the financial statements that have been included in the white paper and covered by their audit report; 2) other person responsible for the accuracy and completeness of information in the part of the white paper he/she has assumed responsibility for – solely in connection with that information (Law on Digital Assets, Art. 21).

The issuer or an authorized person on behalf of the issuer submits a request for approval of the publication of white paper to the competent supervisory authority. The supervisory authority shall issue a decision on the approval of a white paper publishing within 30 days following the receipt of a duly completed application and shall submit the decision to the applicant (Law on Digital Assets, Art. 23(4)). On the other hand, the Law on Digital Assets leaves the possibility for the supervisory authority to reject the request of the issuer of digital asset to publish a white paper for one of the following reasons: 1) the white paper or information, and/or documentation supporting the application do not meet the conditions prescribed by this Law or enactments adopted pursuant to this Law, and the applicant failed to remedy this within the set timeframe; 2) the white paper contains incorrect, inaccurate or misleading information or significant omissions resulting in incorrect, inaccurate or misleading information for investors, and the applicant failed

to remedy this within the set timeframe; 3) the applicant is an issuer in respect of which the supervisory authority has imposed a supervisory measure due to non-compliance with the provisions of the law governing the capital market, law governing investment funds, law governing alternative investment funds, law governing the prevention of money laundering and the financing of terrorism, laws governing the operations of financial institutions or this Law, and the issuer failed to act pursuant to the measure imposed; 4) data in the white paper are not in line with the issuer's decision on the issuing of digital assets or with other data that must be submitted along with the application; 5) the decision of the issuer's competent body on the issuing of digital assets is null and void or rescinded; 6) preliminary bankruptcy procedure has been initiated against the issuer; 7) bankruptcy procedure has been initiated against the issuer; 8) liquidation or forced liquidation has been initiated against the issuer (Law on Digital Assets, Art. 25).

If the supervisory authority approves the publication of the white paper, the issuer shall publish the white paper within a reasonable time, but no later than the commence of the initial offering of digital assets. In addition, the issuer is obliged to publish the white paper in the Serbian language on its website (Law on Digital Assets, Art. 27(1-2)). Where the publishing of the white paper for the initial offering has been approved, the timeframe for the beginning of registration and payment of digital assets shall commence at the latest within 30 days following the day of receipt/issuing of the decision on the white paper approval. The payment of digital assets will be made in money, digital assets, and/or services of the acquirer of those digital assets (e.g. transfer of issued digital assets to the "miners" of those digital assets) (Law on Digital Assets, Art. 28(1-2)). If the initial offering of digital assets is successfully completed (this is a criterion that the issuer should determine in a white paper), the issuer is obliged to immediately notify the supervisory authority, as well as to publish a report on the outcome of the initial offering on its website by no later than three business days after the offering is closed (Božović, 2021, p. 5). Succeeding a successfully completed initial offering of digital assets with an approved white paper, the issuer shall inform investors through its website about secondary trading in digital assets.

5. SECONDARY TRADING OF DIGITAL ASSET

The Law of Digital Assets explicitly permits secondary trading of digital assets issued in the Republic of Serbia or abroad regardless of the fact whether a white paper has been approved for them in accordance with the Law. (Božović, 2021, p. 6). Digital assets can be bought or sold through platforms specialized for that purpose, but also through crypto math, which include automated electro-mechanical devices through which the acquisition or disposal of digital assets can be made for cash or the exchange of digital assets for each other. On the other hand, the digital asset trading platform is a multifunctional system used for organized digital asset trading, administered by the platform operator, with the objective to facilitate the connection of third parties interested in buying, selling and exchanging digital assets (Milic Law Office, 2021). Companies licensed by the supervisory authority for the provision of digital asset services and all other legal persons, entrepreneurs and individuals may trade via the digital assets trading platform in the Republic of Serbia. The

Law insists that during this form of trading of digital assets, the organizer of the platform respects the principle of transparency, both before and after the transactions regarding digital assets. The platform operator may temporarily dismiss trading in digital assets admitted to trading if it assesses that this is necessary to protect investors or eliminate risks to smooth or stable trading in digital assets. In this event, the platform operator will inform the supervisory authority about the cancellation of such trading without delay. The supervisory authority may order to platform operator to temporarily or permanently dismiss trading in specific digital assets if such trading contravenes this Law or if such action is necessary to preserve financial stability (Law on Digital Assets, art. 31-35).

The Law also allows OTC (Over-The-Counter) trading of digital assets. The contracting parties are not required to use the services of any digital asset service provider for the conclusion and implementation of transactions in OTC trading. In addition, the Law forecasts using smart contracts in secondary trading in digital assets. If a digital asset service provider ensures services which include the use of smart contracts, it shall obtain the consent of the digital asset user for the use of smart contracts (Law on Digital Assets, Art. 36 and 37). Finally, it remains to be seen to what extent these provisions of the Law will be applicable in practice.

Unless otherwise provided by this Law, the law governing the capital market[428] shall apply to the issuing of digital assets that have all the features of a financial instrument and to the secondary trading and the provision of services connected with such digital assets (Law on Digital Assets, Art. 7(1)). Notwithstanding of this rule, the law governing the capital market shall not apply to the issuing of digital assets that have all the features of a financial instrument, nor to the secondary trading and the provision of services connected with such digital assets, if all of the following conditions are met: 1) digital assets have no characteristics of shares; 2) digital assets are not fungible with shares; 3) the total value of digital assets issued by a single issuer during a period of 12 months does not exceed EUR 3,000,000 in the dinar equivalent at the official middle exchange rate of the dinar against the euro determined by the National Bank of Serbia on the day of the issue, i.e. during the primary sale (Law on Digital Assets, Art. 7(2)). Therefore, for legal persons who decide to issue digital assets in accordance with all aforementioned required conditions, the issuance can be performed under a significantly simplified procedure, fulfilling only the requirements of the Law on Digital Assets as *lex specialis*. In that case, the issuer is not obliged to fulfil formally and substantively significantly stricter rules prescribed by Law on the Capital Market (Milic Law Office, 2021).

6. CONCLUSION

The future of digital asset is hard to predict due to its vulnerability to external crash and its potential for abuse through crime activities such as fraud or money laundering. On the other hand, we can notice that digital assets markets and associated innovative technologies raise new and complex issues related to the regulation and compliance. It should be noted,

[428] Law on the Capital Market, *Official Gazette of RS*, No. 31/2011, 112/2015, 108/2016, 9/2020 and 153/2020.

that there are many significant differences in the positions and risks connected with issuance and trading of digital assets and traditional securities. Taking into account that digital assets as a category don't fit neatly into existing regulatory framework – currencies or securities, but rather cover all of them, most jurisdictions have yet to develop thoughtful regulation to create a fair, transparent and orderly digital assets market. The current legal loophole maintains fraud and a digital asset market is not yet safe for investors, particularly for institutional investors to enter with certainty and confidence. Therefore, a comprehensive legal approach is necessary, combining insights from digital processes with securities law, capital market regulation, contract law and property law.

The Republic of Serbia is one of the few countries in the world that has adopted the Law on Digital Assets. The Law on Digital Assets provides legal security on the digital assets market and withdraws the digital asset itself out of the grey zone, giving its status a legal form. Hence, the Law on Digital Assets is a good step forward but it remains to be seen whether its implementation will follow the digital assets market. Regulations will to ann important extent be regulated by bylaws. Such bylaws will regulate in more detail the issuance and secondary trading of digital assets, whose efficiency will determine the successful implementation of the Law on Digital Assets in practice (Božović, 2021, p. 7).

Therefore, the Law on Digital Assets unequivocally represents a remarkably step forward towards the introduction of digital assets in both life and economy. When it comes to the introduction of the institute of fiduciary, such a step is even progressive. It seems indisputable that this is definitely a good beginning of the regulation of the digital assets market in the Republic of Serbia. However, a clear position of the legislator regarding certain relevant issues is yet to come in the future.

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NATIONALISING THE GENERAL DATA PROTECTION REGULATION IN WESTERN BALKAN

Data protection has become a buzzword worldwide since the adoption of the EU General Data Protection Regulation (GDPR) and its implementation in May 2018. The Regulation caused a significant effect on global dta protection regulation mainly due to high fines envisaged as well as its broad territorial scope. The result thereof was several national legislations being adopted globally reflecting most or some of new European data protection provisions. The Regulation, as well as other pertinent legal documents, quite expectedly affected all EU candidate countries that initiated respective harmonization processes. Each of them had their own pace, as well as challenges, in adjusting national legal regimes to Union acquis. The paper aims at identifying the challenges faced by respective national legislators in the Western Balkans countries: Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia in their transposition of the GDPR, as well as the Law Enforcement Directive, into domestic law. In addition, the paper will try to examine the adaptiveness of national legislation to the EU regulation and the law-making processes in each country. Finally, the paper will estimate whether the sole reliance on the European legislation is suitable or may even cause confusion in the proper implementation and harmonisation with acquis, and where possible, suggest alternative approaches in respective WB countries to enable gradual compliance that may better serve the current state of data protection therein.

Keywords: data protection, GDPR, EU harmonisation

1. INTRODUCTION

The adoption of the 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/

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EC (General Data Protection Regulation - GDPR)[429] and the Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA,[430] further harmonised data protection in the European Union (Law Enforcement Directive - LED). Member States were given more than two years to prepare for a smooth implementation of the new regime, which imposed more stringent obligations on those that process personal data, greater control of individuals on how data were processed and vested significant power in independent data protection authorities, most notably the possibility to fine data controllers with large amounts of money.

These instruments, most notably the GDPR, resulted in worldwide advocacy and subsequently the adoption of national legislation, which mostly matched well to the GDPR,[431] while some provisions even taken verbatim. Inevitably, these included Western Balkan countries, all of which were obliged by the respective stabilisation and association agreements and all but one being the EU candidate countries.

Both, the GDPR and the LED have brought numerous novelties in data protection, from compulsory data protection officers for public authorities, through data breach notifications and stringent rules on data transfer to high administrative fines imposed on data controllers and processors by national data protection or other authorities. In comparison to the previous data protection regime defined under the Data Protection Directive 95/46/EC[432], the leap was too high, and many Member States have undergone difficulties complying with the two.[433]

For the Western Balkan countries, the bar was even higher, having in mind that most national laws, as well as enforcement thereof, were not entirely in compliance with the Directive 95/46/EC, at the time of the adoption of the GDPR according to respective country reports. This observation was emphasised in respective country reports. Therefore, the choice of the approach in this law making is significant to securing a countrywide adoption of the law and the respect of the right to personal data protection.

2. SPECIFICS OF THE GENERAL DATA PROTECTION REGULATION

There are several features of the GDPR that are worth emphasising to better understand the importance of choosing the most appropriate manner by non-EU members when complying with national laws. These features pertain both to the process which lead to

[429] Referred in the Article as the General Data Protection Regulation or GDPR.

[430] Referred in the Article as the Law Enforcement Directive or LED.

[431] Switzerland passed data protection legislation in 2020, which will come into effect in 2022. Most provisions match those of the GDPR.

[432] European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995, O.J. (L 281).

[433] For example, Slovenia did not adopt a national legislation, a GDPR implementing law, before the entry into force, which resulted in Slovenian DPA not being competent to impose administrative fines set out by the GDPR.

the adoption of the provisions and the hierarchy of the GDPR in the EU legal system, as well as to its content and mechanisms to secure consistent application throughout the European Union (EU).

The drafting of the document took several years. It commenced in 2012, when the European Commission proposed a comprehensive reform of the Data Protection Directive 95/46/EC to strengthen online privacy rights.[434] The work on the draft was finalised in 2014 and the Draft was adopted by the European Parliament. More than 4,000 amendments were submitted by MEPs, which is the highest number of amendments in the history of the EU Parliament, and the overall process will be remembered by the great number of lobbying groups and stakeholders.[435]

The GDPR not only substituted the former directive, but it placed data protection to a higher level of coherence Europe-wide. In contrast to directives, regulations are immediately applicable and enforceable in all Member States. Nonetheless, considering the vast scope as well as the omnipresence of data processing, the GDPR provided possibility, albeit envisaged by very few provisions, to allow margin of appreciation and accommodate national specific rules. When adopted in April 2016, the Member States were given the deadline longer than two years to prepare for its implementation, as well as to regulate those areas that were left open for national legislators, such as the age of a minor to provide consent for data processing happening online, or the procedure for compliance certification.

The GDPR is intended to serve as a comprehensive data protection regulatory framework, save for those areas, such as public security and fight against crime,[436] or national security,[437] which fall outside the scope of general regime. By the time the law-making was finalised, new issues pertinent to data protection emerged that the GDPR failed to regulate, such as big data. In addition, matters such as e-privacy were subject to other directives.[438]

Notwithstanding few provisions allowing specific national provisions to secure consistent application of the GDPR, its whole chapter was dedicated to the establishment of a consistency mechanism, which included strict rules and procedures. The European Data Protection Board (EDPB), as a separate legal entity with the task to ensure consistent application was established.[439] The EDPB is competent for, *inter alia,* issuing opinions and guidelines aimed at either specific provisions of the GDPR or specific issues that might emerge through the practice, therefore making the GDPR a living instrument. In other words, apart from the GDPR and its preamble that serves as applicable explanatory memorandum, the EU general data protection regime is supported by soft law regulation, that in return makes those interpretation relevant for all data controllers and processors. Such a characteristic is unique.

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[434] European Data Protection Supervisor, The History of the General Data Protection Regulation, available at: https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en, (1.9.2021.).

[435] The drafting of the GDPR, the advocacy is well presented in the documentary directed by David Bernet, *Democracy: Im Rausch der Daten,* 2015.

[436] The matter is regulated under Law Enforcement Directive.

[437] This matter is outside the current competences of the EU.

[438] i.e. e-Privacy Directive. Currently, the new e-privacy regulation is being finalised.

[439] Art. 70 of the GDPR.

3. DATA AND METHODS

Having in mind that sources on the law-making processes in Western Balkan countries are scarce, including academic articles, this comparative analysis, in addition to official documents and other existing sources, rests on data – facts and observations – gathered from interviews that were conducted with high officials of respective national data protection authorities, as well as with, where applicable, representatives of public authorities competent for the preparation of the legislation. In addition, interviews were conducted with representatives of civil society organisations prominent in the field of data protection, where applicable, having in mind that in most countries civil society organisations have not been involved in the processes, nor have they taken part in other initiatives vis-à-vis personal data protection, or EU integration in this field. The interviews were conducted in August 2021.

4. GDPR AND LED IN THE WESTERN BALKANS – NATIONAL APPROACHES

4.1. Albania

Albania is an EU candidate country since 2014. According to the Stabilisation and Association Agreement, signed in 2006 which entered into force in 2009, Albania is obliged to harmonise its legislation concerning personal data protection with Community law and other European and international legislation on privacy, including the establishment of independent supervisory bodies with sufficient financial and human resources to efficiently monitor and guarantee the enforcement of national legislation on personal data protection.[440]

Albania adopted the Law on the Protection of Personal Data establishing a data protection authority in 2008,[441] which was later amended in 2012 and 2014. In 2012 Progress Report, it was noted that some progress vis-à-vis further approximation with the EU acquis was made with amendments to the Law.[442] The compliance of national data protection legislation has not been notified in the following reports until 2018, and the focus was on the implementation thereof. In 2018, the European Commission noted that the alignment of national data protection law with the GDPR and the LED was needed,[443] which was reiterated in the latest Report.[444]

Albania ratified the Convention for the Protection of Individuals with regard to

[440] Article 79 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, 2009, O.J. (L107). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0428(02) (1.9.2021.).

[441] Official Journal No. 9887 of 10.3.2008., amended in 2012 (OJ No. 48/2012) and in 2014 (OJ No. 120/2014).

[442] European Commission, 2012, Albania 2012 Progress Report, 10.10.2012, SWD(2012) 334 final, p. 55, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/al_rapport_2012_en.pdf (1.9.2021.).

[443] European Commission, 2018, Albania 2018 Report, 17.4.2018., SWD(2018) 151 final, p. 26, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf, (1.9.2021.).

[444] European Commission, 2020, Albania 2020 Report, 6.10.2020, SWD(2020) 354 final, p. 30, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania_report_2020.pdf (1.9.2021.).

Automatic Processing of Personal Data[445] as well as the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows[446] in 2005. However, it has not yet signed the 2018 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[447]

In late 2020, the Albanian Data Protection Authority (Albanian DPA) commenced the drafting of the new law jointly with external experts engaged through an EU funded project.[448] The new data protection law in line with the GDPR and the LED has been jointly drafted by the project and the Albanian DPA's experts and will be submitted within September 2021 with the Ministry of Justice, since it is the competence of the latter to initiate a legislative process in this field.

The new personal data protection law is expected to be adopted by the end of 2021.[449]

4.2. Bosnia and Herzegovina

Bosnia and Herzegovina signed the Stabilisation and Association Agreement back in 2008, which came into force in 2015.[450] Harmonisation of data protection legislation, including the establishment of independent authorities is envisaged in Article 79 of the Agreement. Following the adoption of the GDPR as well as the LED, no new laws, both federal and laws of entities, have been adopted. The Data Protection Authority (BiH DPA) is established in 2006[451], as a federal authority independent from the executive power.

The Law was last amended in 2011[452] and, according to the 2014 Progress Report, "preparations for personal data protection are still at an early stage".[453]

[445] CETS. 108, Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108).

[446] CETS. 181, Council of Europe, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows

[447] Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223 (1.9.2021.).

[448] According to the interlocutor from the Albanian DPA, the DPA is a beneficiary of a Twinning Project entitled "Institution-building for alignment with the Union acquis on the protection of personal data", a Member State consortium from Italy and Austria, comprising of the Italian Personal Data Protection Authority (Garante per la Protezione dei Dati Personali), supported by the Austrian Human Rights Institute Ludwig Boltzmann Gesellschaft and CSI-Piemonte in Italy.

[449] Ibid.

[450] Council Decision (EU) 2015/997 of 16 June 2008 on the signing on behalf of the European Community of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 2015, O.J. (L164). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2015:164:FULL&from=en (1.9.2021.).

[451] Law on Personal Data Protection ("Official Gazette BH", No. 49/06), later amended and currently Law on Personal Data Protection ("Official Gazette BH", No. 49/06, 76/11 and 89/11).

[452] Law on Amending the Law on Personal Data Protection ("Official Gazette BH", No. 89/11).

[453] European Commission, 2014, Bosnia and Herzegovina 2014 Progress Report, Brussels, 8.10.2014., COM(2014)700 final, p. 58, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf (1.9.2021.).

In 2017, the BiH DPA urged the BiH Council of Ministers to harmonise the law with the recently adopted GDPR and LED, with the aim of launching certain activities on this issue. Since the Council did not react, the BiH DPA undertook activities to draft a proposal for a new Law on Personal Data Protection.[454] In doing so, the BiH DPA relied on, apart from its own internal resources, the exchange of expertise and experience with counterparts from Province of Saxony (Germany) and Croatia, as well as individual experts' inputs through different projects supported by the EU.[455] The Draft was then submitted to the Council of Ministers, which later, in 2018, commissioned the BiH Ministry of Civil Affairs[456] to establish an intersectoral Working Group to draft a new Law Personal Data Protection. The Working Group, consisting of representatives of public authorities, notably of federal ministries, relied on the Draft prepared by the BiH DPA.[457]

In the meantime, the Council of Europe adopted the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+)[458], which BiH signed in 2020, however, not ratified.[459] BiH is a member of both the Convention 108 and its Additional Protocol CETS. 181.

In mid-2019, the Draft Data Protection Law was submitted to the Council of Europe Office in Sarajevo, EU Delegation to Bosnia and Herzegovina as well as Special representative of the EU in Bosnia and Herzegovina for comments.[460]A public consultation, as a formal stage in the law-making process, has been organised. However, there is no available reporting on the matter in the media.

It is important to emphasise that no civil society organisations have been involved in the process of the law-making, nor during any public discussion about the provisions of the law. Allegedly, *ad-hoc* consultations with different stakeholders, including chambers of commerce, have been held.[461]

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[454] Personal Data Protection Agency in Bosnia and Herzegovina, Annual Report on Personal Data Protection in Bosnia and Herzegovina for 2018 (Izvještaj o zaštiti podataka o ličnosti u Bosni i Hercegovini za 2018. godinu), 2019 (No. 01-02-4-638-1/19 Date: 14.5.2019.), p. 3. Available at (in Bosnian only): http://www.azlp.ba/publikacije/Archive.aspx?langTag=bs-BA&template_id=149&pageIndex=2 (1.9.2021.).

[455] Personal Data Protection Agency in Bosnia and Herzegovina, Annual Report on Personal Data Protection in Bosnia and Herzegovina for 2018, 2019 (No. 01-02-4-638-1/19 Date: 14.5.2019.), p. 3. According to the interlocutor from the BiH DPA much of the draft law was written by BiH DPA staff, and these experts provided ad hoc comments pertaining to specific provisions.

[456] The Ministry has a mandate related to establishing the basic principles of coordinating activities, coherence of the plans of entity authorities and defining strategies at the international level in the fields: health and social protection, pensions, science and education, work and employment, culture and sports, geodetic, geological, and meteorological affairs. For personal data protection, the Ministry of Civil Affairs has a sole competence.

[457] Information provided by the interlocutor from the BiH DPA.

[458] CETS. 2018, Council of Europe, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223)

[459] BiH signed the Protocol on 2.7.2020., however, it has not ratified it by the end of preparing this article.

[460] According to the interlocutor for the BiH DPA no analyses of the Draft Law have been provided so far. The author, however, was commissioned by the Council of Europe to provide analysis on the compliance of the Draft Law with CoE conventions, hence, acquainted with the content of the Draft.

[461] These consultations, according to the interlocutor from the BiH DPA, have not been a part of formal consultations.

The process of the adoption of the law in Bosnia and Herzegovina is still pending. When it comes to the content of the perspective data protection legislation, according to the available version of the BiH Draft Law on Personal Data Protection, it appears as a transposition of both relevant EU data protection legal instruments into domestic legislation. It seems to have been written reflecting the GDPR as well as the LED. The structure of the Draft Law is set to divide provisions transposing the GDPR from those transposing the LED.

In a nutshell, the draft Law, save from few articles could be best described as a translation of the two EU legal instruments. These include provisions that are prescribed by the GDPR for the EU Member States to regulate those specific situations in accordance with their legal systems, such as those pertaining to the processing on personal data in the context of employment.[462] Original provisions of the Draft Law refer to video surveillance. In addition, the Draft Law contains no reference to the Convention 108 or other Council of Europe legal instruments.

4.3. Montenegro

Montenegro signed the Stabilisation and Association Agreement in October 2007 which entered into force in May 2010.[463] Harmonisation with EU legislation in the field of data protection, as well as the establishment of a data protection authority, are envisaged in Article 81.

According to the 2012 Progress Report, a good progress was made regarding the right of individuals to personal data protection, notably due to the Law on Personal Data, the Information Secrecy Act and the Law on Free Access to Information. Nonetheless, it was noted that "further efforts [were] needed to implement the national legislation in line with the EU acquis in this area"[464] which was essential also for the cooperation with Eurojust.[465] Subsequently, the Law was amended only once in 2017, however, new provisions pertained to video surveillance.[466] In 2020 Report, the European Commission noted that a new law on protection of personal data was in preparation with the aim of aligning it with the GDPR and the LED.[467]

The work on the drafting of the new law started in 2017 and was coordinated by the Ministry of Interior. The working group comprised of representatives of public authorities, including the Montenegrin Data Protection Authority (Montenegrin DPA). Though envisaged

[462] Christopher Kuner, Lee A. Bygrave and Christopher Docksey (eds.), 2020, *The EU General Data Regulation (GDPR) – a Commentary,* Oxford: OUP Oxford, pp. 1229-1238.

[463] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 2010, O.J. (L 108). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2010.108.01.0001.01.ENG (1.9.2021.).

[464] European Commission, 2012, Montenegro Progress Report, Brussels, 10.10.2012., SWD(2012) 331 final, p. 50, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf (1.9.2021.).

[465] Ibid, p. 52.

[466] Official Journal of Montenegro, 22/2017.

[467] European Commission, 2020, Montenegro 2020 Report, Brussels, 6.10.2020., SWD(2020) 353 final, available at: https://www.ecoi.net/en/file/local/2040146/montenegro_report_2020.pdf (1.9.2021.).

as an inclusive process by the Ministry, civil society organisations did not take part in it.[468]

Initially, the draft law was to harmonise national legislation with both the GDPR and the LED.[469] In July 2018, Montenegrin DPA announced the work on new data protection law and the compliance thereof with the GDPR.[470] However, during the drafting process, it was advised by experts engaged through EU funded projects to separate pieces of legislation, having in mind that the EU legal instruments were of different level.[471] The work was put off and later continued only vis-à-vis general data protection regime.

The process of the adoption of the law in Montenegro is still pending, the law complying national data protection legislation with the GDPR is expected by the end of 2021.

Montenegro ratified the Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2005[472] and 2010[473] respectively. However, it has not yet signed the 2018 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[474] Content-wise national legislation is expected to follow the provisions as in the GDPR, as well as the order thereof.

4.4. North Macedonia

North Macedonia signed the Stabilisation and Association Agreement back in 2001, which came into effect in 2004.[475] North Macedonia ratified the Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2006[476] and 2009[477] respectively.

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[468] According to the interlocutor from the Ministry, CSOs were not active in the field of personal data protection.

[469] According to the interlocutor from the Ministry.

[470] Agency for Personal Data Protection and Free Access to Information, 2018, (press release 24.7.2018.), Law on Personal Data Protection: the Law shall be in compliance with General Data Protection Regulation (GDPR) (in Montenegrin only: Zakon o zaštiti podataka o ličnosti: Zakon će biti usklađen sa Opštom uredbom o zaštiti ličnih podataka (GDPR) https://www.paragraf.me/dnevne-vijesti/24072018/24072018-vijest2.html (1.9.2021.).

[471] According to the interlocutor from the Ministry.

[472] Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108 (1.9.2021.).

[473] Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=181 (1.9.2021.).

[474] Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223 (1.9.2021.).

[475] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, 2004, O.J. (L 84).

[476] Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108 (1.9.2021.).

[477] Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=181 (1.9.2021.).

In 2019, it signed the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, however, it has not ratified it yet.[478]

The first initiative regarding the alignment of national data protection legislation with EU law was of Macedonian Data Protection Authority (Macedonian DPA) in 2017. According to the 2017 annual report, [479] the DPA prepared a draft law, even though without legislative competences. As noted in the Report, public discussions had been organised with different stakeholders including one for civil society organisations, however, without significant interest.[480] The draft was also subject to review by external experts engaged through the EU funded project.[481] The process was then shifted to the Ministry of Justice,[482] which established a multistakeholder working group comprising of representatives of ministries, DPA, national experts and a CSO prominent in the field of digital technologies.

The Law on Personal Data Protection was adopted in early 2020 giving a grace period of 18 months for data controllers and processors to comply with new requirements, thus came in effect in late August 2021.[483] The Law transposes the GDPR into national legal system and to the great extent it is a genuine piece.

4.5. Serbia

Serbia signed the Stabilisation and Association Agreement in 2008, which Serbia ratified same year and came into effect only in 2013.[484] Harmonisation with EU legislation in the field of data protection is envisaged in Article 81, as well as the establishment of a data protection authority. With the adoption of the Data Protection Act in 2008, the competencies of a data protection authority were attributed to the existing independent authority – Commissioner for Information of Public Importance established in 2004.

The first initiative to adopt a new law was initiated by the Serbian Data Protection Authority (Serbian DPA)[485] that drafted a Model Law in 2014 and submitted to the Ministry of Justice.[486] This Model Law, as presented in the accompanying explanatory memorandum,

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[478] Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223 (1.9.2021.).

[479] Macedonian DPA, 2018, 2017 Annual Report, p. 10, available (in Macedonian only) at: https://dzlp.mk/sites/default/files/u4/godisen_izvestaj_dzlp_2017_web_2.pdf (1.9.2021.).

[480] According to the interlocutor, there was one organization present.

[481] Macedonian DPA, 2019, 2018 Annual Report, p. 8, available at: https://dzlp.mk/sites/default/files/u4/annual_report_dpdp_2018_en.pdf (1.9.2021.).

[482] Macedonian DPA, 2019, 2018 Annual Report, available at: https://dzlp.mk/sites/default/files/u4/annual_report_dpdp_2018_en.pdf (1.9.2021.).

[483] O.J. of the Republic of North Macedonia, No. 42/2020.

[484] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, 2013, O.J. (L 278). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22013A1018%2801%29 (1.9.2021.).

[485] Full name: Commissioner of Information of Public Importance and Personal Data Protection.

[486] Commissioner for Information of Public Importance and Personal Data Protection, 2014 (press release 17.10.2014.), *Commissioner submits Model of new Law on Personal Data Protection to the Government*, available

aimed at complying the national legal regime with the then relevant EU regulation, notably Data Protection Directive, as well as the then work of the Council of Europe on modernising the Convention 108.[487] As a response to this, the Ministry of Justice presented a Draft Law in October 2015, and opened discussion. However, the Draft was heavily criticised both by the Serbian DPA[488] and civil society organisations on the process and its content, while the latter emphasised the failure of the process to involve stakeholders other than representatives of the executive and security sector.[489] The process was consequently put off.

Later in 2017, following the adoption of the GDPR and the LED, the Serbian DPA submitted the second Model Law on Personal Data Protection.[490] Similarly to the first Model Law, there were no actions taken on behalf the Government, and in late 2017, the Ministry of Justice opened a public debate on the Second Draft Law on Personal Data Protection and in March 2018 provided a report acknowledging a number of comments submitted by various stakeholders, such as public authorities including the Serbian DPA, association of judges, business actors and legal offices, IT associations and human rights organisations.[491] Most of the criticism related to the fact that provisions of EU legal acts are taken verbatim and to great extent inapplicable in the national legal regimes. According to the Ministry, the work of the drafting group was supported by experts engaged through EU funded projects.

Eventually, the Law was adopted in November 2018[492] without substantial deliberation in the Parliament and entered into force in August 2019, leaving nine months to prepare for the implementation.

Serbia ratified Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2005[493] and 2008[494] respectively. In 2020, Serbia ratified the Protocol amending

at: https://www.poverenik.rs/en/press-releases/1900-poverenik-stavio-na-raspolaganje-vladi-model-novog-zakona-o-zastiti-podataka-o-licnosti.html (1.9.2021.)

[487] Commissioner for Information of Public Importance and Personal Data Protection, Data Protection Model Law 2014, available in Serbian only.

[488] Commissioner for Information of Public Importance and Personal Data Protection, 2015 (press release 4.11.2015.), *Unsatisfactory Draft Law on Personal Data Protection*, available at: https://www.poverenik.rs/en/press-releases/2219-nezadovoljavajuci-nacrt-zakona-o-zastiti-podataka-o-licnosti.html (1.9.2021.).

[489] Share Foundation, 2015, Letter to the Ministry of Justice - Comments on the Draft Data Protection Law, available (in Serbian only) at: https://resursi.sharefoundation.info/wp-content/uploads/2016/11/share_fondacija_komentari_na_nacrt_zakona_o_zastiti_podataka_o_licnosti.pdf (1.9.2021.)

[490] Commissioner for Information of Public Importance and Personal Data Protection, 2017 (press release 6.7.2017.), *Commissioner puts model personal data protection law at disposal of government*, available at: https://www.poverenik.rs/en/press-releases/2622-commissioner-puts-model-personal-data-protection-law-at-disposal-of-government.html (1.9.2021.)

[491] Ministry of Justice, 2018 (press release), *Report on public debate on the Draft Law on Personal Data Protection*, available (in Serbian only) at: https://paragraflex.rs/dnevne-vesti/230318/230318-vest11.html (1.9.2021.).

[492] Republic of Serbia Official Gazette, No. 87/2018.

[493] Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108 (1.9.2021.).

[494] Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=181 (1.9.2021.).

the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[495]

Regarding the content of the Serbian Data Protection Act it complies of both GDPR and LED, while the provisions of the two documents intertwine to the extent that the order of provisions in the GDPR is changed due to insertion of provisions of the LED pertaining to the same issues, such as data subject rights. Many of those GDPR provisions that are allowing EU Members States to further regulate remained open in the national law. In addition, provisions of the LED are taken with no further elaboration nor with more instructive wordings.

5. COMMONALITIES AND DIFFERENCES WITHIN THE WESTERN BALKAN REGION

In two, North Macedonia and Serbia, out of five countries a law has been adopted to harmonise EU data protection regime. Notwithstanding the difference in pace amongst respective law-making processes throughout the region, certain commonalities may be drowned.

What is evident is that the process was by default initiated by a national data protection authority, which has no legislative powers, including the competence to draft legislation. Nonetheless, in some cases (Bosnia and Herzegovina, North Macedonia and Serbia), the DPAs took action and drafted their own proposal.

Each process was supported by an external expertise, in different stages, through projects and other activities funded by the EU, such as TAIEX or IPA funds.

What is lacking in all these processes, is an overall assessment of the impact of the transposition of the GDPR into domestic legal systems and what such a decision may entail vis-à-vis other pieces of legislation. As an example, while preparing for EU membership[496] Slovenia authorities reviewed and revised, where applicable, several hundreds of laws and bylaws to adjust with the Data Protection Directive.[497]

Civil society organisations did not take active part neither in law-making, nor in advocacy, in most of countries, save in North Macedonia, in which one organisation was actively involved in the drafting of the law, and in Serbia, in which a great number of organisations criticised both the process and the content of the law.

Only one country ratified the Council of Europe Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (so-called Convention 108+) even though each of them is a member state of the Council of Europe and signatory to the other treaties pertaining to personal data protection.

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[495] Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223 (1.9.2021.).

[496] Slovenia became an EU Member State in 2004.

[497] Ruzic, N., 2018, (5.3.2018.) *Srbija u susret GDPR-u*, PC Press, available (in Serbian only) at: https://pcpress.rs/srbija-u-susret-gdpr-u/ (1.9.2021.).

6. CONCLUSION

Legislative reform such as in the field of personal data protection should have been dealt with more systemic approach, needs assessment as well as with the estimation about how effective new rules may be applied.

Any process, in general, may be observed as one that could have been more inclusive. However, the processes led in Western Balkan countries are best described as top-down processes with no, or very little involvement of non-state stakeholders.

As often is the case, candidate countries tend to legislate national rules in accordance with Union acquis simply by translating provisions of relevant legal instruments. However, this is fallible on several grounds. The EU data protection instruments, notably the GDPR, are a product of long advocacy, lobbying and deliberations, which relied not only on the goals but also on best practices, or even failures, throughout EU Members States. The lack of knowledge about the logic behind certain provisions inevitably leads to misunderstanding of the application thereof.

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