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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.

We publish the Regional Law Review annual collection after another complex year for scientific work that is behind us. The efforts made by the editorial staff are presented to you through our new edition. This year, 18 papers were submitted, with a total of 28 authors from 11 countries, and I would like to use this oportunity to thank all of them.

Our team of reviewers should also be mentioned, academic staff who selflessly invested their energy and time to contribute to the quality of the papers. A total of 22 reviewers from seven countries participated in the evaluation process, and I sincerely thank them all.

As always, my special 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 those activities.

In the years to come, we will try to develop even more mechanisms of cooperation and exchange of ideas, as well as to enrich the content with new forms. In the coming months, we will work hard on indexing our publication in new databases, in order to expand its international visibility.

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.

On the way to recognizing RLR as a relevant regional factor in the development of legal science in the region, there are still many steps that must be passed. I invite you to be a part of our research family in the coming years and to contribute with your work to the formation of a community of researchers who, through joint efforts, will point out problems and propose solutions on various issues in the legal science and practices.

In Belgrade, October 2022

Dr. Mario Reljanović
Editor

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RIGHT OF ACCESS TO THE COURT OF REVIEW IN THE PROCEDURE OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The procedure of recognition of a foreign arbitral award is initiated by an application and finalised by a decision by which the foreign arbitral award is recognised, or the recognition is refused. After the decision of the court of first instance, the dissatisfied party may lodge an appeal, an ordinary legal remedy within the subject-matter jurisdiction of the Court of Appeal of Montenegro.

In practice, problems may arise after the appellate court's decision on the appeal of the dissatisfied party, given different approaches, found in both theory and practice, to the admissibility of extraordinary legal remedies. No dilemmas of this type arise in theory when it comes to the admissibility of special legal remedies, such as the constitutional complaint, which is reflected in a uniform practice of the Constitutional Court of Montenegro.

This scientific paper provides an overview of legal remedies, with an emphasis on the review, which are available to the parties or which, in the authors' opinion, should be considered admissible after the court's decision to recognise or refuse to recognise a foreign arbitral award.

Keywords: foreign arbitral award, recognition procedure, court of review, constitutional court.

1. INTRODUCTION

The effect of a foreign arbitral award may not automatically extend outside the territory in which it was made, and it might happen that a party with a legal interest might need to initiate a recognition and enforcement procedure for that purpose.

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The courts in Montenegro may decide on the recognition and enforcement of foreign arbitral awards in two ways: as the main issue for which the Commercial Court of Montenegro has jurisdiction or as a preliminary issue when a party requests enforcement on the basis of a foreign arbitral award as a writ of execution which has not been previously recognised (Knežević, 2007, pp. 119-139. Pavić, 2010, pp. 34-41. Trajković, 2000, p. 569 *et seq*. Vukoslavčević, 2012b, p. 104 *et seq*).

The procedure of recognition of a foreign arbitral award is initiated by an application and finalised by a decision in which the foreign arbitral award is recognised, or the recognition is refused. After the decision of the first instance court, the dissatisfied party may lodge an appeal as an ordinary legal remedy for which the Court of Appeal has the subject-matter jurisdiction. When it comes to extraordinary legal remedies, such as the application for the protection of legality and the review, the position of theory and practice was not uniform even while the previous Law on Resolving Conflict of Laws with Regulations of Other Countries[1] was in force, and the new legal solutions have not brought to the greater uniformity of views on this matter. The admissibility of constitutional complaint as a special legal remedy does not raise any questions in theory, which is reflected in the practice of the Constitutional Court of Montenegro.

This scientific paper provides an overview of legal remedies available to the parties or which should be admissible, in the authors' opinion, after the court decides to recognise or refuse to recognise a foreign arbitral award, with an emphasis on review.

2. THE PROCEDURE FOR RECOGNITION OF A FOREIGN ARBITRAL AWARD

2.1. Certain dilemmas about the term "foreign arbitral award"

A party to the proceedings before a foreign arbitral tribunal usually enters the proceedings for the recognition of a foreign arbitral award in order to obtain its enforcement in the state of recognition. As a rule, arbitral award is condemnatory, and the main goal of the party requesting exequatur is to extend its effect to the territory where the foreign arbitral award is intended to be enforced (Vuković, 1986, p. 3).[2]

The issue of subject-matter jurisdiction is regulated by the systemic law in this area, i.e. by the Arbitration Law, which in its first article determines the scope of its application. This law regulates the arbitration itself, recognition and enforcement of arbitral awards, as well as the jurisdiction and actions of courts in connection with the arbitration (Arbitration Law of Montenegro, Art. 1). The Commercial Court of Montenegro has the subject-matter

[1] Law on Resolving Conflict of Laws with Regulations of Other Countries, *Official Gazette of the Federal Republic of Yugoslavia*, no. 46/1996. The previous title of the law was the Law on Resolving Conflict of Laws with Regulations of Other Countries in Certain Relations. The Law came into force on 1 January 1983. After 1996, in the Federal Republic of Yugoslavia, this Law was harmonised with the Constitution by changing its title, but certain corrections were also made in terms of its content. Namely, as the title was "unusually long for our circumstances", it was changed by omitting the part "in certain relations".

[2] That is one of the differences in the procedure of recognition of foreign court awards, which do not have to be condemnatory and eligible for enforcement, which implies that the court must recognise every decision it enforces, but it is not necessary to enforce every foreign award it recognises.

jurisdiction which covers specific issues of deciding on the appointment of arbitrators, objections to the competence of the arbitral tribunal, delivery of the decision, deciding on the claim for annulment of the arbitral award and the application for recognition of a foreign arbitral award or interim measure (Arbitration Law of Montenegro, Art. 6).

The notion of "foreign arbitral award" covers any decision rendered by an arbitral tribunal not situated in Montenegro and considered a decision of the state in which it was rendered. Thus, the basic criterion for determining whether an arbitral award is to be considered a foreign arbitral award is a territorial principle, as one of the most developed criteria for the territorial localisation of arbitration (Bordaš *et al*, 2007, p. 606). What was not regulated by the domestic legislator, and may cause a dilemma in practice, are the situations in which the arbitral awards were issued on the territory of Montenegro but on the basis of the procedural law of a foreign state. Namely, since the parties in the arbitration dispute have a full freedom to agree on the law that would be applied to the merits of the dispute and the procedural law to which the procedure would be subjected, there is a real chance that the procedure would be conducted according to the rules of foreign procedural law. Will such decision, although made on the domestic territory, be considered a foreign arbitral award because the foreign procedural law was applied? It seems that our legislator has ruled out this possibility by prescribing only one criterion for determining whether the arbitral award is to be considered a foreign one. Examples from the comparative arbitration practice show that there are different legal solutions for this matter, which is reflected in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Covention prescribes the possibility of using several other criteria when determining whether an award is foreign. Namely, in the first article on the scope of its application, the New York Convention emphasises that its text applies to the recognition and enforcement of an arbitral award in a dispute between natural or legal persons rendered in the territory of a state other than the one in which recognition and enforcement of the award is sought and that it also applies to the arbitral awards that are not considered domestic awards in the state in which their recognition or enforcement is sought. Thus, for example, in Serbia (Pavić, 2010, p. 40) a foreign arbitral award is considered to be a decision made by an arbitral tribunal outside Serbia, as well as a decision made by an arbitral tribunal in Serbia if foreign law was applied to the arbitration proceedings (Arbitration Law of the Republic of Serbia, Art. 64 para. 3). In Croatia, the decision of the arbitral tribunal (award) is ascribed to the state where the place of arbitration is located (Arbitration Law of the Republic of Croatia, Art. 38). The significance of the New York Convention for this matter is also reflected in the fact that its adoption, i.e. ratification in certain states, practically created an international framework on the basis of which the signatory states are to harmonise their national legislation when it comes to international arbitration (Joelson, 2007, p. 382).

2.2. The course of the procedure

In order to extend the effects of a foreign arbitral award beyond the legal system in which it was made, the relevant legal prerequisites prescribed by the state of recognition need to be met. That means that the foreign awards are not recognised automatically

and that it is necessary to determine the existence of these prerequisites in the state of recognition. Such determination is conducted in the appropriate procedure. In this sense, we may speak of two paths for deciding on the recognition of a foreign award. Namely, the recognition of a foreign award might be subject to a special court procedure for the assessment of eligibility of a foreign award to be recognised and declared enforceable. It can also be disscussed as an incidental issue (Kostić-Mandić, Stanivuković & Živković, 2010, p. 213) in an ongoing procedure on another legal matter (e.g. litigation, enforcement or bankruptcy proceedings) (Pavić, 2010, p. 42).

The procedure of recognition of a foreign arbitral award is a special formal procedure aimed at recognising a foreign arbitral award, i.e. making its effects equal to the effects of a domestic award, and this, according to most authors, is to be done in the non-litigious proceedings (Bordaš *et al.*, 2007, p. 548), which is most often justified by pragmatic reasons or the need for the speedy resolution of the matter at hand.

In the recognition procedure, the foreign arbitral award is also declared enforceable, which is followed by a special enforcement procedure. The enforcement, in principle, does not fall within the procedure of recognition of foreign awards, but in this procedure the award is only declared enforceable, as is the case with domestic awards. In the same manner, it is possible not to have a special procedure for declaring the foreign award enforceable but to have it incidentally assessed within the enforcement procedure through the assessment of whether the prerequisites for enforcement are met.

The recognition and enforcement procedure are initiated by a petition of the parties participating in the arbitration proceedings, or possibly by their legal successors. The parties need to enclose the following documents:

- The original arbitral award or its certified copy;
- Arbitration agreement or document on its acceptance in the original or certified copy;
- Certified translation of the foreign arbitral award and the arbitration agreement in the Montenegrin language and in the language in the official use before the competent court (Arbitration Law of Montenegro, Art. 51 par. 2).

The procedure of recognition of foreign arbitral awards is carried out through the application of a system of a limited control, according to which the examination of the award is done exclusively with regard to the prerequisites established by law (Lu, 2006, pp. 757-762). The court does not go into examining the merits of the award, except for its compatibility with the public policy as a condition for recognition (for more on public policy, see Tapola, 2006, pp. 151-164. Carodine, 2007, pp. 1192-1195. Harris, 2007).

Recognition of a foreign arbitral award may be refused only if the competent court finds that the conditions concerning: the arbitration agreement; respect for the right to defence; arbitration procedure; exceeding the powers of arbitrators or the composition of the arbitral tribunal are not met, if the party opposing recognition proves that:

- The arbitration agreement is not valid under the applicable law, as determined by the parties in the agreement, or under the law of the state in which the award was made;
- The party was not duly informed about the appointment of the arbitrator, or the arbitration procedure or the party was not able to express its views for some other reason;

- The award refers to a dispute that was not covered by the arbitration agreement, or that goes beyond the limits of that agreement; the partial refusal of recognition is possible if it is determined that the part of the award exceeding the limits of the arbitration agreement may be separated from the rest of the award;
- The choice of the arbitral tribunal or the arbitral proceedings were not in accordance with the arbitration agreement or, in the absence of such an agreement, in accordance with the law of the state where the arbitration takes place;
- The award has not yet become binding on the parties, or the award has been annulled or its enforcement suspended by the court which made the award or by the court which declared the award enforceable (Arbitration Law of Montenegro, Art. 52 para. 1).

Also, other than upon objection of a party, the court of recognition must take care *ex officio* of two prerequisites in order to protect the domestic legal order. These concern the question of arbitrability (for some views on arbitrability, see Sajko, 2010, pp. 961-969. Damjanović, 2015, pp. 357-361) or suitability of a dispute to be resolved by arbitration under Montenegrin law and the compatibility of the effects of a foreign arbitral award with the Montenegrin public order.[3]

In the procedure of recognition of a foreign arbitral award, the Commercial Court is to limit itself to examining whether the conditions prescribed by law are met. If it finds it necessary, the court may request further clarifications from the arbitral tribunal which made the award, from the parties and the court, or from the notary or other person with whom the decision was deposited (Arbitration Law of Montenegro, Art. 54 para. 1). The party who opposes the recognition of a foreign arbitral award has the right to state its position in the proceedings on the petition for recognition, while the statement on the petition for enforcement is allowed only if this would not jeopardise the successful completion of the requested enforcement (Arbitration Law of Montenegro, Art. 54 para. 2 and 3).

In particular, the court before which the application for recognition has been lodged must inform the respondent and allow the respondent to respond to that application and participate in the proceedings. That primarily refers to the submission of evidence on the non-existence of prerequisites for recognition, which is usually the main strategy of the respondent. There may be certain facts and circumstances that the court would not find out if the parties were not given an opportunity to state their views (Grbin, 1980, p. 183). It follows from this that the argument that both the petitioner and the respondent should be given the opportunity to state all relevant facts and circumstances in an adversarial procedure is absolutely justified. If the recognition procedure were non-adversarial, the respondent could be denied to prove that, for example, the right to defence was not respected in the award procedure for which recognition is sought or that the decision was made under duress (Vukoslavčević, 2012, p. 102).

There is also an opposite view in theory, according to which the procedure for recognition of foreign awards should be conducted as non-adversarial proceedings (Vuković & Eduard, 2005, pp. 488, 489). The main argument here is that even in non-adversarial proceedings,

[3] For more on public order as a condition for recognition of foreign awards, see Vukoslavčević (2012a, pp. 200-211).

the parties could point to the relevant facts, with the difference that they could avail themselves of this opportunity only if the court deems it necessary. The proponents of non-adversarial proceedings point to their simplicity, speed and efficiency as their main advantages. On the other hand, they see the possibility of leaving an unscrupulous party a room to file unfounded complaints as the main shortcoming of adversarial proceedings, which delays and increases the cost of proceedings. However, if in the procedure of recognition of a foreign award, which was conducted as a non-adversarial one, the party have had no opportunity to state all relevant facts and circumstances, it would certainly use this opportunity in the appellate procedure which, no doubt, may further prolong the entire procedure and increase the costs (Vukoslavčević, 2012, p. 103).

After conducting the procedure, the Commercial Court issues a decision recognising the foreign arbitral award or refusing the recognition. This decision is of declaratory nature, and the court of recognition therein takes a legal position regarding the fulfilment of prerequisites for extending the effects of a foreign award on the domestic territory. If the recognition of a foreign arbitral award was decided upon in a special procedure, this decision has *erga omnes* effects and, in accordance with the provisions of the Arbitration Law, must be reasoned (Arbitration Law of Montenegro, Art. 54 para. 4). The reasoning is required as a way to show the fulfilment of the itemised list of prerequisites for the recognition of a foreign award. The decision has *ex tunc* effect, which means that the recognised foreign award produces legal effects from the moment it was made, not from the moment of its recognition.

3. LEGAL REMEDIES AGAINST THE DECISION ON RECOGNITION/REFUSAL OF A FOREIGN ARBITRAL AWARD

In the procedure of recognition of a foreign arbitral award, the Arbitration Law envisiges a two-stage decision-making process so that an appeal may be lodged against the decision rendered in the exequatur procedure. The Court of Appeal of Montenegro has the subject-matter jurisdiction to decide in the appellate procedure. Appeal is timely if it was lodged within 15 days from the date of delivery of the decision on recognition/refusal of recognition (Arbitration Law of Montenegro, Art. 54 para. 5). An appeal may be lodged both against the decision on the recognition of a foreign arbitral award and against the one by which the recognition of a foreign arbitral award was refused.

The Arbitration Law does not contain provisions on other legal remedies,[4] which leaves open the question of admissibility of extraordinary legal remedies, such as the application for protection of legality and the review. During the Federal Republic of Yugoslavia, and later, the State Union of Serbia and Montenegro, according to the interpretation given by the Supreme Court of Serbia, an application for the protection of legality was allowed while the

[4] The identical normative legal situation exists in the neighbouring countries, such as the Republic of Croatia and the Republic of Serbia, whose laws governing arbitration contain only norms governing the appeal procedure against a decision on recognition, while conclusions on possible extraordinary remedies can be made only on the basis of court practice and legal theories.

review was considered an inadmissible legal remedy.[5] The position on the inadmissibility of review was also taken in the recent Montenegrin court practice,[6] and as such raised several questions that merit further examination of scholars and professionals. All this is due to the need to allow the unhindered enjoyment of the right to an effective remedy and the right of access to court as an integral part of the right to a fair trial, guaranteed by the Constitution of Montenegro and the European Convention on Human Rights and Fundamental Freedoms.

It is important to analyse the admissibility of legal remedies in the procedure of recognition of foreign arbitral award through the practice of constitutional and other courts. In order to do so, we will identify, through a hypothetical example, the available mechanisms for the enjoyment of the right to legal remedy, i.e. identify the ordinary, extraordinary and special remedies that are available to the parties dissatisfied with the outcome of the proceedings before the first instance or higher courts.

Petitioner A and respondent B (who will be the complainant lodging a constitutional complaint in a later procedure) concluded an agreement on the implementation of an investment in the territory of the state of the respondent, which contained an arbitration clause stipulating that any dispute not settled amicably is to be resolved through arbitration. The same provision stipulated that, unless the parties otherwise agreed, aany dispute would be settled through international arbitration in a procedure conducted by an international arbitration institution designated in the contract in accordance with the arbitration rules of that designated arbitration institution, if any, or according to the UNCITRAL arbitration rules at the discretion of that arbitration institution.

After a dispute on non-compliance with certain provisions of the main contract arose, petitioner A enforced the arbitration clause before the International Court of Arbitration of the International Chamber of Commerce in Paris, which ended the dispute by making an arbitration award.

Petitioner A initiated before the Commercial Court of Montenegro the procedure of recognition of a foreign arbitral award and, in this specific case, four first instance decisions were issued. The Commercial Court refused to recognise the foreign arbitral award in all four rulings.

In the appellate procedure for which the Court of Appeals has the subject-matter jurisdiction, the first three first-instance decisions of the Commercial Court were revoked, while the fourth decision was reversed by the Court of Appeal deciding to recognise the arbitral award of the International Court of Arbitration in Paris.

Respondent B filed an application for review before the Supreme Court against the decision of the Court of Appeal reversing the first-instance decision of the Commercial Court, and after that, it lodged a constitutional complaint.

In the procedure for recognition of a foreign arbitral award, the respondent pointed out the incompetence of the International Court of Arbitration, which issued the award, as the

[5] Legal understanding adopted at the session of the Civil Division of the Supreme Court of Serbia on 16 December 1991, in: *Izbor sudske prakse*, number 10/2005.

[6] Supreme Court of Montenegro: Rev. br. 662/12, of 11 September 2012; Rev. br. 66/15, of 29 January 2015; Rev. br. 745/17, of 25 October 2017.

obstacle to its recognition. The respondent noted that the main contract lacked a precise provision on the arbitration institution before which the resolution of a potential future dispute among the parties is to be resolved. The Court of Appeal held that petitioner A did not violate the principle of equality of arms in the arbitration proceedings by initiating the procedure before the Paris arbitration and that respondent B, apart from raising objections against its jurisdiction, also had the opportunity to challenge for the same reasons its arbitral award before the French state court,[7] where the possible annulment of the arbitral award would then be a reason for refusing recognition or enforcement. The Court also noted that the respondent did not use the possibility to designate an arbitral institution under Article IV, paragraphs 3 and 5 of the European Convention on International Commercial Arbitration 1961, nor did the respondent state which arbitration institution it intended to designate, *i.e.* which court, in its opinion, would be competent to resolve the dispute. By taking into account the existence of an arbitration agreement, the second instance court concluded that the general condition for the validity of any agreement, including an arbitration agreement,[8] is consent of the will of the parties, and that the will must be expressed in a clear and unambiguous way in order to establish with certainty the intention of the parties to exclude the dispute under a particular contract from the jurisdiction of the national court and entrust it to arbitration for settlement. The arbitration clause from the main contract was characterised as incomplete because the name of the arbitration institution or its seat was not explicitly stated. It was also stated that the interpretation of this incomplete clause required interpretation of the contract and contractual documents (documents related to the contractual relationship) and to take into account the overall circumstances of the case, which together form the entirety of the concrete contractual relationship, in order to determine the intention of the parties in general, and in particular their intentions in relation to the arbitral institution. Since no rules different from those of the ICC International Arbitration Court were included in the main contract, unlike the Commercial Court, the Court of Appeal concludes that the parties intended the disputes to be resolved by ICC arbitration and that, unlike the court of first instance which applied a strict linguistic interpretation of the arbitration clause, the Court of Appeal conducted an interpretation of the arbitration clause by applying principles that ensue from the comparative arbitration law. The Court of Appeal also noted that liberalisation, *i.e.* easing strict rules on the form of the arbitration agreement, is the only solution for disputes involving an incomplete arbitration clause. For these reasons, the challenged decision was reversed and the foreign arbitral award was recognised.

While deciding on the review initiated by respondent B, the Supreme Court rejected this legal remedy as inadmissible by pointing out that: *In the procedure initiated by petition for recognition of a foreign arbitral award, i.e. an award granted by the International Court of Arbitration, the court does not assess a legal relationship or a subjective right, but deals exclusively with the question of whether the conditions for its recognition were fulfilled. Therefore, the final decision recognising the award of the foreign arbitral tribunal is not to be*

[7] This is an action for annulment, which is also allowed in our legal system as a legal remedy available to the parties to challenge a domestic arbitral award.

[8] On some aspects of the form of an arbitration agreement, see Uzelac A. The Form of the Arbitration Agreement and the Fiction of Written Orality, How Far Should We Go? *Croatian Arbitration Yearbook*. 2001(8), pp. 83-107.

considered a decision under Article 414, paragraph 1 of the Code of Civil Procedure,[9] *which leads to the conclusion that the review is inadmissible. Namely, the rules of procedure for the recognition of a foreign arbitral award are prescribed by the Arbitration Law. Pursuant to the provision of its Article 54, para. 5, an appeal may be lodged with the Court of Appeal of Montenegro against the decision rendered in the procedure of recognition of a foreign arbitral award within 15 days from the date of delivery of the decision on recognition. The mentioned law does not provide the possibility of filing an application for review against the final decision of the second instance court on the recognition of a foreign arbitral award, which is why the review is inadmissible, and should be refused as such.*

After the decision of the Supreme Court to refuse the review, Respondent B filed a constitutional complaint with the Constitutional Court of Montenegro. The decision of the Constitutional Court[10] in this case corresponds to the position of the authors on the admissibility of review in the procedure of recognition of a foreign arbitral award in the context of the right of access to court of review. In the analyzed decision, the Constitutional Court raised the basic constitutional law question on the criteria for assessing whether the right of access to court of the complainant lodging the constitutional complaint was violated in this case. In other words, the Constitutional Court asked whether in the constitutional order of Montenegro, according to the state of the applicable legislation, the review is allowed in the procedures of recognition of foreign arbitral awards.

Since the provision of Article 54, paragraph 5 of the Arbitration Law prescribes that an appeal may be lodged against a decision rendered in the procedure of recognition of a foreign arbitral award with the Court of Appeal of Montenegro, the Constitutional Court concludes that the legislator had a clear and unequivocal intention to provide the parties to the procedure of recognition of foreign arbitral award with an effective method of legal protection against the decision made by the Commercial Court in that procedure. The rule laid down in Article 54, paragraph 5 of the Arbitration Law limited itself to explicitly stating that appeal is a regular legal remedy.[11] However, this provision of the named law in a legal order based on the rule of law, the Constitutional Court concludes, cannot be interpreted in such a way that the legislator has absolutely ruled out the possibility of filing available extraordinary legal remedies, including the review, against the mentioned decisions of the Commercial Court, as may be concluded from the Supreme Court's ruling that the Arbitration Law "*does not provide for the possibility of filing an application for review against the final decision of the second instance court recognising a foreign arbitral award, which is why the review is inadmissible and should be rejected as such*".

The Constitutional Court found that the Supreme Court approached this issue excessively formalistically, applicable law was applied "mechanically", without taking into account

[9] The Code of Civil Procedure, *Official Gazette of Montenegro*, No. 48/18, 51/17, 34/19, which states as follows: "The parties may also apply for the review against the decision of the second instance court by which the procedure was finalised."

[10] Constitutional Court of Montenegro, no. U-III 1624/18, of January 29, 2019.

[11] The provisions of the Arbitration Law of the Republic of Croatia (Article 49, paragraph 5) and the Arbitration Law of the Republic of Serbia (Article 68, paragraph 2) regulate the issue of admissibility of legal remedies in the same way, regulating only an appeal as a regular remedy, from which we must not conclude about the *a priori* inadmissibility of extraordinary legal remedies.

the specifics and importance of the legal area to which a particular court proceeding belongs and without a comprehensive consideration of the legal issue in the light of other relevant regulations, as well as the relevant features of the constitutional and legal order of Montenegro, including the constitutional role of the Supreme Court. An objective legal order in a democratic society, based on the rule of law, cannot be built, and the protection of constitutional rights of parties in court proceedings cannot be based on reasons that are not based on a comprehensive approach to law and interpretation of legal norms in accordance with the Constitution. From the perspective of protection of constitutional rights of parties, in court proceedings, the application of applicable laws to specific cases will always be constitutionally and legally unacceptable if it neglected general principles of Montenegrin legal order based on the rule of law and protection of individual constitutional rights of individuals and other parties in the proceedings. That was expressed in this particular case when a legal provision was interpreted in isolation and mechanically, regardless of the guarantees of a fair trial and other values protected by the Constitution, without considering the fact that the Constitution reflects comprehensive principles of a fair trial in connection with which all national laws, regulations and other legal acts must be interpreted. Such an interpretation given by the Supreme Court, in the opinion of the Constitutional Court, led to a restriction of access to the court of review because it had no legitimate aim and, as such, could not be considered consistent with Article 32 of the Constitution[12] and Article 6, paragraph 1 of the European Convention[13].

We have seen that the analyzed provisions of the Arbitration Law do not exclude the legal possibility of filing an application for review against the final decision of the second instance court on recognition of a foreign arbitral award (which regulates only the right to appeal), so it seems necessary to analyze Article 414, paragraph 1 of the Law on Civil Procedure, which prescribes that the parties may apply for a review of the decision of the second instance court by which the procedure was finalised. This is especially due to the fact that the Supreme Court, in the decision refusing review which is the subject of the constitutional court control, took the position that "a final decision recognising the award of a foreign arbitral tribunal is not considered a decision under Article 414, paragraph 1 of the Law on Civil Procedure, and therefore the review is not allowed". The court found the reason for its position in the fact that "in the procedure regarding the petition for recognition of a foreign arbitral award – the decision of the International Arbitration Court - the court does not assess the legal relationship or subjective right, but deals exclusively with assessing the fulfilment of conditions for its recognition." Accordingly, it may be concluded that the Supreme Court considers that in the legal order of Montenegro, the review is allowed only if the nature of the dispute or procedure is such that the domestic

[12] Everyone has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law.

[13] In determining his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

court deals with the assessment of legal relationship and/or subjective right, by which all second-instance decisions on the recognition of a foreign arbitral award are, *a priori*, excluded because those decisions deal "exclusively with the assessment of the fulfilment of the conditions for its recognition".

In its decision, the Constitutional Court rightly points out that from the constitutional law perspective the relevant fact is that the Supreme Court, as a court of review in the procedure of recognising a foreign arbitral award, has the legal possibility to change the individual legal situation of the parties (petitioner and respondent) which arises from the second instance decision of the Court of Appeal on the recognition and/or non-recognition of a foreign arbitral award. Accordingly, the meritorious review of these decisions of the Court of Appeal before the Supreme Court enters into the essence of the right to the court of each petitioner, or respondent, as party in the procedure of recognition of a foreign arbitral award. Therefore, the legal provisions on legal remedies for the protection of parties in the procedure of recognition of foreign arbitral award must be interpreted and applied so that their protection is not theoretical or illusory but effective and efficient. In the disputed decision, the Supreme Court did not provide sufficient and relevant reasons to convincingly show that in the legal order of Montenegro, based on the rule of law, the recognition of foreign arbitral awards cannot be subject to the review procedure. With such a state of affairs, it must be concluded that the manner in which the Supreme Court, as a court of review, interpreted and applied the relevant laws in this particular case, did not achieve the purpose of the constitutional guarantee of the "right to a court". Consequently, the very essence of the right of the respondent (the complainant lodging the constitutional complaint) of access to the court of review, guaranteed by Article 32 of the Constitution and Article 6, paragraph 1 of the Convention, was violated.

The practical significance of the Constitutional Court's actions in this case is manifold, in particular if we keep in mind that this is the first case in Montenegrin constitutional court practice in which the issue of access to the court of review in the procedure of recognising a foreign arbitral award was raised. Although the proceedings of the court are *in concreto*, related to an individual case, this case is not only concerned with the assessment of the interpretation and application of the right to a legal remedy in an individual case. The answer to the constitutional legal question of whether the decisions of lower instance domestic courts, recognising or refusing recognition of foreign arbitral awards, are subject to review by the highest court in Montenegro, which has a constitutional function to ensure uniform application of the law by the courts, paves the way for all future identical cases. Given the applicable legislation and the legal nature and importance of these legal cases for the parties to the proceedings, which in some cases, under certain circumstances, raised the issues of public interest, the answer to the question may not be negative. Another argument for this conclusion lays in the legal situation in which the Court of Appeal revoked three times the first instance decision of the Commercial Court and it reversed it in its fourth and final ruling. We can undoubtedly conclude that there is an important public interest for the Supreme Court, as the highest court in the country, to respond on the merits to the disputed legal issues and thus ensure uniform application of the law in all future cases where these legal issues would arise.

After the decision of the Constitutional Court of Montenegro, the Supreme Court, in the repeated procedure, ignored the clear instructions found in it, maintaining the same position on the inadmissibility of review and issued a decision similar in content to the previous one revoked by the Constitutional Court. The decision in question was subject of a dispute before the Constitutional Court in a new procedure on a constitutional complaint, which again ended by revoking decision of the Supreme Court.[14]

In the new decision, the Constitutional Court concludes that in the disputed decision, the Supreme Court did not provide sufficient and relevant reasons to convincingly show that in the Montenegrin legal order based on the rule of law, recognition of foreign arbitral awards cannot be subject to review. With all this in mind, it must be concluded that the manner in which the Supreme Court, as a court of review, interpreted and applied the relevant laws in this particular case did not achieve the purpose of the constitutional guarantee of the "right to a court". Consequently, the very essence of the right of the respondent (the complainant) of access to the court of review, guaranteed by Article 32 of the Constitution and Article 6, paragraph 1 of the Convention, was violated.

From the perspective of the principles of rule of law, legal certainty for the parties and their legitimate expectations, it will be interesting to follow the further actions of the Supreme Court after the latest decision of the Constitutional Court. That is for the reason that the imperative provisions of the Constitution and the Law on the Constitutional Court prescribe the duty to comply with and enforce the decisions of the Constitutional Court. Namely, the provision laid down in Article 151, paragraph 3 of the Constitution stipulates that the decisions of the Constitutional Court are binding and enforceable, the provision of Article 3 of the Law on Constitutional Court stipulate that everyone shall comply with the decisions of the Constitutional Court and that the views on certain issues expressed in the decisions of the Constitutional Court are binding on all state authorities, while the provision of Article 52, paragraph 1 of the same law prescribes that state authorities are required to enforce the decisions of the Constitutional Court which are within their competences. Moreover, pursuant to Article 76, paragraph 1 of the Law on Constitutional Court, the Constitutional Court is authorised, when it finds that the disputed individual act violated human rights or freedoms guaranteed by the Constitution, to uphold a constitutional complaint and repeal the act, and return the case for retrial to the body that issued the repealed act. That implies that the Constitutional Court is authorised to determine the manner of eliminating the harmful consequences of the established violation of the right or freedom guaranteed by the Constitution, as it did in this case. This further means that in a situation where a retrial is ordered due to an identified violation of the rights or freedoms guaranteed by the Constitution and the European Convention on Human Rights, the enforcement of a decision of the Constitutional Court does not imply only a formal issuance of a new decision by that court, as the Supreme Court did in this case, but also the actions and decisions of the Court to be in accordance with the legal reasons set out in the decision of the Constitutional Court which is to be enforced, as required pursuant to Article 77, paragraph 2 of the Law on the Constitutional Court.

[14] Constitutional Court of Montenegro, no. U-III 1328/19, of January 28, 2021.

4. CONCLUSION

The answer to the question of whether access to a court of review is allowed in the procedure of recognition of foreign arbitral awards should not be seen as a complicated one, at least from a normative point of view. The constitutional guarantee of the right to a court in correlation with the right to a legal remedy should ensure that the normative basis also receives its practical affirmation. However, the latest Montenegrin court practice in the procedure of recognition of foreign arbitral awards, as we have seen, relativises and ultimately denies the right of access to a court of review following an appellate decision, by citing primarily the former Yugoslav and Montenegrin court practice. It is not necessary to emphasise the court practice as a source of law and its legally nonbinding character in European continental legal systems. Reconsideration of the previously taken positions and changes in the court practice is expected and in accordance with the overall social changes and trends. If the deviation from the previous court practice ensues from a compliance with a decision of the Constitutional Court, the task of a judge of an ordinary court should be significantly simplified when taking into account the fact that everyone is required to comply with the decisions of the Constitutional Court.

Interpretation of legal norms and application of applicable law to specific cases will always be constitutionally and legally unacceptable if it neglects the general principles of the Montenegrin legal order based on the rule of law. Isolated interpretation of a legal provision, such as the absence of an explicit norm on admissibility/prohibition of review, independently of guarantees of a fair trial and other values protected by the Constitution and by disregarding the fact that the Constitution contains the overarching principle of a fair trial in relation to which all laws, regulations and general acts in the state are to be interpreted, is unacceptable.

The right of access to the court of review in the procedure of recognition of foreign arbitral awards has its normative basis and is practically feasible, as only in this way, the authors believe, can the constitutional guarantee of the right to a court be realised, which was also finally confirmed by the decision of the Constitutional Court of Montenegro.

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JUDICIAL STAY OF CRIMINAL PROCEEDINGS: AN ISRAELI DEVELOPMENT TO A BRITISH DOCTRINE

The right to a fair trial in criminal proceedings is one of the most basic constitutional rights. The way to achieve it is to ensure a "favourable neighbourhood" for this right i.e., constitutional law that recognises human rights, the tradition of judicial review, and a judicial system capable of scrutinising decisions of the Government. The last condition is specifically related to the capacity of a judicial system to review the prosecution's discretionary decisions and to stay or dismiss the proceedings when necessary. In the United Kingdom, the doctrine is known as the "judicial stay of criminal proceedings and is justified by the concept of "abuse of process". Israel "imported" the doctrine and has developed it in its own way. The prosecution's power is among the most far-reaching powers of administrative authorities. The need to restrain it asked for a mechanism, set in legislation or in case law, which would balance the goal of efficient enforcement of law and order with the preservation of fundamental values, including fairness, equality, and due process, to prevent distortion of justice. It became necessary to allow a defendant to raise arguments justifying the request to stay the trial, such as: delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of evidence; investigative impropriety; prosecution's manipulative practices or misuse of process or power; selective and discriminatory enforcement; entrapment; prejudicial pre-trial publicity, etc. How do legal systems with limited and partial constitutional "tools" handle this essential principle of protecting fairness?

Keywords: criminal proceedings, constitutional law, judicial review, fairness, dismissal.

1. INTRODUCTION

The basic right to a fair trial in criminal proceedings is one of the most basic constitutional rights and an essential aspect of human dignity. The way to achieve it in a particular legal system is to ensure a so-called "favourable neighbourhood" *i.e.,* constitutional law that

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recognises human rights, the tradition of judicial review, and an independent judicial system that is willing to scrutinise acts and decisions of the Parliament and the Government. The last condition is specifically related to the capacity of a judicial system to review the prosecution's discretionary decisions and to stay or dismiss the proceedings when necessary and, specifically in our case, to review the discretion of the prosecution, and in some cases, to stay or dismiss the trial. In the United Kingdom, the doctrine of "judicial stay of criminal proceedings" (furthermore "JSOCP") is based on the concept of "abuse of process". Israel "imported" the doctrine and has developed it in its own way. Conceptually, the doctrine answers to one of the most significant challenges of legal systems: how to broaden the role of judges as protectors of human rights in a democracy.[1] The doctrine can be used to examine and explain the key elements of the British and Israeli legal systems. To this aim, we will take a closer look at the topic of prosecutorial discretion and judicial review. In criminal cases, the courts have absolute power to decide on someone's guilt or innocence. At the same time, in the UK and Israel alike, the legislator has in the past refrained from granting the court, by way of an explicit legal rule, the power to rule that an indictment filed by the prosecution is to be set aside. This applies even when the charge is obviously tainted with extreme unreasonableness or when conducting the trial is clearly in contrast to the public interest or is unfair. The range of persons authorised to prosecute is usually vast; it may include the Attorney General's office staff, police and municipal prosecutors, private authorised prosecutors, etc. Indictments are issued by district prosecutors, police prosecutors, and others without any prior judicial approval or pre-trial screening. In fact, the prosecutor controls the entire proceedings: filing the indictment, refraining from filing it, staying the proceedings, reaching a plea bargain, filing an appeal, and so forth. The UK and Israel follow the expediency principle. Prosecutor first analyses whether there is enough evidence for a realistic prospect of success in a case and then decides whether the prosecution is in the public interest. The powers of the prosecution are among the most far-reaching powers the state authorities can have. In light of the broad powers of the prosecution, it was essential to arrive at an arrangement, whether in legislation or in case law, which would balance the goal of enforcing the law and ensuring that criminals were punished, against the goal of preservation of fundamental values, including the presumption of innocence, the protection of human dignity, fairness, equality, and due process, in such a way as to prevent distortion of justice. Prosecutors must prosecute, not persecute. They must be consistent, fair, and objective. However, it can happen that they approach particular individuals harshly or gently for political reasons; it is also possible that race, religion, or nationality influences prosecutorial decision-making.

Therefore, the exercise of prosecutorial discretion calls for accountability. It became necessary, in the UK and in Israel, to allow a defendant to raise before the court arguments which could justify the request to stay and actually dismiss the trial, such as: delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of relevant evidence; investigative impropriety; prosecution's manipulative practices or misuse of process or power; selective and discriminatory enforcement; entrapment; prejudicial pre-trial publicity (the so-called "trial by the media" and "moral panic"); unique personal

[1] Barak, A. 2006. *The Judge in a Democracy*. Princeton: Princeton University Press.

circumstances, etc. Under British case law, the court has the inherent authority to set aside an indictment which constitutes "abuse" of the defendant's rights given the circumstances of the case.[2] The approach adopted by the English case law, which originated in the demand to protect the defendant from the abusive practices of the prosecutorial authorities,[3] subsequently imposed a broader test, according to which the defendant needed merely to indicate "gravely improper" conduct of the prosecutor.[4]

In 2007, the Knesset *i.e.,* the Israeli Parliament, adopted an amendment to the Criminal Procedure Law (Amendment No. 51). This new law added another objection to the objections that the defendant was so far entitled to raise: "[…] The filing of the indictment or the conducting of the criminal proceeding is in material contradiction to the principles of justice and legal fairness." At first glance, it seems that the Parliament has thereby recognised a preliminary argument which exploits concepts of "justice" and "legal fairness" and granted the discretion to the court to decide whether it is proper to conduct the trial against the defendant regardless of the question of guilt or innocence, and even without examining all the relevant facts of the case. This new law emphasised a unique evolution of the doctrine of JSOCP, a rare legislative action based on British tradition.

The British literature on the doctrine is quite limited. There are only a few monographs on the topic.[5] The earlier studies are limited mainly to the British context[6] and they usually map the case law in Britain not chronologically but according to the different types of abuse.[7] Little discussion can be found about the justifications and the legal theoretical foundations of the doctrine.[8]

In this paper, the author analyses the doctrine through a new approach to hybridisation. The paper summarises the findings of an investigation into the relationship between the elements of constitutional law, judicial independence and legal doctrine relevant to the doctrine. The author presents a hybrid overview of the necessary elements that are found behind it.[9] It is interesting to examine how legal systems with limited constitutional "tools" at their disposal apply the doctrine in order to ensure the realisation of the principle of fairness. Both the UK and Israel are characterised by a lack of a comprehensive constitution. There are some "trends" or "winds" of "constitutionalism," nevertheless, neither of the two countries has a complete constitution. How this affects the court's ability to implement its

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[2] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

[3] *Connelly v D.P.P.* [1964] 2 All E.R. 401.

[4] *R v Looseley* [2001] 4 All E.R. 897. See also: *R. v Grant* [2005] EWCA Crim. 1089. *R. v* Beardall [2006] EWCA Crim. 577. *R. v Harmes* [2006] EWCA Crim. 928. *Jones v Whalley* [2006] UKHL 41.

[5] See mainly: L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justice.

[6] Wells, C. 2017. *Abuse of Process.* 3rd ed. Oxford: Oxford University Press.

[7] Young, D, Summers, M. & David Corker. 2015. *Abuse of Process in Criminal Proceedings.* 4th ed. Bloomsbury: Bloomsbury Professional.

[8] The only comprehensive textbook in Hebrew is: Nakdimon, Y. 2021. *Judicial Stays of Criminal Proceedings.* 3rd ed. Nevo.

[9] Initial, different, and partial observations were made by the author in his previous short article: Zamir, A. 2014. Truth v. Justice: Judicial Stay of Criminal Proceedings Due to Principles of Justice and Fairness – an Israeli Development to a British Rule. *The Journal of Criminal Law*, 78(6), p. 511.

powers of judicial review and discretion when it comes to prosecutorial decisions? On the one hand, the paper will examine whether the primary justification for using the doctrine in the United Kingdom is of a procedural nature *i.e.*, one of "due process" used in order to avoid "abuse of process". On the other hand, the article will examine whether its primary justification in Israel is to be found in the constitutional principle of human dignity. The research highlights that the Israeli Basic Law on Human Dignity and Liberty from 1992 also emphasises the principles of justice and fairness. Even without a comprehensive formal constitution, and although the Basic Law speaks only about "liberty" and "dignity", we should wonder whether it is up to the courts to determine what is meant by these principles on a case-by-case basis. Do they also include the principles of due process and the right to a fair trial? Could the mechanism of judicial review and the principles of reasonableness, proportionality and equality be used as criteria for examining the public interest in the indictment, just as they serve for the examination of any administrative act, whether individual or general? Is it possible to "constitutionalise" or "codify" the doctrine? If there are different justifications, do they influence the courts' tendency or reluctance to apply the doctrine? As it seems, the types of justification or their sources have a lesser impact on the readiness of the court to apply the doctrine. Among the more relevant factors is the level of independence of the judiciary, the degree of its readiness to undertake judicial review of the acts of governmental bodies, and the way courts balance contradicting interests. Paradoxically, the broad discretion granted by the legislator to the courts on this matter has not led to greater recourse to the judicial stay of criminal proceedings. Can we determine or foresee the level of courts' readiness to use their authority in this regard? The answer is probably negative.

2. RELEVANT ASPECTS OF THE BRITISH CONSTITUTIONAL LAW

The UK has an unwritten constitution. In other words, no single document, or series of documents, is known as the Constitution. The lack of a codified constitution also means that there is no set of rules that is antecedent to the state and government institutions and could therefore be said to represent a foundation of the state. The most specific feature of the UK constitution is that it lacks a formal codification. UK, nevertheless, displays the broad characteristics of what has been termed liberal democracy and achieves this without having guarantees set out in a constitutional framework.[10]

Indeed, the concept of parliamentary supremacy is deeply rooted in Britain's cultural and legal tradition.[11] Britain is well known for exporting parliamentary democracy to different countries and legal systems worldwide, making it their rule of law.[12] The courts' incompetence to declare primary legislation void became part and parcel of the British

[10] Leyland, P. 2016. *The Constitution of the United Kingdom - A Contextual Analysis.* 3rd ed. Bloomsbury: Bloomsbury Publishing, pp. 55,60.

[11] Baker, A. V. 2001. So Extraordinary, So Unprecedented an Authority: A Conceptual Reconsideration of the Singular Doctrine of Judicial Review. *Duquesne Law Review*, 39(4), p. 729. Dicey, A. V. 2013. *The Law of the Constitution.* Oxford: Oxford University Press, pp. 27-50.

[12] For the history of Parliament see: Bradley, A. W. & Pinelli, C. 2013. Parliamentarism. In: Michael Rosenfeld, M. & Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, pp. 650-652.

legal system and Britain's social culture. Britain has traditionally painted the courts as disabled lawmakers and stressed their function as law-declarers. [13]

The British Human Rights Act 1998 (further "HRA") took effect on October 2, 2000.[14] The HRA assimilates the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (further "ECHR" or "Convention")[15] in British law. Some jurists and scholars consider the ECHR a pivotal factor in Europe's reaction to World War II, which created a new awareness of civil liberties and fundamental human rights.[16] One of the most crucial lessons the European countries learned from the Nazi Germany regime was to use constitutions and constitutional guarantees, which made a judicial review a tool for restraining the power of European governments and for preventing another "Weimar-style" democratic backsliding. The HRA challenges the old British concept of Parliament as an impeccable institution that can do no wrong. Scholars have noted that the HRA undoubtedly may become one of the most fundamental constitutional documents since the Bill of Rights, which will cardinally affect the practice of traditional constitutional principles and the British legal culture.[17]

Another pivotal element that plays a vital role in democracies is the element of trust. Trust is one of the most crucial foundations of political legitimacy.[18] In the UK, unlike in the United States, most people do not have a mindset of distrust for the Government and do not display an inherent suspicion of the political authorities like Parliament and Government. Therefore, a more restrained judicial review of administrative actions has evolved there. British judges are generally reluctant to limit the exercise of ministerial administrative power.[19] This model, which is anchored in British tradition and would not necessarily function well in other legal systems, does not necessarily focus on the judiciary as a guardian of human rights. One may argue that this trend might even strengthen due to the 2016 vote to leave the European Union ("BREXIT"). The Human Rights Act – the main instrument for the protection of human rights in the United Kingdom – will expectedly not be directly affected. However, the formal disappearance of the EU fundamental rights law from the United Kingdom legal order will lead to a more general disenchantment with human rights law. This development is likely to lead to heightened uncertainty in this area, particularly if the Government decides to go ahead with plans to repeal the Human Rights Act.[20] It is open to debate whether this change will have any effect on the JSOCP doctrine or not.

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[13] Curtis, M. 1997. The Government of Great Britain. In: *Introduction to Comparative Government*. 4th. ed. London: Pearson, pp. 48-89.

[14] The British Human Rights Act. 1998. Available at: https://www.legislation.gov.United Kingdom/United Kingdompga/1998/42 (2. 10. 2022).

[15] European Convention for the Protection of Human Rights and Fundamental Freedoms. 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (2. 10. 2022).

[16] Young, J. 1999. The Politics of the Human Rights Act. *Journal of Law & Society*, 1999(26), p. 27.

[17] Hunt, M. 1999. The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession. *Journal of Law & Society*, 26(1), p. 86.

[18] Misztal, B. A. 1996. *Trust in Modern Societies.* Cambrige: Polity Press, p. 245.

[19] Curtis, M. 1997. The Government of Great Britain. In: *Introduction to Comparative Government*, 4th. ed. London: Pearson, p. 89.

[20] Lock, T. 2017. Human Rights Law in the UK After Brexit, *Public Law,* 2017 (supp. 1), p. 117.

3. THE DEVELOPMENT OF THE DOCTRINE IN THE UK

In British criminal law, known as the "abuse of process" principle,[21] the JSOCP doctrine is well-established in the British legal system. We may argue that the doctrine combines two main aspects presented above: taking human rights into account and exercising judicial review. It was created in 1964 in the House of Lords' judgment in the case of *Connelly*.[22] The case concerned a defendant who took part in an armed robbery during which a man was killed. Though found guilty of murder, the conviction was later overturned in an appellate court on the grounds that the judge misdirected the jury in the first instance. Later, the defendant was retried on the same sequence of events for committing robbery. The defendant's claim that he was already tried for these events was overruled since the murder he was prosecuted for in the first trial was materially different from the robbery felony he was accused of in the latter.

Notwithstanding this, the House of Lords raised the question of whether the second indictment against the defendant – issued for the same sequence of events he was already tried for – constitutes an "abuse of process" that justifies the second trial's dismissal. The House of Lords determined that the second trial does not constitute an abuse of process since the United Kingdom criminal proceedings at the time prevented combining murder and robbery crimes in a single indictment. Nevertheless, in this judgment, the House of Lords established the foundations of the "abuse of process" criminal law doctrine, also called the "judicial stay of criminal proceedings" doctrine. The Court mentioned that British criminal law has always acknowledged the court's jurisdiction to prevent injustice toward the defendant. That was evident over the years from the judicial discretion exercised by courts in the UK, securing justice for the defendant. Lord Devlin indicated that if no restrictions are put on the prosecution's power to break one criminal case into several indictments, the defendant may suffer injustice and abuse of process. It is appropriate and desirable that the court would deliberate a single factual case just once in order to maintain public trust.

The Court's ruling in the following years expanded the doctrine's application to many other situations since the rationale that a court may dismiss proceedings in cases of abuse of process seemed appropriate in other cases, as seen in a variety of examples. For instance, the doctrine was mentioned in cases of impairments in the acts of the investigative authorities which may have damaged a defendant's ability to defend himself; it was implemented in indictments which were filed merely to prevent the application of the statute of limitation; it was pointed out regarding filing an indictment a very long time after the offences were allegedly committed, which could have impaired the defendant's right to defend himself; it was invoked in situations where the authority was involved in the crime the defendant was accused of or entrapped the defendant into committing a crime; it was applied when

[21] L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justice. Young, D, Summers, M. & David Corker. 2015. *Abuse of Process in Criminal Proceedings*. 4th ed. Bloomsbury: Bloomsbury Professional. Wells, C. 2017. *Abuse of Process*. 3rd ed. Oxford: Oxford University Press.

[22] *Connelly v D.P.P.* [1964] 2 All E.R. 401.

the authority tried to withdraw from an agreement not to prosecute the defendant for a criminal act. The doctrine was applied as well in various other situations where prosecuting the defendant was unjust, or concerns were raised regarding potential abuses of his right to a fair trial.

The 1993 judgment in the case of *Bennett*, ruled by the House of Lords, is another milestone in the evolution of the abuse of process doctrine.[23] The House of Lords determined that the judiciary is accountable for the rule of law, including *inter alia*, ensuring that the state authorities abide by the law. Applying judicial criticism to the authorities' conduct and preventing violation of individuals' fundamental rights is the duty of the judiciary and the way to ensure the accountability of state authorities. Thus, the Court has the authority to impede the law enforcement authorities from wrongdoing before submitting the indictment and from abusing their power. Consequently, declaring the submission of the indictment against the defendant as an abuse of process and hindering the trial from being held represents a realisation of the court's responsibility.

In the 2001 *Looseley* case,[24] the House of Lords determined that entrapment circumstances in which the authorities seduce a defendant to commit a felony are an abuse of process and may thus justify the remedy of ordering a stay of proceedings for the defendant.

It seems that the JSOCP is a procedural remedy by which the court can halt the prosecution and prevent it from initiating proceedings on the grounds that the prosecution would amount to an abuse of process. The court's authority to stay criminal proceedings on such grounds is known as the "abuse of process doctrine" or the "abuse of process discretion".[25] It derives from the general responsibility of the court to regulate proceedings.[26] Choo observes that in determining whether to stay the proceedings on the above basis, the court is effectively reviewing the exercise of prosecutorial discretion by the executive. As we saw, in the landmark case of *Bennett*, Lord Lowry identified two categories of cases in which a court has the discretion to stay the proceedings on the basis that pursuing those proceedings will constitute an abuse of its own process "either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case".[27]

Although English courts have occasionally spoken of a stay as a remedy, and despite its vagueness, the usual justification for a stay is to protect the judicial process and the rule of law.[28] Accordingly, the courts have spoken of maintaining the "integrity of the judicial process", "fairness", "upholding the rule of law", keeping the "public confidence in the criminal justice system", etc. It must be emphasised that the above expressions, especially the "fairness to try" terminology, have been subject to criticism. Choo wrote in this regard:

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[23] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.

[24] *R v Looseley* [2001] 1 W.L.R. 2060.

[25] L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justic, p. 1.

[26] In *R v Beckford* [1996] 1 Cr App R 94, the Court of Appeal even referred to this duty as "constitutional".

[27] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.

[28] Wells, C. 2017. *Abuse of Process*. 3rd ed. Oxford: Oxford University Press, pp. 8-9.

> "It is confusing, to say the least, to use the term "unfair trial" to connote a trial that has the potential to result in a factually incorrect guilty verdict and to say that it would be unfair to try a defendant in circumstances where, even if a "fair trial" can be held, it will nevertheless be inappropriate to try the defendant because of considerations of moral integrity. To make matters even more confusing, the courts sometimes display lack of care in their use of these terms".[29]

At the outset, it is fair to say that all those rhetorical exercises are of no use for the attempts to define the test for the application of the JSOCP. In effect, they even raise doubt on whether there is any relevant test. A workable test defined with precision, and stripped of vague value judgments, is probably an unrealistic goal. However, we must not be discouraged by the use of all those vague expressions, such as "fairness", "rule of law", and "public confidence"; they do reflect sentiments that most people understand. Moreover, there is a notable lack of constitutional terminology in the discussions on this matter, which barely involve justifications that recall human rights, such as human dignity.

4. THE RELEVANT FEATURES OF THE ISRAELI LEGAL SYSTEM AND ITS CONSTITUTIONAL LAW

When the British left Israel in 1948, they left behind a mixed system of governmental law - one part of it based on English law and the other part remaining Ottoman. The mandatory legacy shaped many aspects of Israeli law. It is found first and foremost in the general characteristics of the legal system. The Israeli legal system inherited from the mandatory law several important features: the respectful attitude to precedent; the notion that judges have an active and essential role in creating norms; the centrality of lawyers in the conduct of legal proceedings; the unified structure of the court system; and many other general characteristics. Even when a branch or several branches of Israeli law underwent partial processes of continentalisation (for example, civil law that has been in a continuous process of codification in recent decades based on models taken from continental Europe), the Israeli legislature maintained a mandatory conception, mainly regarding the role of judges.[30] Therefore, the absorption of the doctrine of JSOCP in Israeli law does not raise any wonder or difficulty.

The Declaration of Independence, back in 1948, stated that the state of Israel "will be based on freedom, justice, and peace […] will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or gender […] will guarantee freedom of religion, conscience, language, education and culture and will safeguard the holy places of all religions".[31] Yet, the Declaration is not a constitution. The

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[29] *Ibid,* p. 187.

[30] Shachar, Y. 1995. History and Sources of Israeli Law. In: Shapira, A. & DeWitt-Adar, K. (eds.), *Introduction to the Law of Israel*. The Hague, p. 1.

[31] The Israeli Declaration of Independence. 1948. An English version of the Declaration is available at: https://main.knesset.gov.il/en/about/pages/declaration.aspx (2. 10. 2022).

Knesset decided not to draft a constitution but to prepare basic laws - each to be a chapter of the future constitution. As of today, there are 13 basic laws in Israel. These basic laws deal with the formation and role of the principal state institutions and their relations. A few of them also protect certain civil rights. While these laws were initially meant to be draft chapters of a future Israeli constitution, they are already used daily by the courts as a kind of constitution. Yet, the basic laws do not deal with all constitutional issues, and there is no deadline to complete the process of merging them into one comprehensive constitution. Only a few basic laws have a "limitation clause", such as the Basic Law on Human Dignity and Liberty, enabling the courts to exercise judicial review of legislation. However, the right to a fair trial is not explicitly mentioned.

The system that develops in a country with an unwritten constitution and an unwritten bill of rights depends on the content of the laws prevailing in the country and on the interpretation of the laws by the judiciary. In the Israeli legal system, which has neither a written constitution nor an entrenched bill of rights, human rights guarantees are incorporated into the constitutional arena by a presumption developed by the Supreme Court.[32] This presumption ensures that civil rights will be upheld. In practice, based on decades-long experience, this strong presumption enables the courts to modify the ordinary meaning of statutory provisions so that they will be consistent with the concept of civil rights. According to the prevailing interpretation, the legislature has no intention to curtail civil liberties.

The Israeli Supreme Court's endeavour to secure civil rights is exemplified by the landmark decision of *Kol Ha'am* from 1953.[33] *Kol Ha'am* dealt with the power of the Minister of Interior to prevent any newspaper from publishing material that is, in its opinion, "likely to endanger the public peace". The Supreme Court flexibly interpreted the statute, basing its ruling on the presumption of civil rights under which every law should be interpreted. The impact of this decision on Israeli constitutional law was to achieve a judge-made constitutional doctrine, much like the formal constitutional doctrine of the United States.[34]

In March 1992, an event took place in the Israeli constitutional arena which had a significant impact on the Israeli interpretation of the JSOCP doctrine. The Knesset enacted two new basic laws: the *Basic Law on Freedom of Occupation*[35] and the *Basic Law on Human Dignity and Liberty.*[36] These laws, which formed a constitutional revolution and a constitution in miniature, created a new era in Israeli constitutional law. They recognised several fundamental rights - freedom of occupation, the right to property, the

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[32] Grimm, D. 2003. Types of Constitutions. In: Rosenfeld, M. & Sajó, A, (eds.), *The Oxford Handbook of Comparative Constitutional Law*, p. 106.

[33] H.C.J. 73/53 *Kol Ha'am v Minister of the Interior*, 7 P.D. 871 (1953) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior (2. 10. 2022)

[34] Halmai, G. 2013. The Use of Foreign Law in Constitutional Interpretation. In: Rosenfeld, M. & Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, p. 1340.

[35] The Basic Law on Freedom on Occupation. 1994. An updated English version is available at (the 1994 version replaced the 1992 version): https://knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf (2. 10. 2022).

[36] The Basic Law on Human Dignity and Liberty. An updated English version is available at: https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx (2. 10. 2022).

right to freedom, privacy, and human dignity - and provided that these rights could not be infringed save by legislation that meets certain specific criteria.

The new basic laws opened the door to judicial review of statutes to an extent previously unknown in Israel. Thus, the "limitation clause" made it possible for a court to annul a law endorsed by the Knesset if, in its view, it conflicted with the fundamental rights safeguarded by the basic laws and did not "accord with the values of the state of Israel" - an imprecise term of uncertain boundaries. [37] The fact that legislation has not confined the power to annul laws to a particular constitutional court (such as in France, Germany, and Italy) has opened the gates to a phenomenon with which Israel is still unfamiliar. In addition to their power to annul specific laws, the basic laws have far-reaching implications for the interpretation of existing legislation and the delimitation of the authority of governmental agencies. Recognition of human rights in the Basic Law on Human Dignity and Liberty is general and all-embracing and may even evolve into a substitute for a constitution that expressly addresses fundamental rights, such as equality or freedom of expression. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process, and more. In any event, in enacting the new basic laws, the state of Israel has joined the family of nations that believe that limitations must be set on the right of a majority to derogate from fundamental human rights.

5. HOW ISRAEL IMPORTED AND IMPLEMENTED THE DOCTRINE?

The Israeli constitutional model determined that JSOCP is a constitutional remedy provided to a defendant by a criminal court in case of violations of the human rights defined in the Basic Law on Human Dignity and Liberty. In accordance with this basic law, the defendant has a constitutional right to a fair trial. This constitutional model enables the court to stop judicial proceedings in a case where to prosecute a defendant and conduct legal proceedings would unjustly impair his right to dignity, liberty, and due process. This right might be realised in Israeli law if the limitation clause of the Basic Law on Human Dignity and Liberty was applied. The limitation clause states that fundamental rights should not be harmed unless for right reasons that adhere to Israel's values and have a reasonable scope. The constitutional model is applied to determine the scope of the defendant's constitutional right, the extent to which this right should be protected under the circumstances, and the applicability of the JSOCP doctrine in the case.

The court should therefore execute a two-phased balancing test. In the first phase, the court will internally examine the balance between the defendant's rights and other basic rights. At the end of this phase, the court will determine whether the defendant's human rights were breached. If such a right were indeed breached, the Court would conduct a second external phase of balancing between the breach of human rights and the opposing values and principles that constitute the public interest in the case. At the end of the second phase, the scope of protection that should be granted to the defendant will be determined. In a case in which the seriousness of the violation of a defendant's human rights justifies

[37] Barak-Erez, D. 1995. From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, *Columbia Human Rights Law Review*, 26(2), p. 309.

stay of proceedings, the defendant will be entitled to JSOCP. The prosecution proceedings will be halted as unconstitutional, either by an order stating the defendant should not be indicted (in case the hearing is conducted at the Supreme Court prior to the indictment) or by applying the authority of the criminal court to cancel the indictment (in case of a decision that was made after the indictment was submitted).

The Supreme Court deliberated a claim for JSOCP for the first time in a comprehensive judgment from 1996. In the case *Yefet*,[38] the Court deliberated on the bankers' conviction in the "bank stock adjustment" case. It rejected the defence's claim that the criminal proceedings should not have been initiated in the first place for various reasons, including the authorities' own involvement in the shares' adjustment. The defence argued that the indictment should be dismissed by applying the JSOCP based on the authorities' misconduct. The majority opinion held that JSOCP is not applicable under the circumstances of the case. While presenting the court's decision, Justice Levin said that, in principle, a claim for JSOCP should be used only in cases when the authority "used its power in an exceptionally unfair and unjust way". The court adopted the test of "an outrageous conduct by the authority that involves persecution, oppression, and abuse of the defendant […] when it comes to cases the mind cannot tolerate, where conscience is shaken, universal sense of justice is gravely compromised, and the court is flabbergasted by".

In the years to come, the *Yefet* test was a leading test which practically turned the claim for JSOCP into a "dead letter" in the Supreme Court's rulings. An additional Supreme Court rulings indicated that the Court is willing to acknowledge the claim for JSOCP as case law, but one that should not be ruled. This was especially obvious in the case of *Kogen,* which was ruled in 1997.[39] The case involved soldiers who took part in a military mutiny and were prosecuted despite an explicit promise of the state not to do so. The Court refused to intervene in the state prosecution authority's decision, emphasising the gravity of the matter and the public interest. Despite the reasons provided by the Court, the violation of principles of judicial justice and fairness to the detriment of defendants was undeniable and might have caused distrust in the authorities' promises in future similar cases. It is worth noting here the Privy Council ruling in Phillip's case.[40] In a 1995 ruling, the Privy Council accepted the claim of the coup leaders who seized the local Parliament that they should be granted leave because of the injustice caused by violating the pardon they received during negotiations.

A change of direction can be found in the 2005 Supreme Court judgment in the case of *Borovitz*.[41] In that case, the district court convicted an insurance company, its CEO, and two additional officers for offences concerning restrictive agreements they have formed in various insurance fields in contravention to the Antitrust Law. The insurance company was fined, and the officers were subjected to prison sentences, probation, and fines. Claiming application of JSOCP, the appellants pleaded dismissal of the indictment

[38] Yefet v the State of Israel, P.D. 50 (2) 221 [1996] Crim. App. 2910/94.

[39] H.C.J. 5319/97 Kogen v the Chief Military Prosecutor, H.C.J. 5319/97 [1997] P.D. 51 (5) 67. An English version is available at: https://versa.cardozo.yu.edu/opinions/kogen-v-chief-military-prosecutor. (2. 10. 2022).

[40] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

[41] *The State of Israel v Borovitz*, P.D. 59 (6) 776 [2005] Crim. App. 4855/02.

and cancellation of the judgment against them based on their discrimination relative to others who formed restrictive agreements, yet were not prosecuted. They claimed to be victims of a ban imposed by their agreement partners, who, as a result, joined the restrictive agreements only to mislead them. Additionally, they claimed impairments in the procedure of authorising the private detectives who investigated the case and, in the way, the criminal investigation procedure was conducted. In merits, the claim for JSOCP was rejected based on the observation that the criminal procedure conducted in the case did not clearly harm the principles of justice and fairness in a way that justifies the stay of the proceedings or their acquittal.

In the *Borovitz* case, the Court expressed a central reservation concerning the narrow test, determined in *Yefet's* case, for a JSOCP to be applicable. The Court ruled, as stated by Justice Eliyahu Matza, that "it should not be dismissed that the harm in the sense of justice and fairness may be referred not solely to an outrageous act by the authorities but, for example, to their negligence or even to circumstances the authorities have no control over, yet clearly bring to the conclusion that the defendant in a case cannot be fairly tried, or that the criminal proceeding itself will materially harm the sense of justice and fairness". Thus, it seems that the claim for JSOCP should not be evaluated solely in relation to the authorities' conduct but instead viewed from a broad perspective, including the circumstances of the case as a whole.

Having said that, it should be noted that the reservation the Court expressed regarding the *Yefet* test is not absolute. The test developed in *Yefet's* case was viewed by the Court as suitable in cases of judicial estoppel and it was noted that in different cases, different levels of precaution might be taken, often a lower one. The Court also stressed that not every inadequate act of the authorities – be it the investigative, the judicial, or a different one – justifies a JSOCP. The Court will place great weight on the public interest in holding the trial. It will deliberate on other means for addressing the flawed acts of the authorities before taking the radical measure, such as JSOCP, which should be taken only in "highly extreme cases" and after the defendant shows a clear causal relationship between the authority's misconduct and the violation of his rights. Applying JSOCP is supposed to reflect, according to the judgment, a proper balance between all the principles, values, and interests the criminal proceedings involve. Thus, the Court would take into consideration a number of different aspects of the concrete case. On the one hand, there are the interests involved in prosecuting the defendants and executing legal proceedings, the imperative of revealing the truth, protecting public safety, protecting the rights of the victim, and, on the other hand, protecting the defendant's fundamental rights, revoking flawed actions of the public authorities and the need to deter them from repeating these errors in the future, observing the integrity of judicial proceedings and preserving public trust in the legal system. The Court clarified that the question of whether to apply JSOCP will be examined in three phases. In the first phase, the Court will identify the flows in the procedure, regardless of the question of whether the defendant is guilty. In the second phase, the Court shall examine whether, due to the flaws, conducting the criminal proceedings will "acutely damage a sense of justice and fairness". In this phase, the Court must balance different relevant interests and consider the actual circumstances of the case. It will consider the

severity of the felony the defendant is accused of, the strength of the evidence, the personal circumstances of the defendant and of the victim of the felony, the gravity of violations of the defendant's rights, the extent of liability of the authority, and whether it acted maliciously or in good faith. In the third phase, the Court will consider remedies and whether, rather than dismissing the indictment altogether, the flaws identified may be fixed in mild and proportional ways, such as dismissing specific accusations, dismissing a piece of evidence, or reducing the punishment.

The Supreme Court viewed the case-law set in the case of *Borovitz* as an expansion of the previous precedent set in *Yefet's* case. In the case of *Rosenstein*[42], the Court ruled that JSOCP may be claimed not only in the narrow sense of criminal proceedings but also in extradition proceedings, either as an "internal" claim in the extradition proceedings or an "external", a general one, in the Court. As stated by Justice Edmond Levy, using the test for JSOCP, which may have led to rejecting the extradition request, was applicable since "there were serious concerns of violating either the principles of justice and legal fairness or the right to a due process".[43]

The Basic Law on Human Dignity and Liberty reinforced the principles of justice in criminal law. The JSOCP law completes it and further fortifies the protection of individual rights to due process. The legislator developed and expanded a case law, enabling a better ecosystem to protect justice and fairness in criminal law. The case law evolved before the legislation. It started by acknowledging the applicability of the JSOCP claim only in exceptional circumstances where the public authority's conduct is "outrageous, involving prosecution, oppression, and abuse of the defendant". It continued in a more liberal approach, also applied in trial courts, saying it is sufficient that "conducting a fair trial to the defendant cannot be ensured, or that executing the criminal proceedings will genuinely harm the sense of justice and fairness" in order to acknowledge the claim. This evolution resembled the evolution of the doctrine in Britain, which started with setting a criterion of "abuse" by the prosecution authorities toward the defendant and later formed a broader criterion according to which an indication of "severe inappropriate misconduct" by the defendant is sufficient.

The rulings in Israel paved the way to legislate the JSOCP law, but the legislator developed and intensified the case law to enhance justice. In 2007, the Knesset adopted the amendment to the Criminal Procedure Law (Amendment No. 51). This new law added a preliminary argument to the arguments that the defendant is entitled to raise: "[…] The filing of the indictment or the conducting of the criminal proceeding is in material contradiction to the principles of justice and legal fairness." At first glance, it seems that the Parliament has, thereby, recognised a preliminary argument which exploits concepts of "justice" and "legal fairness" and the granting of discretion to the Court, which may decide whether it is proper to conduct the trial against the defendant regardless of the question of guilt or innocence, and even without examining all the relevant facts. This new law emphasised a

[42] Rosenstein v the State of Israel [2005] Crim. App. 4596/05. An English version is available at: https://versa.cardozo.yu.edu/opinions/rosenstein-v-state-israel (2. 10. 2022).

[43] Ibid, section 10 of the judgment. The claim for JSOCP was rejected on merit since the appellant did not prove that the decision to extradite was discriminatory.

unique evolution of the doctrine of JSOCP, a rare legislative action based on British tradition.

The road the legislator walked on is broad, in which a material "contradiction" to principles of justice and fairness may lead to an indictment dismissal, even if no actual "harm" was done to the defendant.

According to the JSOCP law, the Court is somewhat required to step into the prosecution's shoes and decide whether to refrain from an indictment or dismiss it due to principles of justice and legal fairness. The Court was explicitly permitted to do so by the law and is obliged to realise the legislation's purpose while balancing it with other interests of criminal law. It is a subtle balance that requires the understanding that convicting criminals could unjustly harm the rights of the defendant and, thus, contradict to the public interest. Executing the JSOCP law requires a new mindset that the Basic Law on Human Dignity and Liberty promotes, as the law which protects basic human rights even in serious crimes.

The first time the new law was referred to in the Supreme Court was in the 2007 ruling in the case of *Limor*[44], where a few defendants appealed for JSOCP based on claims of delay and selective enforcement. The Supreme Court eventually endorsed the district court's ruling and rejected the defendants' claims. Though laconically, the Court noted that the *Borovitz* criterion would continue to guide the Court after the law was passed. Shortly after, in its ruling in the *Teger*[45] case, the Supreme Court comprehensively analysed the JSOCP status before and after the endorsement of the law. Though the Court was not required to, it noted, in the words of Justice Berliner, that the concept of "material contradiction" adopted by the law is similar to the "actual harm" criterion established in the *Borovitz* judgment. The Court thus concluded that the ordinance was not revolutionary compared to the state of affairs existing before the *Borovitz* case. Since then, one can identify inconsistencies and lack of uniformity in the Supreme Court's rulings.

6. CONCLUSION: COMMON LAW WINS, OR LEGAL REALISM PREVAILS

The case-by-case approach can be explained by or seen as an expression of legal realism, a jurisprudential philosophy that contextualises law practice. Its supporters argued that a multitude of extra-legal factors—social, cultural, historical, and psychological—are at least as important in determining legal outcomes as the rules and principles by which the legal system operates, and that one must go beyond the technical (or logical) elements its procedures or rules are entailing. The law is not only about the rules which are incorporated in statutes and court decisions guided by procedural law. Law is just as much about the experience, about real flesh-and-blood human beings doing things together and making decisions. Pound's famous distinction between "law in books" and "law in action"[46] is a recognition of the difference between the law embodied in various codebooks and law practised by a broad range of officials, including police, judges, attorneys, prison staff, and others. Llewellyn admired Pound's approach, yet he criticised him for not being experimental enough. For all of his pronouncements regarding the contextualisation of law,

[44] *The State of Israel v Limor* [2007] Crim. App. 7014/06.

[45] *Teger v the State of Israel* [2007] Crim. App. 5672/05.

[46] Pound, R. 1911. The Scope and Purpose of Sociological Jurisprudence. *Harvard Law Review*, 24(8), p 591.

Pound did not show much interest in the actual behaviour of judges and of others whose job was to apply the law. In other words, Llewellyn advocated for an even more positivistic, behaviouristic form of legal realism. From his perspective, Pound never wholly escaped from the conventional, formal jurisprudence that emphasised legal order and wordiness. Instead, a fully formed legal realism insists on learning the behaviour of legal practitioners, including their practices, habits, and ways of action.[47] More specifically, Llewellyn describes an adjudicatory phenomenon he calls "the law of fitness and flavour." He observes that cases are decided with "a desire to move in accordance with the material as well as within it […] to reveal the latent rather than impose new form, much less to obtrude an outside will". Llewellyn is *not* talking about following precedents, as he is careful to explain that no specific case generates this sense of flavour and fitness. Instead, it is the case law system that generates "a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration." The instant outcome and rule must "fit the flavour of the whole"; it must "think with the feel of the body of our law" and "go with the grain rather than across or against it".[48]

This legal theory corresponds with our doctrine. To understand and study it we went on a journey through time and different places. The journey brought a sense that the doctrine of "abuse of process" or "judicial stay of criminal proceedings" has still remained somewhat vague. The findings of the study suggest that the effort to "codify" or "constitutionalise" the doctrine failed, both in the UK and Israel. One might think that we could have expected such a result in the "homeland" of common law (the UK), but to a lesser extent in a mixed legal system that pretended to be moving towards codification and constitutionalisation (Israel). It is somewhat surprising that the judgments on the matter in both systems share a commonality: most of them lack a theoretical and principal discussion that may become solid foundations for the doctrine. It will be complicated for the doctrine to evolve and develop without these foundations. The "job" was left for the judges, on a case-by-case basis, a typical approach of the common law, mainly based on legal realism. It can thus be suggested that the constitutional language is almost entirely absent in Britain as a basis or a justification for using the doctrine. In Israel, after "importing" the British doctrine as such, a serious effort has been made to give it a more legislative and even constitutional justification, using terminology taken from the constitutional theory of protecting human rights, especially human dignity, or from administrative law. The author here contemplates the possibility that those efforts failed. The years following the new JSOCP law's entry into force in Israel reveal a rather peculiar picture. When the legislator sets new norms, one may usually identify in the years that follow different periods and layers of reference and legal interpretation in the Supreme Court's rulings. However, in this case, the Supreme Court seems to have remained in the phase of ignoring the new law, almost totally avoiding to interprete and analyse the content and meaning of the new law and its legislative history. The specificity of this situation is even more pronounced since the new law grants the Court a vast and powerful jurisdiction in criminal cases,

[47] Llewellyn, K. N. 2017. *Jurisprudence – Realism in Theory and Practice.* Transaction ed. Routledge.

[48] Llewellyn, K. N. 1960. *The Common Law Tradition: Deciding Appeals.* Boston: Little, Brown & Co, pp. 190-191, 222-223.

enabling it to exercise judicial discretion regarding the prosecution's considerations. Moreover, it turns the Court into a more inquisitorial and meaningful player in the criminal proceeding, one that is able to decide whether the trial against the defendant is just and fair altogether. However, the Court does not wish to take this responsibility and power even when the law grants them to it. How can that be, in view of the bold attitude of the Israeli Court in the past, of a court that was not deterred from exercising strict judicial activism, including wide judicial criticism of government bodies, even though the law did not explicitly grant it this authority? When the legislator entrusts a powerful weapon to the Court's hands, why is the Court reluctant to use it? Would a possible answer be that the Court has not made the required conceptual leap? It maintained the old conservative concept that deems the prosecution as the sole authority to decide whether a person should be prosecuted according to criminal law, and only once it has decided to do so, the Court's role is to inquire and rule whether the defendant is innocent or guilty. This answer does not seem right, as the new law intended to change precisely this old concept and to set new legal standards concerning the defendant's human rights. A second answer may be that the Court prefers the "law and order" attitude, prioritising fighting crime and defending society and its individuals. This state of mind may be prevalent among many judges, *inter alia*, due to the public and media's "buzz" or panic on "crime surge" and "rising crime levels". However, this answer does not justify the fact that the new law and the legislator's intention are practically ignored by judges. A third answer may suggest that the Court prefers an inquiry to find the truth over vague "justice and fairness" considerations; after all, it is the Court's core role to hear witnesses, examine the evidence, and rule accordingly. The author believes this is a narrow perception of the Court's role and the interpretation of the term "truth". The Court also serves general social goals, and if it concludes in a certain case that the defendant was wronged or that it would be unfair to conduct the trial against him or her (for reasons of discrimination, delay, breaching a commitment, etc.), it has the jurisdiction to dismiss the charges. For the prosecution, and more so for the felony victim (if the felony concerns a specific victim), the result would seem unjust in this individual case, and it is hard to deny this subjective feeling. However, injustice toward the victim may be waivered in order to do justice to the defendant. Similarly, essential values of justice and fairness for the defendant may outweigh the injustice caused by the fact that the factual truth of the case would not be revealed since the realisation of these values conveys an essential social message regarding, *inter alia*, advisable norms of the conduct of authorities, or a humane behaviour that respects the value of human dignity. Even if we adopt the utilitarian approach, the power given to the Court to exercise discretion more decisively and clearly should be advocated. Such an attitude will increase the public trust in a prosecution, the considerations of which are subject to the Court's scrutiny. If the trial does not occur eventually and the Court does not inquire into the case, we shall not say that the truth has been lost. Instead, a different truth has prevailed, that of the defendant. This truth sheds light on a different narrative, showing the injustice and unfairness caused to the defendant and, more broadly, to common essential values. Nailing down the JSOCP claim in an explicit law provision is, in some way, a "justice revolution" since it integrates values of justice and fairness into criminal law, even if the legislator

chooses to do so by setting a test which is similar to one determined in previous judgments. The constitutional status of the right to fair proceedings should be reflected in the balance between opposing interests. That status can be derived from the fact that this right is acknowledged in the Basic Law on Human Dignity and Liberty, especially in the human rights to dignity and personal liberty. The legislator's recognition of JSOCP is tantamount to *de facto* fulfilment of the Basic Law. The power of the right to JSOCP does not turn it into an absolute right, but it makes it a heavy weapon to fight for primacy when required. Nobody denies that the value of revealing the truth is acknowledged as a pivotal purpose of criminal proceedings. Fighting crime, protecting public safety, and restoring victims' rights are added to this value. On the flip side, there are values of justice and fairness toward suspects and defendants, the disregarding of which may infringe on fundamental rights and cause serious harm to the public trust in the fairness of criminal proceedings. As seen, the doctrine had been evolving in the UK and later on in Israel before any law was passed. Initially, willingness to accept the JSOCP claims existed only in exceptional cases when the authority's demeanour presented scandalous behaviour involving discrimination, oppression, and abuse of the defendant. The evolution of the doctrine brought to a more liberal approach which settled for recognising the claim when it could not be ensured that the defendant would get a fair trial or when the criminal proceedings would substantially harm the sense of justice and fairness. The evolution adhered to the British approach, which started with the demand to prevent the defendant's abuse by the prosecution authorities and created a broader test that settles for the defendant's indication of "severely improper behaviour". The JSOCP doctrine requires, to some extent, that the Court puts itself in the shoes of the prosecution when deciding whether to avoid an indictment or dismiss an existing one due to broad considerations of justice and fairness. However, there is no reason for the Court to refrain from doing so. The Court was granted explicit permission to do so and has the duty to fulfil the purpose of the legislation while wisely balancing other interests of criminal law. This intricate balance should be based on the understanding that fulfilling the purpose of the law by harming the defendant's personal interest opposes the general public interest. Executing the JSOCP doctrine necessitates a change in the mindset and overcoming of the past fixations. Sometimes, the value of revealing the truth, in its classic meaning, should withdraw in the face of values of justice and fairness.

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FREEDOM OF EXPRESSION OF JUDGES' COMMUNICATION

It is essential that the judicial function be public, discreet and professional. Its legitimacy as a public authority is obtained through the recognition of judgments, in which there is an identification between decisions and society. But what type of communication must be made by the judiciary, and especially by judges, to provide information about their activities and, thus, provide that their interaction with citizens strengthens the society by generating a greater connection between the sovereign and the public power?

Keywords: expression, rights, information, judges, self-censorship.

1. INTRODUCTION

Information is an instrument by which knowledge is acquired. Therefore, information and its exchange become vital for any democratic system since it allows citizens to understand what is happening in the country and form an opinion. Hence, information is of intrinsic importance for society, positing itself as a fundamental right and recognizing itself as a human right.

This research departs from the premise that the judicial function must be public, discreet, and professional. Its legitimacy as a public authority is obtained through the recognition of judgments, in which there is an identification between decisions and society. But what kind of communication must be made by the judiciary, and especially by judges, to provide information about their activities and that their interaction strengthens the society by generating a greater connection between the sovereign and the public power?

One of the elements that strengthen democracy is the communication of ideas. In the present study, it is the information provided directly or indirectly by judges that must be carried out and meet certain criteria. In the first scenario, we have the information

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that occurs about a case that is in process, in which advertising is limited because it is the subject of a judgment not yet resolved. Another form of communication occurs when a judge gives an opinion on a matter that is not related to the functioning of the judiciary, in which it expresses its discernment as a professional opinion. There are also live sessions using institutional communication channels. There is also an opportunity to make available to the public a draft judgment that will be considered for voting in the session of the court. No less important, it is the private communication that the judge sometimes makes with the representatives of the parties, who lobby for their proposals and concerns to produce a solution that favours them. Finally, documents relating to the proceedings or documents forming part of a file have been leaked several times, in which the judge is responsible for the protection of that information because, although they are public documents, there is a legal duty not to disclose them publicly.

Freedom of expression is certainly one of the pillars of any democratic system, but it is not an absolute right. Here, the weighting of this right with the right to information of the petitioners and society to understand the work of judges has to take place. So, this investigation will try to find out which communication system is the ideal one for the judges to inform the parties and the community, under what conditions they should communicate by safeguarding their freedom of expression and, on the other hand, protect the rights of defendants by striking a balance between these fundamental rights.

The purpose of this study is to analyse the forms of communication of judges, to generate some guidelines on ethics that the judges should abide by so their actions are not compromised or censored, the image of the judiciary is taken care of, and no obstacles or interference are generated to the impartially of judges. But at what time and under what circumstances the head of a court could discuss a case and be sanctioned for non-compliance by a Council of Honour?

So, this work makes an analysis of the best communication model for judges. The communication model that will be proposed should allow the debate of ideas, the analysis of judicial work, and above all, propose the criteria to regulate this issue.

First, the relationship between democracy and the judiciary will be examined, which will address the autonomy of this public power, judicial independence, tenure and job stability of the judiciary, legality as a guiding principle of the judiciary, the impartiality of the judiciary, the publicity of the jurisdiction and the protection of personal data, all with the aim of creating a theoretical framework that indicates the qualities and activities of the judiciary. In the second section of the paper, the information on the judiciary will be unravelled. The freedoms and limits of communication of the judges will be analysed in three stages: i. institutional (accountability), ii. the development of their work (right to information), and iii. personal (private-lobbyist care). To conclude this section, two communicative models on the exercise of the freedom of expression of judges will be presented: the proper self-censorship and the possibility of creating a code of communicative ethics in judicial matters. This research will be concluded with several conclusions and proposals that will capture the focus of attention on the communication of judges.

In this way, the paper will elaborate on the right to information, the limits of publicity, due accountability, and the ways in which judges, the parties and the mass media currently communicate.

The current system of communication of the judiciary and also that of judges will be reviewed formally and informally. It is important to note that this work does not intend to restrict the freedom of expression of judges but to ensure that there are guidelines for preserving impartiality, certainty, professionalism, publicity and information to society.

It is a question of guaranteeing and protecting the fundamental principles of publicity and information of society, which must be balanced with the freedom of expression of judges in a combination that attests to an independent and objective jurisdiction, and at the same time, protects the right of privacy of individuals.

2. DEMOCRACY AND THE JUDICIARY

The first issue to be considered is how a democratic system grants public power for its exercise.[1] This is through honestly elected representatives and fair elections so that they can return to various principles, values, and goods and achieve their goals as a social group. It also decides what form of power distribution will be available, as well as the form of government.

Since the transition from the absolutist to the modern state, the custom of concentration of power was banished. To begin with, it would no longer be a private power derived from divine authority; rather, it would be the people who would choose and recognise public authorities, in addition to being part of decisions in public affairs. Power was also devolved to a single person, and a system of distribution of functions between various public powers (executive, legislative and judicial) was created.[2] A fundamental point was also to abrogate the despotic power of the rulers. They would now be limited by the rule as a means of defending the people against arbitrariness.[3]

Thus, the constitution became the instrument for placing and protecting the principles, values and assets of society, and, on the other hand, the determination of the functions of public authorities and the banishment of the concentration of power in a single authority.[4]

From what can be observed, there is a link between democracy and the division of powers that makes it possible to create a system of balances and curb power with the same power. This organization, which is born from democracy, allows there to be no concentration of power, to avoid abuses and, above all, that there is the legitimacy of public institutions.[5]

With regard to the establishment of the judiciary as part of the functions of the state, it should be borne in mind that, in order not to be manipulated or subjugated to private

[1] Anselmino, V. 2016. La división o separación de poderes. *Revista Anales de la Facultad de Ciencias Jurídicas y Sociales,* 13(46), pp. 188-203.

[2] Solozabal, J. 1981. Sobre el principio de la separación de poderes. *Revista de estudios políticos,* 1981(24), pp. 215-234.

[3] Caballero, A. 2000. J. La transición del absolutismo al Estado moderno, In: López Ayllón, Sergio (ed.), *Transiciones y diseños institucionales*, UNAM, México: UNAM, pp. 19-47.

[4] Bonilla, D. 2015. La arquitectura conceptual del principio de separación de poderes. *Revista Universitas,* 2015(131), pp. 231-276.

[5] Laski, H. 2000. *Authority in the modern state*. USA: Kitchener, USA, p. 28.

interests, the judiciary must enjoy autonomy and independence from the authorities (public, private and factual). As the analysis will show, this implies autonomy for the judiciary as a power of the union, which allows it to administer itself without external interference.

3. PROTECTION OF PERSONAL DATA

The privacy of any court case must be safeguarded by the judge, guaranteeing the secrecy of the proceedings and that some type of information is not disseminated while it is *sub iudice*.

This has two objectives: firstly, that there is no interference in the work of a judge and to prevent the opinion of third parties from becoming relevant to its judgment; secondly, that the data contained in the file be protected and continue to be private, as it is of a personal nature or represents sensitive information.

But there is one basic aspect to this clash of rights, the right to information and the right to privacy, which must be kept in mind by the authorities:

> "The right to be able to freely make certain decisions concerning one's life plan, the right to protection of certain manifestations of physical and moral integrity, the right to honor or reputation, the right not to be presented in a false guise, the right to prevent the disclosure of certain facts or the unauthorized publication of certain types of photographs, protection against espionage, protection against misuse of private communications, or protection against disclosure of information communicated or received in confidence by an individual."[6]

In relation to our main topic, we can observe a space that must be immaculate and secret, that becomes a limit to authority, and that guarantees that the information contained and derived from the judicial case will remain in pendent until the case is over.

It can be observed that various international instruments guarantee the right to privacy as a way to protect the private sphere and, above all, not to disclose certain facts or acts.

However, if one of the parties to the proceedings decides that the information shall be made public, it must be made public because of a system of automatic exit in which the right to privacy and the protection of personal data can be waved only with the express consent of the owner of the right.

> "The right to privacy includes the right to the privacy of information, which is the right that allows anyone not to disseminate information of a personal or professional nature, linked to his or her private life. This right cease to apply when the holder of the right gives his consent to the disclosure of the information."[7]

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[6] Registro 165823, Primera sala de la SCJN. Novena época, Tomo XXX, Diciembre de 2009, p.277, con rubro*: Derecho a la vida privada. Su contenido general y la importancia de no descontextualizar las referencias a la misma*. Amparo directo en revisión 2044/2008. SCJN.

[7] Registro 168944, Tribunales Colegiados de Circuito. Novena Época. Semanario Judicial de la Federación y su Gaceta. Tomo XXVIII, Septiembre de 2008, Pág. 1253, con epígrafe*: Derecho a la intimidad. Su objeto y relación con el derecho de la autodeterminación de la información.* Amparo en revisión 73/2008. SCJN.

With this jurisprudential criterion concluded, the theoretical framework and the trouble are to be addressed. What is discussed further is whether judges enjoy the freedom of expression and under what circumstances the right to information is protected, the acts of the judicial authorities can be publicised, and the privacy of the parties to the proceedings and the third parties is guaranteed.

4. THE INFORMATION OF THE JUDICIARY

At the beginning of this section, we must stress the importance of the elements which lay in the basis of this work: the freedom of expression of the judge and the right to information of the society, as well as the process of balancing these two rights.

It can be seen that freedom of expression and the right to information are the pillars of a democratic system.[8] Laurence Whitehead points out that both rights are essential in a democracy:

"• Citizens have the right to express themselves without danger of severe punishment, on broadly defined political issues.
• Citizens have the right to seek alternative sources of information. In addition, alternative sources of information exist and are rarely protected by law".[9]

Democratic regimes share a number of minimum elements for genuine democracy. One of the conditions for calling a regime "democratic" is that citizens have the right to seek alternative sources of information. Information responds to the need of the human being to express himself and to know what others have expressed. Its importance for society is so great that it belongs to the category of fundamental human rights.

As beings of freedom, we must have the right to express ourselves, to inform and to be informed, and such a natural prerogative must be guaranteed by the state and the conditions for its realisation defined by society. Society is the one which defines the limits of the process of generating and using information and assigns to information its value and function.[10]

In general, the free flow of information is one of the conditions of a free society and constitutes an element of a democratic society. Public information is a catalyst for social participation: those who have more and better information have greater opportunities to participate and influence decision-making on public policies, programs and projects, both public and private.

The right to information is a fundamental condition of the adequate performance of public officials and the efficient use of public funds. With free access to information, we will be able to put our authorities on trial to see if we should continue to place our trust and representation in them. At the same time, the right to information allows state officials to publicise their activities.

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[8] Águila, R. 2000. *Manual de ciencia política*. Madrid:Trotta, p. 159.

[9] Whitehead, L. 2003. *Democratization*. Oxford / Chicago University Press, pp. 10-11.

[10] Quezada, B. P. (Coord.). 2001. *Derecho de Acceso a la Información Pública en los Estados.* México: Universidad Iberoamericana, p. 28.

This is a subjective public right of social interest, which since the Universal Declaration of Human Rights implies the exercise of three distinct but interrelated powers: receiving, researching and disseminating information.

Public information has been established as a public good that serves to control public and governmental affairs, with the state and its various bodies effectively guaranteeing information and preventing it from being impeded. Thus, freedom of information protects democracy from autocratic temptations and actions aimed at ignoring citizens' opinions and generates checks and balances in the exercise of power.[11]

What needs to be clarified is how much freedom a judge can have and what issues a judge can discuss and make public because, although he is still a citizen, no less true is that his position does not allow him to exercise the same rights as others.

5. FREEDOM OF EXPRESSION AND LIMITS OF THE JUDGE'S COMMUNICATION

This section will analyse the freedom of expression and the expression of ideas of the judges. For example, although it was mentioned that they cannot make public their opinions in a pending case, they can express their opinion in other areas, such as in academia or legislative work:

Judges should necessarily be involved in the discussion of reforms and other legal matters.

Beyond the general recognition it receives in major international human rights treaties, the right to freedom of expression is included in a number of specific instruments related to the independence of the judiciary.[12]

But judges must refrain from making judgements that, for an observer, might compromise their power to administer justice independently and impartially. On the other hand, it is necessary to present the principles that should govern the judiciary and the rights and freedoms of judges in a democratic state based on the rule of law.

6. GUIDELINES FOR THE CONDUCT OF THE JUDICIARY [13]

The Bangalore Principles of Judicial Conduct call upon judges to refrain from compromising the requirements of their office by providing that: "A judge, like any other citizen, has the right to freedom of expression, [...], but when exercising these rights and freedoms, they will always behave in a manner that preserves the dignity of judicial functions and the impartiality and independence of the judiciary".[14]

The same declaration deals with the independence of the judiciary, which "shall be guaranteed by the State and proclaimed by the Constitution or legislation of the country.

[11] Peschard Mariscal, J. 2005. A *10 años del derecho de acceso a la transparencia*. Mexico: INAI, p. 154.

[12] CIJ. 2005. *Principios Internacionales sobre la Independencia y Responsabilidad de Jueces, Abogados y Fiscales – Guía para Profesionales*. Ginebra, pp. 39 - 40.

[13] UNODC. 2018. *Bangalore Principles of Judicial Conduct*. Available at: https://www.ohchr.org/sp/professionalinterest/pages/independencejudiciary.aspx (11. 7. 2022).

[14] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial. New York: Naciones Unidas,* p. 17.

All governmental and other institutions shall respect and abide by the independence of the judiciary".[15] The importance of the judiciary in the constitutional framework is noted.

Thus, while its independence is guaranteed, it also obliges the judiciary to ensure that judicial proceedings are conducted in accordance with the law, as well as respect for the rights of the parties.[16]

With regard to the rights and freedoms of judges, the following was considered in this document:

> "In line with the Universal Declaration of Human Rights and like other citizens, members of the judiciary shall enjoy the freedoms of expression, belief, association and assembly, except that, in the exercise of those rights, judges shall conduct themselves at all times in a manner that preserves the dignity of their functions and the impartiality and independence of the judiciary."[17]

It can then be deduced that judges have their rights, but that they must exercise them without harming the integrity of the judiciary and showing that their arguments are professional and adhere to the norms.

As far as our research topic is concerned, the Bangalore Declaration confirms that: "[j]udges shall be bound by professional secrecy with respect to their deliberations and confidential information obtained in the course of their duties, unless they are public hearings, and shall not be required to testify on such matters". With regard to the right to information of the parties and society, the Bangalore Declaration proposes that:

> "An obligation to answer to others, especially those who may feel aggrieved by the judge's actions, contradicts the independence of the judiciary. With the exception of the expression of judicial grounds or other procedures provided by law, a judge is not obliged to report on the merits of a case, even to other members of the judiciary. If a decision revealed such incompetence as to constitute an offence deserving of a disciplinary process, the judge would not be "reporting" to this very remote situation, but answering a charge or responding to an official investigation conducted in accordance with the law."[18]

Similarly, with regard to the judge's freedom of expression, it is stated that outside the court, a judge must avoid the deliberate use of words or conduct that may reasonably create a perception of a lack of impartiality. It no longer enjoys the same freedom as other citizens but rather a freedom that is limited in order to guarantee certain individual rights.

> "By definition, partisan activities and statements lead a judge to publicly choose one side of the debate over another. The appearance of bias will be accentuated if, as is almost inevitable, the judge's activities generate criticism or rejection. In short, the judge who uses the privileged platform of jurisdictional functions to enter the partisan political arena jeopardises public confidence

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[15] *Ibid.*

[16] *Ibid,* p. 25.

[17] *Ibid,* p. 43.

[18] *Ibid*, p. 81.

in the impartiality of the judiciary. There are some exceptions. These include comments by a judge on an appropriate occasion in defence of the judicial institution or his statements to explain specific legal issues or certain decisions to the community or to a specialised hearing, or the defence of fundamental human rights and the rule of law. However, even on such occasions, the judge must be concerned to avoid, as far as possible, participation in topical polemics that can reasonably be seen as politically partisan."[19]

In the exercise of his duties, he/she has absolute freedom as long as he/she is professional, impartial and objective. But what role a judge could or should play in the media:

"The media have the role and the right to gather and disseminate information to the public and to comment on the actions of the administration of justice, including court cases before, during and after the trial, without violating the presumption of innocence. This principle should only be set aside in the circumstances provided for in the International Covenant on Civil and Political Rights. If the media or interested members of the public criticise a decision, the judge must refrain from responding to such criticism in letters to the press or in occasional comments while in office. A judge should only speak on the basis of his or her judgements in the conduct of his or her cases. It is generally inappropriate for a judge to publicly defend his or her judicial decisions."[20]

It should be noted that it is possible to report, without disseminating information, on the case being tried. Here, moderation is the key to the control of what information is being provided to society.

A characteristic of judges is that they must observe the principle of integrity in performing judicial activities. This supports his/her work and the image of the judge before the social conglomerate:

"Integrity is the attribute of righteousness and probity. Its components are honesty and judicial morality, and to be good and virtuous in his behaviour and character. Integrity thus defined has no degrees. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity. A judge must always, not only in the performance of his judicial duties, act honestly and appropriately for jurisdictional functions; be free from all fraud, deceit and falsification; and to be good and virtuous in his behaviour and character. Integrity thus defined has no degrees. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity." [21]

The conduct of a judge should therefore reaffirm public confidence in the integrity of the judiciary. Not only that the integrity of justice be secured, but it must also be shown

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[19] *Ibid*, p. 57.

[20] *Ibid*, p. 60.

[21] *Ibid*, p. 66.

to the public how this is done. [22]

As a subject of constant public scrutiny, a judge must accept personal restrictions that may be considered a burden on ordinary citizens and must do so freely and voluntarily.[23]

In particular, a judge shall behave in a manner consistent with the dignity of judicial functions.

> "Every judge must expect constant scrutiny and public comment and must therefore accept personal restrictions that ordinary citizens may consider a burden. The judge must act freely and voluntarily even if these activities are not viewed negatively when carried out by other members of the community or profession. This applies to both the judge's professional and personal conduct. The legality of the judge's conduct, while important, is not the full measure of its correction. Returning to the issue of the rights and freedoms of judges, the Bangalore Declaration states that: Every judge must expect constant scrutiny and public comment and must therefore accept personal restrictions that ordinary citizens may consider a burden. The judge must act freely and voluntarily even if these activities are not viewed negatively when carried out by other members of the community or profession. This applies to both the judge's professional and personal conduct."[24]

The legality of the judge's conduct, while important, is not the full measure of its appropriateness.

Returning to the issue of the rights and freedoms of judges, the Bangalore Declaration states that:

> "A judge, when appointed, does not relinquish the rights of freedom of expression, association and assembly enjoyed by other members of the community, nor does he abandon his previous political ideas or cease to have an interest in political issues. However, restraint is needed to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate level of participation of judges in public debate, there are two fundamental considerations. The first is whether the participation of the judge is likely to undermine confidence in his or her impartiality. The second is whether such participation may unnecessarily expose the judge to public attack or be incompatible with the dignity of judicial functions. If any of these cases occur, the judge should avoid such participation."[25]

A limit is then set on public proceedings and on their statements in the role of judges, which guarantees integrity and impartiality and is based on the understanding that their independence is not absolute since they are the image and materialisation of the judiciary.

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[22] *Ibid*, p. 67.

[23] *Ibid*, p. 67.

[24] *Ibid*, p. 69.

[25] *Ibid*, p. 88.

> "A judge should not take an inappropriate part in public polemics. The reason is obvious. The very essence of being a judge is the ability to view controversial issues objectively and fairly. It is equally important for the public to see that the judge demonstrates estrangement, lack of predisposition, absence of prejudice, impartiality, openness of mind and the balanced approach that is the hallmark of a judge. If a judge enters the political arena and participates in public debates - opining on controversial issues, participating in disputes with public figures in the community or openly criticising the government - will not give the impression of acting fairly when acting as a judge in court. Nor will the judge be considered impartial when he has to adjudicate on disputes relating to matters on which he has expressed views in public; nor will he be considered impartial, and that is perhaps most important, when public figures or ministries that the judge has previously publicly criticised act as parties, litigants or even witnesses in the cases that fall to him to rule."[26]

A judge who has declared himself/herself homophobic, for instance, or who has expressed his/her political preference, who favours the poor, who supports evangelicals, and so on, could be seen as lacking impartiality.

By the same token, it has been shown that it is best for judges to refrain from publicising their hobbies, predilections, preferences, or tastes.

In order to continue with the issue of the information it administers, possesses, monitors and controls, the judge should understand the types of communication which the judiciary and the judges can use in order to give effect to the right to information of society.

7. MODELS OF COMMUNICATION OF THE JUDICIARY

The judiciary, as a public institution, has the public duty to inform society of its activities. This can be done through various instruments. First of all, it can regularly publish information about its work in order to secure its transparency and accountability. That can be done in various ways, such as through open justice projects, live transmission of sessions, and by ruling on requests based on the right to information.

Therefore, transparency and access to public information are the basic inputs for civil society to have contact with public institutions. In this way, it is also possible to know how the bureaucracy works, to evaluate its achievements and, where necessary, to sanction it. In this way, access to information can enable communication between the government and the public.

In the exercise of his/her functions, the judge has at his disposal various means, including electronic ones, to make public statements. While doing that, he/she is allowed to present his/her opinions of a professional nature, but it is not appropriate for him/her to comment on the cases which are dealt with by another judge. He/she can also have conversations and interviews with journalists, but with limits already mentioned.

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[26] *Ibid*, p. 89.

> "There are limited circumstances in which a judge can speak properly about a politically controversial matter, specifically when it directly affects the functioning of the courts, the independence of the judiciary (which may include remuneration and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge. However, even in such matters a judge must act with great restraint. While it may be correct for a judge to address public submissions to the government regarding such matters, the judge should not be seen in a "lobbying" action before the government or as if to indicate how it would rule if certain situations were brought before the court. In addition, a judge should remember that his or her public comments may be taken as a reflection of the views of the judiciary; sometimes it is difficult for a judge to express an opinion that is held publicly as a personal point of view and not as that of the judiciary in general."[27]

Here special consideration should be given to the hearings that judges hold with the parties to the proceedings, during which the parties might try to influence the decision in the case.

8. LOBBY

The democratic system is made of a set of values and principles that allow the stability of the same by enabling the renewal of the authorities in a peaceful and orderly way through periodic and free elections in which all citizens can participate actively or passively. The citizens should have the possibility to realise their right of assembly to exchange information and discuss public affairs without censorship or sanctions. [28]

Lobbying is a political prerogative that enables the contact of citizens with public authorities and is designed to provide them with the opportunity to intervene in the actions of government institutions.[29] This intervention informs and forms the public agenda in politics. Lobbying is also regarded as the art of political persuasion.[30] It is an instrument of influence on politics. It can take place for a variety of reasons and at all stages of the legislative process with regard to the actions of public officials and the actions of the judiciary.[31]

The link between the two arises when lobbyists contact public servants to present their offers or opinions to them and try to influence them in relation to their work, prior to which the public officials will act only in accordance with their convictions, commitments

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[27] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial.* New York: Naciones Unidas, pp. 89-90.

[28] Whitehead, L. 2003. Democratization. Oxford / Chicago University Press, p. 20. Águila, R. 2000. *Manual de ciencia política.* Madrid:Trotta p. 156.

[29] Miller, C. 1998. *Practical Techniques for Effective Lobbying*. London: Thurgood, p. 3.

[30] Zetter, L. 2008. Lobbying. The art of Political Persuasion. Harriman, p. 3.

[31] Goldstein, K. M. 2008. *Interest Groups, Lobbying and Participation in America*. Cambridge: Cambridge University Press, p. 6.

or interests. In the broadest sense, public policy lobbying involves the attempt to affect laws, regulations, court decisions, and other types of public decision-making with political repercussions.[32]

In our case, lobbyists try to persuade magistrates by providing additional or special information to influence the judge's final decision. As far as our subject is concerned, lobbying is also carried out with the representatives of the judiciary.[33]

The main job of the judicial branch is to resolve civil and criminal disputes. However, as bureaucratic agencies, their internal work is not as public.

In democratic systems, courts have the power to interpret laws and their regulations, but laws rarely cover every eventuality that may occur in practice. Thus, courts often clarify the content of laws to say what the law "really means".[34]

There is another form of communication with the judiciary found in the procedural institute of *amicus curiae* (friends of the court) [35] that allows certain collective entities to present before the court their opinion on a matter discussed by the court and which also provides these entities with the possibility to attend the hearing with the parties. As such, *amicus curiae* is a manifestation of the right to information and to discuss a specific topic.

The Institute of *amicus curiae* can also be used by the collective entity organized around a common interest to put pressure on the courts. Courts often decide on very important matters (e.g., abortion, affirmative action, civil rights, immigration, etc.), and in some cases, particular interests. But these private hearings are regulated in different ways in different countries:

> "a) A judge is not obliged to accept the request for a private meeting; b) The judge should ascertain the purpose of the meeting before deciding whether to accept the request; c) The judge may consider whether the meeting should include members of the prosecution and the defence. Frequently, the requested meeting addresses issues of the criminal branch of the court (e.g., representatives of Mothers Against Drunk Driving) d) The request of the special interest group should be made in writing to avoid misunderstandings and the judge should confirm the meeting and the basic rules of the discussion in writing; e) The absolute prohibition of communication with the parties on specific cases must be respected and clarified to the applicant before the beginning of the meeting; f) The judge must decide whether the presence of a court clerk during the meeting is appropriate. Such a presence would avoid any future misunderstanding of what was discussed at the meeting. It

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[32] *Ibid*, p. 57.

[33] Goldstein, K. M. 2008. *Interest Groups, Lobbying and Participation in America*. Cambridge: Cambridge University Press, p. 16.

[34] *Ibid,* p. 40.

[35] Organised interests could be also used as a means of putting pressure on the courts under the *amicus curiae* ("friend of the court") formula. Courts often decide on very important matters (e.g., abortion, affirmative action, civil rights, immigration), and in some cases, particular interests "inform the Court of their views on the possible implications of their decision and encourage the adoption of a decision favouring them in the dispute". An amicus report is essentially a note that presents the views of an organized interest on a case to the court that decides it. Kober-Smith, M. 2000. *Lobbying*. London: Cavendish, pp. 31 - 40.

would also protect the judge from an awkward situation if his words were later incorrectly quoted".[36]

These private meetings could result in decisions no longer in line with the law but in accordance with the private commitments in which personal benefits override the public interest. Political corruption can be recognized where there are:

1. A public official,
2. Breach of trust placed in him by the public,
3. Damage to the public interest,
4. A public official is aware that his conduct is aimed at meeting a personal and private interest, which is contrary to the rules,
5. The conduct of a public official benefits a third party by providing it with access to a good or care, which it would not otherwise obtain. [37]

The problem occurs when lobbyists succeed in convincing judges and magistrates to privilege their interests so that both obtain benefits, rewards or profits, forgetting the common good, abandoning their independence and their impartiality, and preventing the realisation of justice.

A matter that has become a custom is when judges receive the parties to the conflict in private as part of their right to a hearing. But we must bear in mind that the parties seek to influence the decisions of the judge.

Now, in case of a private appointment, this should be known to the other party, which should be entitled to participate directly or through their representatives. In order to continue the analysis, the use, enjoyment and limits of the public expressions that judges carry out in the exercise of their judicial function will be further investigated.

9. THE EXERCISE OF JUDGES' FREEDOM OF EXPRESSION

Freedom of expression is a constitutional right, also called the free expression of ideas, which has already been introduced. However, it is important to point to the Judicial Code of Ethics, which talks about the origin and basis of this right:

> "By virtue of the innovative transformations that society experiences every day, it is natural that judges in their daily interrelationship become involved in this dynamic, as happens in other sectors, giving rise to interest leagues that could affect their free conscience and essential role in the delivery of justice. It is, therefore, very useful to have there the references identifying the values and principles relating to the exercise of the judicial function."[38]

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[36] *Ibid*, p. 40.

[37] Heidenheimer, A. 2007. *Political corruption*. USA: Transaction Publishers, p. 42.

[38] SCJN. 2004. *Código de ética del Poder Judicial de la Federación*. Mexico: SCJN, p. 4.

Interesting as well is the role assigned to the use of the media and the right to information:

> "Every day society seeks to be informed and the state has been strengthening the channels of access to public information, conditions that make it question or make judgments that may transcend the judge's free conscience, by virtue of the fact that their judicial acts are subject to public scrutiny by means of social impact instruments, which may lead to a loss of confidence in the organs of administration of justice if they do not act with independence, impartiality, objectivity, professionalism and transparency."[39]

From what can be observed, there is an ethical responsibility of judges when using their freedom of expression that guarantees the independence of the judiciary, but which is not absolute. The judge must be prudent,[40] considering the importance of his/her duties, keeping in mind that he/she does not have the same rights as citizens and that, on the contrary, he must protect the privacy rights of the parties in the cases he is to decide on. It is essential to recognise that the judge can make public statements, but this is until it makes the case *res judicata.* This case law establishes guidelines to protect the right to privacy:

> "In short, we seek to prevent the dissemination by third parties of information about the privacy of others without the consent of the holder. Hence, if the interference with the private life of the injured third party consists in the dissemination by other members of his family of facts that concern their private lives and which involve him, as the cause of the affliction suffered by them, then such dissemination cannot be considered to be arbitrary or abusive. This is so because it was carried out in the exercise of their legitimate right to disseminate information of their own, insofar as it is truthful, and that the expressions used are constitutionally protected because they are not absolutely vexatious, that is, offensive, oppressive or impertinent, depending on the context."[41]

Accordingly, it is declared the duty of the judge to keep private any case that he is discharging, and which occurs to his good judgment in the use of public statements.[42] And here comes the final conclusion of this analysis, and that is that the judge must have recourse to self-censorship, or there would be an ethics committee to judge his actions, and he might be punished.

No one doubts that judges are expected to behave according to certain standards both inside and outside the court. Is it simply a matter of personal decency, or is a certain

[39] *Idem.*

[40] Coaguila Valdivia, J. 2016. Modelo de juez complejo y Estado Constitucional de Derecho, *Revista de Investigación Perú*, 8(3), pp. 93-121.

[41] Registro 2005525. Primera Sala. Décima Época. Gaceta del Semanario Judicial de la Federación. Libro 3, Febrero de 2014, Pág. 641, con epígrafe: Derecho a la vida privada. Alcance de su protección por el estado. Amparo directo 23/2013.

[42] See: MacKay, W. 1992. Judicial Free Speech and Accountability. Should judges been seen but not heard? *National journal of constitutional law*, 1993(3), pp. 159-180.

professional group expected to observe certain standards of conduct in their own interest and in the interest of the community? Since this is the fundamental question, some elementary observations need to be made.[43]

9.1. The proper self-censorship of the judiciary

In this model called the "self-censorship model" (Jon Elster's concept),[44] the judge is free to make any statement, but he`s responsible for them and responds if he provokes any criminal harm or he could be sued for damage in civil courts, there is liberal conduct.

> "This is so for reasons strictly linked to the type of activity they have chosen to carry out, which requires intense public scrutiny of their activities. In the case of privacy, it may sometimes be a matter of public interest for the dissemination and general knowledge of data which, from certain perspectives, may be described as private, are clearly connected to aspects that it is desirable for citizens to know in order to be in a position to properly judge their performance as public servants or officials. With the right to honor something similar happens the following: the activities carried out by persons with public responsibilities are of interest to society, and the possibility of criticism that the latter may legitimately direct them must be understood in a broad sense."[45]

Thus, while judges must guarantee the right to information, they must also protect the right to privacy:

> "It also guarantees the right to have privacy in order to have control over the publicity of the information of both the person and his family. This translates into the right to self-determination of information involving the possibility of choosing which information in the person's private sphere can be known or which must remain secret, and designate who and under what conditions may use such information. In this context, the right to privacy imposes on public authorities, as well as individuals, a number of obligations, namely: not to disseminate personal information, including personal data, confidentiality, banking and industrial secrecy and, in general, non-interference in the privacy of individuals; the state, through its organs, must take all measures to ensure the effective protection of this right."[46]

One could say that there is a clash of the right of freedom of expression of the judge, on the one hand, and of the right to public information, on the other.

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[43] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial. New York: Naciones Unidas*, p. 31.

[44] Elster, J. 2020. *Constitunacionalism and democracy.* Cambridge: Cambridge University Press, pp.1-18.

[45] Libertad de expresión y derecho a la información. Su importancia en una democracia constitucional. Tesis: 1a. CCXV/2009. Novena época. Semanario judicial de la Federación y su Gaceta. Tomo XXX, Diciembre de 2009. Pag. 287. Amparo directo en revisión 2044/2008.

[46] Registro 1000815. Sala Superior. Tercera Época. Apéndice 1917-Septiembre 2011. VIII. Electoral Primera Parte - Vigentes, Pág. 223, con rubro: Libertad de expresión e información. Su maximización en el contexto del debate político. Amparo en revisión 73/2008.

As already mentioned, there must be criteria to control the freedom of expression and information that the judge performs, but always trying to maintain the privacy of citizens. In resolving the conflict between freedom of expression and the right to information, as opposed to the right to privacy, the specific case should be considered in order to verify which of these rights should prevail by distinguishing, in the case of public persons to the greatest or least projection of the person, given their own position in the community, as well as the way in which they themselves have modulated the public knowledge about their private life.

To conclude on the topic of communication models, it is possible to establish a set of guidelines that the judge must take care of when making a public statement or using the mass or electronic media.

9.2. Guidelines for the Communication of Judges

Ethical standards can also be used with this function, but in an ethical trial, there is no reason that can be invoked by the defendant for a breach of ethics that happened deliberately. In other words, an Ethics Committee can accept reasons that would be unacceptable if it acted as a legal tribunal.[47]

Because it is not a subject of this paper, a series of guidelines is proposed that would qualify whether a judge should be responsible for communications made by him or by a third party on his behalf.[48] According to the guidelines, when a judge violates the privacy rights of a party, such conduct should be subject to the evaluation of the ethics committee.

These guidelines explain their objective, guiding principles, parties' rights and obligations, actions and defences, precautionary, the integration and selection of the committee to judge possible violations, the characteristics of this process (standing, claim, defence, evidence, conclusions, resolution), the type of penalties, and so on. Also, the guidelines inform the plaintiff of his/her judicial rights to claim the reparation of civil or administrative damage where applicable.

Any accusation or complaint against a judge for judicial and professional performance shall be dealt with promptly and impartially in accordance with the relevant procedure. The judge shall have the right to be heard impartially. At that initial stage, the examination of the matter will be confidential unless the judge requests otherwise.[49]

10. COMPARATIVE LAW

In the case of disclosure of private information, we have several different regulations worldwide. For example, in the US and Canada, there is an ethics statute for judges which points to the limitations of the freedom of expression in his/her work of judges. In addition, the European Charter on the Status of Judges identifies restrictions on the professional

[47] Ibero-American Code for Judges, p. 3.

[48] Moran, J. 2015. Courting Controversy: the problems caused by extrajudicial speech and writing. *Victoria University of Wellington Law Review*, 2015(46), pp. 453-494.

[49] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial*. New York: Naciones Unidas, p. 45.

manifestation of judges outside the courts: [50]

> "However, this right is not absolute, but is subject to certain limitations inherent in the judicial function. In the case of judges, the unrestricted exercise of the right to freedom of expression may compromise their independence or impartiality, for example, if they disclose information on a specific case to one of the parties or to the media. Judges should therefore refrain from undermining the right to a fair trial, including the presumption of innocence, especially in *sub judice* cases. In this regard, the European Charter on the Status of Judges stipulates that "[j]udges shall refrain from any conduct, action or expression that affects confidence in their impartiality and independence."[51]

The following are some cases in which judges were punished for failing to exercise due caution or, as stated, for self-censorship in the use of their freedom of expression or expression of ideas, *i.e.* for their activities that violated the rights of others and compromised the independence of the judiciary.

11. RELEVANT CASES

Here some cases are presented as examples of the freedom of expression of judges. In the Netherlands, the judges complained about working conditions and because the robes of the Supreme Court judges were very long. For that reason, they organised and presented their protests through Twitter so that the citizenry could know about these problems. Similarly, in Hungary, the Chief Justice criticised the legislature and the coalition government for their legal reforms of the judiciary.[52]

In the case of *Pitkevich v Russia*, the freedom of expression of a judge was discussed. The complainant was about a judge making references of religious nature during the proceedings, which might have generated a bias and affected a judge's independence. So, he was asked to refrain from such behaviour,[53] but there were persons who asked to review all the cases he had already decided as a judge.

Should the judges' discussions be part of the public debate? In the case of *Kudeshkina v Russia*, the judge openly opined against a judgment which served to his critics to ask for his removal from office, because these statements were made during the election campaign and in indirect support of a candidate. Eventually, the judge was suspended from office.[54]

In *Holm v Sweden*, the European Court of Human Rights found a violation of the right of expression of a judge. This case evolved around the political activities of one of the

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[50] Dijkstra, S. 2017. The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR, *Utrecht Law Review*, 13(1), pp. 1-17.

[51] CIJ. 2005. *Principios Internacionales sobre la Independencia y Responsabilidad de Jueces, Abogados y Fiscales – Guía para Profesionales*. Ginebra, pp. 39-40.

[52] Dijkstra, S. 2017. The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR, *Utrecht Law Review*, 13(1), p. 2.

[53] *Ibid,* p. 8.

[54] *Ibid,* p. 9.

jurors, who was against the judge because he was part of the Swedish Social Democratic Workers' Party (SAP). So, it had to be decided if this person could be part of the jury. The European Court decided to support the judge to preserve his impartiality, and the precedent that was made is important because it shows that it should not be allowed for the jury to express animosities against the judge.[55]

The European Court of Human Rights has ruled on a number of cases concerning the freedom of expression of judges, notably in interviews or in their letters in the media.

> "The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty". [56]

In another case, the freedom of expression of judges in the US was discussed. Judge Posner wrote the book "An Affair of State: The Investigation, Impeachment, and Trial of President Clinton".[57] In this text, Richard Posner considered that President Clinton was accused of perjury, fraud, inciting crime, and making false statements in government. But these crimes were not brought as charges by the appointed prosecutor, so they could not be discussed as part of a court case. Richard Posner invoked in his book The First Amendment and opined that the citizens had the right to criticize any authority.

However, Professor Lubet was of the opinion that the role of any judge should not go beyond the actions and statements made at trial and that the rest was an excess of his freedom of opinion, in addition to the fact that Judge Posner highlighted the way in which prosecutors and lawyers act, affecting their impartiality and independence.

12. CONCLUSIONS

1. The judges shall be responsible for maintaining the social and democratic rule of law. They have a duty to re-establish the rule of law and to make society feel that their rights will be respected and protected.

2. The conduct of judicial proceedings shall be governed by a set of principles which shall secure the proper administration of justice. The most important of these are autonomy, legality, impartiality, independence, professionalism and publicity.

3. The courts are committed to legality and professionalism. For law is only a means, and justice is a social yearning. It is not enough to have rules; the judiciary should be of the same capacity to preserve its independence as the other two branches of power (the executive and the legislature). In order to exercise its functions, it needs to have jurisdiction in the first place and that it has independence so that its acts are only done in accordance with the law.

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[55] *Ibid,* p. 12.

[56] *Ibid.*

[57] Posner, A. R. 1999. *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton.* New York.

4. It may be inferred from this that democracy and judicial independence are interrelated, since the greater the democracy, the greater the independence of the judiciary. Consequently, when justice is guaranteed, the state and the political system as such are legitimate.

5. The basic conditions for a fair trial are: the independence, legality and stability of the judge's office. In addition, the judge must be limited by legality and publicity so that his or her judgements are made public. It must also act objectively and professionally to ensure that judgements are impartial.

6. The right to information is one of the guiding principles of democracy since it allows for the free exchange of ideas. In the case of judges, however, certain considerations must be taken into account in order not to affect a case or the image of the judiciary. For this reason, a special communication regime was proposed that would not infringe on their right to expression, but would also ensure the good image of judges and protect the rights of parties to the proceedings.

7. Information and the possibility of exchanging it is a fundamental right in modern democracies. "The right to information contributes significantly to the construction of social reality or, more specifically, to that form of social reality that is democratic society".[58] This prerogative allows us to state our views and to know the views of others. However, the right to information is not an absolute right but has some limitations, such as the right to privacy, public morality, etc.[59]

8. It is useful to mention that judicial independence is also envisaged as a human right. Thus, this institutional principle is in the basis of judicial tasks, and consequently, a petitioner can count on an effective and honest administration of justice.[60]

9. Independence must not be regarded as an absolute right. In the case of the communication of judges about the work they or third parties do, a set of rights must be safeguarded by means of an ethical paradigm that establishes the ways to exercise or make communication in the exercise of their duties.

10. Lobbying is a democratic element that allows certain organised groups to have contact with the authorities to explain their position on a particular issue. However, the threat or temptation might occur when lobbying involves an offer of financial or other benefits for a judge or a future reward as a way to influence the judge so that both parties come out with benefits at the expense of the common good.

11. Lobbying is a complex and heterogeneous phenomenon. This requires an understanding of the variations of the behaviour of a plethora of individual lobbyists, functioning at different levels of government, on behalf of different organisations, in relation to a seemingly infinite variety of information, who use a wide range of techniques to achieve various types of gains.[61]

12. The relationship between lobbyists and representatives of the state presupposes collaboration, which is supposed to take place for the realisation of a common good. But the

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[58] See: Morales Campos, E. 2011. *Derecho a la información, bien público y bien privado: acceso comunitario y acceso individual*. Mexico: Universidad Nacional Autónoma de México.

[59] Peschard Mariscal, J. 2005. *A 10 años del derecho de acceso a la transparencia*. Mexico: INAI, p. 129.

[60] See: CIDH. 2013. *Garantías para la independencia de las y los operadores de la justicia*. Costa Rica.

[61] Nownes, J. A. 2006. *Total Lobbying*. Cambridge: Cambridge University Press, pp. 2-3.

reality is that not all public officials are perfectly virtuous and that most lobbyists represent organised economic interests, so there must be legal mechanisms for lobbyists and public servants not to damage the democratic system and for corruption to be punished. If there is no regulation for this relationship between lobbyists and public officials, one could be confused about who they represent, whether their constituents or a particular company(s).[62]

13. Corruption is not only tied to individual strategies and opportunities but also to the degree of realisation of a system of values and how persuasive legal norms are. Anti-corruption discourse must revolve around morality. Fighting corruption must be seen as an effort by the government, the private sector and civil society to change institutions, have new and effective laws, punish the dishonest behaviour of public officials, and reward the conscientious behaviour of citizens.[63]

14. Two formal and two informal models of the judicial communication system can be found. In the first scenario, the judges have full freedom to express themselves by assuming full responsibility for the handling of the relevant information and safeguarding information, such as personal data or witness protection. In the second case, the judge can give his opinion but with limits established in a code of ethics or in the rule as to the need to safeguard the rights of third parties and to preserve the impartiality and good reputation of the judiciary. In the case of the informal ones, the debate takes place on whether a judge should have a private hearing with the parties, and if it takes place, it is carried out in the presence of all parties, and a detailed record of the meeting is made. Another way in which information is given is through leaks to the media, which. Although some authorities consider them illegal, many people believe that if it is public, information should be disclosed, as was the case with the Pentagon documents in the United States of America.

15. It can be said that it would be appropriate to regulate certain types of communication in order to protect the image of the judiciary and, with them, safeguard its social legitimacy.

16. Freedom of expression is a human right held by all people, but it is not absolute. In the case of judges, they do not enjoy this right in the same way as other citizens since their profession subjects them to special rules, especially their right to association, assembly, expression, and privacy. The judge's reasoning and decisions should leave no scope for doubt in his independence and impartiality. Legality is his ruling principle, and his personal affairs should not affect his professional sphere. The prudence and wisdom of judges should not be reflected only in their judgments but also in their acts of public speech.

17. This research is not an attempt to curb the freedom of expression of judges or restrict the right of the parties and society to information. The paper is about the question of how to exercise responsible communication between judges and citizens, which would be to benefit to both the judiciary and the parties to the proceedings.

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[62] Kayser, R. 2010. *So damn, much money.* Vintage books, p. 3.

[63] Sampson, S. 2005. Integrity Warriors: Global Morality and the Anti-corruption Movement in the Balkans, In: Dieter H. & Cris S. (eds.), *Corruption, Anthropological Perspectives.* London, p. 111.

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ALBANIAN JUSTICE REFORM IN THE FRAMEWORK OF THE EU ACCESSION PROCESS

The accession to the European Union is a guarantee for the future of Albania. It will provide numerous advantages once Albania becomes a full member. The rule of law holds an important place in the sustainability and equity of democratic governance, especially considering the European Union's accession process to the Republic of Albania. The vetting process in Albania is considered a mechanism that will ensure the rule of law in the judicial decision-making process and be an important condition that the country should overtake in ensuring an uncorrupted judiciary system. The justice reform and especially the vetting process is considered to as the main component of the accession talks with the European Union. The reform carries major objectives and benefits whose outcomes hope to quell several issues the candidate country is facing, aspiring to reach the equitable level of changes and proper harmonization on European Union's standards. The evaluation process is based on a three-criteria where temporary vetting organs conduct the investigation for each magistrate. Following this process, the dismissed judges have filed complaints to the European Court of Human Rights based on the right to due process.

Keywords: vetting, International Monitoring Operation, First Instance Commission, EU, SPAK (Special Anti-Corruption and Organized Crime Structures), European Court of Human Rights, harmonization, rule of law.

1. INTRODUCTION

The rule of law holds immense importance of the sustainability of the democratic systems, and especially considering the European Union's accession process of candidate countries such as Albania. As a result, the Justice Reform, a rigorously specified and acted upon

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procedure of thoroughly investigating and evaluating the judicial authority of the country, is considered the main step to be taken prior to accession talks with the European Union (hereinafter: EU).[1] It is expected that the reform would solve several issues the candidate country is facing on the road of achieving equitable changes and proper harmonization with the EU standards.

Primarily, the EU's institutions stated the complete political reform of the Albanian judiciary system, known as the Justice Reform, was the only condition left to be satisfied by the government before the accession talks.[2] More precisely, the EU has set several prerequisites for Albania, among others, the Justice Reform in the framework of the negotiation talks. The Albanian government has been capable of achieving moderate effectiveness on key issues emphasized by the EU institutions during the last three years, with judicial reform remaining the country's main stumbling obstacle.[3] The Albanian Parliament aims to establish a more independent and well-structured, judiciary.[4] On that road, it approved a total of seventeen constitutional amendments, as had been requested by the reform of the judiciary.

These amendments gave rise to the application of the so-called Vetting Law in Albania, also referred to as the non-permanent reassessment of its judges and prosecutors. The establishment of two distinctive institutions has turned out to be necessary and mandatory for the judges, and the prosecutors since they have been the main concern of the re-evaluation process, which includes a First Instance Commission (hereinafter: IQC) and an Appeal Chamber (hereinafter: AC).[5] As a consequence of that, the involvement of the ordinary court system from the vetting process is excluded. These institutions are observed by an International Monitoring Operation body (hereinafter: IMO) established by foreign magistrates from the Member States of the EU or the United States of America (hereinafter: USA). This supervisory institution with no executive power has a supporting and advising role in the vetting process.[6] This article will be focused on three main issues of Justice Reform in Albania: institutional reformation, vetting process, and EU accession process.

2. REFORMING THE JUDICIARY THROUGH INSTITUTIONAL REFORM

The sustained promotion of the broader reform process by the EU and the USA, have helped through multiple initiatives.[7] The majority of cases are decided by a panel of three judges in the SPAK courts (Special Anti-Corruption and organized crime structure). The Special Anti-Corruption and Organized Crime Structures are linked to the SPAK courts,

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[1] European Council. 2016. *Albania Amicus Brief Statement for The Judicial Branch on The Law on The Periodic Re-Evaluation of Prosecutors and Judges (The Judicial Reform)*. Affirmed by the Venice Commission.

[2] *Ibid.*

[3] *Ibid*.

[4] Mykaj, E. 2020. *Judicial vetting: a vital policy tool to fight corruption in Albania*. U4 Anti-Corruption Resource Centre.

[5] *Ibid.*

[6] *Ibid.*

[7] Maxhuni B. & Cecchi U. 2017. An Analysis of the Vetting Process in Albania. Policy Analysis No.01/2017. Available at: https://www.legalpoliticalstudies.org/ (29. 9. 2022).

which are assisted by the Special Prosecutors Office, as a judicial authority, and the National Bureau of Investigating, as a subsidiary research agency. The SPAK is solely responsible for the investigation and trial of cases that fall under the SPAK courts' jurisdiction. The SPAK courts have jurisdiction over corruption, organized crime, and charges against a large group of high-ranking officials, according to Article 135 paragraph 2 of the Constitution. The SPAK courts' capabilities are further defined in Article 75a of the Criminal Procedure Code, which defines "organized crime" to encompass terrorist-related offenses. As a result, the SPAK courts now have most of the corruption-related powers that were formerly shared in the already existing court system. In 2020, the Special Prosecution Office will file 70 cases involving 260 defendants to the SPAK courts, out of which 53 cases involve about 100 defendants being tied to corruption.[8]

The number of vetting bodies' layoffs and dismissals to date demonstrate that the assumption of a high level of judicial impropriety was true. Several confirmation decisions made by the FIC were rejected by the AC, resulting in high numbers of dismissed magistrates. The examples will be discussed in the following chapters of the article. The recruitment and retention of magistrates have now become a new concern because of the rising resignations.

Several constitutional institutions were subject to change during the Justice Reform. These are the High Judicial Council, the High Prosecutorial Council, and the Constitutional Court. [9] The High Judicial Council consists of 11 members, who were elected three months after the entry into force of the law. Six members will belong to the ranks of the judiciary and five others will be lawyers, who will be elected with 3/5 of the votes in the Assembly.[10] When it comes to the Constitutional Court, there will be nine members with a nine-year term. Three members are elected by the President, three are elected by the Assembly with 3/5 of the vote, while another three members come from the Supreme Court. The High Court Justices are appointed by the President of the Republic via the proposal of the High Judicial Council with a non-renewable nine-year mandate.[11] This court regained its quorum in March 2020.[12]

The High Prosecutorial Council is composed of 11 members, six from the corps of prosecutors and five from jurists. The High Prosecutorial Council proposes to the Assembly three candidacies for the Prosecutor General. The High Prosecutorial Council

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[8] Law On the Organization and Functioning of Institutions for Combating Corruption and Organized Crime, *Official Gazette of the Republic of Albania,* no. 95/16, 47/21.

[9] Constitution of the Republic of Albania, *Official Gazette of the Republic of Albania,* no. 8417/97, 9675/07, 9904/08, 88/12, 137/15, 76/16, 115/20. Available at: https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf (29. 9. 2022).

[10] Map of justice reform; new institutions in the judiciary and prosecutor's office 2016. Available at: https://www.reporter.al/2016/01/07/harta-e-reformes-ne-drejtesi-institucionet-e-reja-ne-gjyqesor-dhe-prokurori/; (29. 9. 2022). Constitution of the Republic of Albania, Official Gazette of the Republic of Albania, no. 8417/97, 9675/07, 9904/08, 88/12, 137/15, 76/16, 115/20. Available at: https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf (29. 9. 2022).

[11] Constitution of the Republic of Albania, *Official Gazette of the Republic of Albania,* no. 8417/97, 9675/07, 9904/08, 88/12, 137/15, 76/16, 115/20. Available at: https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf (29. 9. 2022), Art 136/a.

[12] European Commission. 2021. Albania 2021 Report. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Albania-Report-2021.pdf (29. 9. 2022), p. 4.

is established within six months from the entry into force of this law.[13] The Prosecutor General is appointed by 3/5 of the members of the Assembly among three candidates proposed by the High Prosecutorial Council. He is appointed within two months after the constitution of the High Prosecutorial Council and no later than the last date of the mandate of the acting Prosecutor General.[14]

When it comes to the anti-corruption structure, it is established within two months after the constitution of the High Prosecutorial Council. The Special Anticorruption and Organized Crime Structure consists of the Special Court of First Instance, the Special Court of Appeal, the Office of the Prosecutor, and the National Bureau of Investigation. The Prosecutor General has no authority over this structure.[15]

The Judicial Appointments Council performs the verification of non-judge candidates for members of the High Judicial Council, the High Prosecutorial Council, as well as candidates for members of the Constitutional Court.[16]

The High Inspectorate of Justice starts functioning three months after the creation of the High Prosecutorial Council. It is responsible for investigating disciplinary violations against judges and prosecutors at all levels. It consists of five members, out of which three are from the ranks of the judiciary, while two are from the ranks of the prosecution. The Disciplinary Tribunal of Justice decides on disciplinary measures for members of the High Judicial Council, High Prosecutorial Council, Prosecutor General, and members of the High Inspectorate of Justice.[17]

3. VETTING PROCESS IN THE FRAME OF THE APPLICATION OF JUSTICE REFORM IN THE REPUBLIC OF ALBANIA

The immense tension of corruption in the Republic of Albania led to the issuance of the famous package on Justice Reform, as a pre-condition for opening and extending the EU accession negotiations with Albania. As constantly reported by the European Commission through its progress reports, the EU has always identified the judicial system as a sector with a high index of corruption in Albania.[18] [19] Albania has never been in line with the Copenhagen criteria regarding the fight against corruption in the judicial sector.[20]

After the consultative and legislative processes, Albania issued the famous package of the Justice Reform, to comply with the requests and recommendations of the European

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[13] *Ibid*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] Upon all the problematics around the political and economic era of Albania, the utmost with very high index of corruption among the public sectors, was the judicial system. It has been reported throughout the progress reports of the EU Commissions since 2014, when Albania granted the status of candidate country for EU.

[19] Hoxha A. 2020. The EU rule of Law initiative Towards the Western Balkans, *Hague Journal on the Rule of Law*, 13(1), p. 17.

[20] *Ibid.*

Commission for further accession to the EU. It is noteworthy that the package on Justice Reform was approved and enacted in 2016 with the inclusion of 46 new constitutional articles, which referred to the reorganization of the judicial system.[21]

Among others, one of the main issues and changes was the issuance and establishment of the so-called *Vetting Law* in 2016. The referred *Vetting Law* is titled "On the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania".[22] The purpose of the Vetting Law is to lay down certain rules and regulations for the transitional re-evaluation of all the subjects being part of the judicial system (prosecutors and judges), to strengthen and guarantee the application and implementation of the rule of law, due process, and independence of the judiciary. Moreover, it aimed to restore the trust of the public for institutional access and proper functioning, as already proclaimed also in Article 179/b of the Albanian Constitution.[23] Besides that, its scope also covers the role of some specific state organs that are strongly connected with the vetting process such as the First Instance Commission (FIC), AC, IMO, and the Public Commissioner.

The said legal package also included the Law "On the Status of the Judges and Prosecutors in the Republic of Albania" (Law No. 96/2016). However, this paper will remain predominantly focused on the analysis of provisions of the Vetting Law and its implementation. Vetting has regularly been considered a practical organizational tool for transitional majority-rule governments to assess appropriateness of judges and prosecutors for open employment.[24] One of the major objectives of this reformatory process is to strengthen the responsibility of the performance of judges and prosecutors to restore legal certainty within society. The new Albanian Vetting law provides a legal ground for intensive examination and assessment of abilities, competencies, personality, resources, and other specified perspectives of a given person.[25] Staff being involved in exercises that poses questions concerning their judgment and professionalism, incur the sanctions, such as removal from the office, and post-employment prohibition of engaging in similar work assignments.

Two special bodies have been established to carry out the review process. The IQC and the Appeals Chamber Court (hereinafter: ACH). In other words, this process does not occur within the existing regular court system since the judge is subject to evaluation. These bodies are supervised by an IMO composed of judges and prosecutors elected by different EU Member States. Such a international oversight force reviews the process playing an oversight and support role throughout the process.[26] In line with this strategy, IMO is with no decision-making powers and sticks to the observing and supporting role in the

[21] Refer to: www.reformanedrejtesi.al/ndryshimet-kushtetuese (29. 9. 2022).

[22] Law on the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania, *Official Gazette of the Republic of Albania,* no. 84/16. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e (29. 9. 2022).

[23] Law on the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania, *Official Gazette of the Republic of Albania,* no. 84/16, Art. 1. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e (29. 9. 2022).

[24] Maxhuni B. &Cecchi U. 2017. *An Analysis of the Vetting Process in Albania. Policy Analysis No.01/2017*. Available at: https://www.legalpoliticalstudies.org/ (29. 9. 2022).

[25] *Ibid.*

[26] *Ibid.*

process. The Public Commissioner Institution represents and protects the public interest in the re-evaluation process. It is guided by the principles of independence and impartiality.

The Public Commissioner does exercise its activity in accordance with the Constitution of the Republic of Albania, the law on the revaluation, all the relevant pieces of national legislation, and ratified international agreements. It rigorously respects the principle of due process and aims to develop a transparent activity, that stores the private data of the parties involved in the re-evaluation process of vetting.

Every member of the judiciary and prosecution shall pass the vetting process to stay in the system.[27] The IQC and the AC, as provided by Article 179/b, paragraph 5 of the Constitution, are the institutions that will decide on the final evaluation. The decision shall be based on one or several components or on an overall evaluation of all three key components.[28]

When it comes to the main objectives concerning this viable institutional procedure, first and foremost to be considered is to bring appropriateness for public employment by evaluating judges and prosecutors. This reformative measure nourishes coherence, unification, and integrity in public sector and re-establishes trust in the government and institutions by the whole population. The process relates to public sector areas since those areas such as the army, police and judiciary are more subject to the infringement of rights. The Vetting Law lays down criteria for controlling the evaluation and investigation skills of the judges and prosecutors. The vetting process might involve one or more institutions, where human rights violations have taken place. The screening process and practices are introduced by the vetting procedures to prevents violations of law. These measures seem important and inevitable to finally align the framework governing the Albanian judiciary with the European standards.

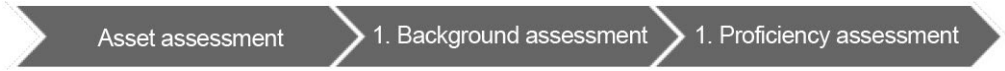
Under Article 179, paragraph 5 of the Constitution, the assets, background, and proficiency of judicial subjects are the three main elements taken into consideration in the assessment and evaluation of the vetting procedure. The two foreseen institutions, the FIC and the AC, decide based on these three components, completing an overall evaluation. The assets are included in an all-inclusive audit of properties, further followed by a declaration which verifies the legitimacy of their origin. When it comes to the third element, the background consists of the verification of other data which are used to identify potential associations with other individuals who are involved in organized crime. Lastly, the so-called proficiency element consists of making sure that every subject will go through a process of evaluating his/her professional skills. This assessment also includes the estimation of organizational and ethical skills, as well as individual qualities which are anticipated by law.

According to the Albanian Constitution, the IQC will conclude the vetting process in five years (by the year 2022) in the first instance, and the AC will fulfill it in nine years in the second instance. The IQC undertakes an unbiased investigation of each magistrate and makes a conclusion based on the evaluation requirements. The magistrate or the Public

[27] *Ibid*. Law on the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania, Official Gazette of the Republic of Albania, no. 84/16, Art. 4. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e (29. 9. 2022).

[28] Law on the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania, *Official Gazette of the Republic of Albania,* no. 84/16, Art. 6. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e (29. 9. 2022).

Commissionaire, who advocates for the public concerns in the vetting process, may pursue the matter to the AC. The Constitutional Court's AC may affirm, modify, or invalidate the IQC ruling after finally hearing the evidence in the second instance. The Vetting Law proclaims in its provisions the three main criteria upon which the bodies of the process, specifically the IQC and AC will conduct the re-evaluation process for the subject.[29] The Vetting Law stipulates that the vetting process for the related subjects has been conducted or will be conducted under one or the three below-mentioned criteria:



In this regard, the Vetting Law describes the three pillars of controlling and verification process:

- assets (information relating to the person's assets and their origin, a description of the person's income and liabilities, and a list of other related persons);
- background (information relating to the person's particular details, address history, education and other qualifications, employment history, and questions concerning links to organized crime);
- proficiency (requires evaluation and assessment whether their ethical and professional activities follow the Vetting Law).[30]

Until 24th of January 2022, the FIC has issued 496 decisions (approximately 62%), consisting of 194 confirmations in office; 183 dismissal decisions; 75 terminations of the process; 34 conclusions of the process; and two decisions on suspension from office. The number of dismissals and terminations from the vetting bodies to date indicates that the perceived high level of judicial corruption was correct. It is the obligation of the established Prosecution Office to conduct the proper investigation of the dismissed judges as indicated by the vetting institutions for possible criminal incrimination. The fact that corrupted magistrates are dismissed does constitute a positive step, but on the other hand, a solution for the recruitment of new magistrates has yet to be found. The Justice Reform is still an ongoing process, but European Commission's recommendation stands for the continuation of the re-evaluation vetting process.

3.1. Case Study: Justice Reform Before the European Court of Human Rights: Justice of the Constitutional Court of Albania: Mrs. Altina Xhoxhaj

Mrs. Altina Xhoxhaj was one of the five members of the Constitutional Court who was dismissed by the vetting process. She was the first of the dismissed judges that land the case to the European Court of Human Rights (hereinafter: ECtHR). The ECtHR rendered the

[29] Law on the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania, Official Gazette of the Republic of Albania, no. 84/16, Art. 4. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e (29. 9. 2022).

[30] Skëndaj, E. *et.al.* 2020. *Vettingu i gjyqtarëv edhe prokurorëve (Për vendimmarrjen dhedinamikën eveprimtarisë së institucioneve të rivlerësimit kalimtar).* Albanian Helsinki Committee.

decision in the case *Xhoxhaj v Albania*, finding that the entire process was not in violation of the European Convention on Human Rights (hereinafter: ECHR).[31]

Following the internal procedures, after appealing to the AC, Mrs. Xhoxhaj filed a lawsuit in the ECtHR, invoking alleged violation of Article 6 paragraph 1, and, Article 8 of the ECHR considering the decision of the FIC, that dismissed her from the position of the justice of the Constitutional Court of Albania and prohibited her to be part of the judicial and prosecutorial system for almost 15 years.

The ECtHR came to the conclusion that there was no violation of Article 6 paragraph 1, since the procedures had been regular, the vetting bodies (FIC and AC) had been independent and impartial, while the examination of the petitioner's appeal in a public hearing by the AC had not been necessary and the principle of legal or judicial certainty was not violated at all.[32] Moreover, the ECtHR found that there was no violation of Article 8 of the ECHR, as the dismissal from office had been proportionate and the permanent legal prohibition to re-enter the justice system due to serious disciplinary violations had been consistent with the guarantees of the integrity of the figure of the magistrate and with public trust in the justice system.[33]

- Case of Married Judges in the System: Niko Rapi- Miliana Muca

One of major problems that has been faced during the re-evaluation process was the application of double standards by the FIC in some cases where examined judges, or prosecutors turned out to be spouses. In that context, the case of Rapi-Muca and the case of Reka-Reka will be analyzed.

Mrs. Miliana Muca, judge of the Special Court Against Corruption and Organized Crime, faced the re-evaluation process at the IQC. Mrs. Muca, who was investigated in terms of all three criteria, was asked for explanations only regarding the source of the parents' income in 2008 and regarding the declaration of the contract for the purchase of a house with a delay of one year.[34] The FIC and AC qualified her for the position of Judge in the Special Court Against Corruption and Organized Crime and confirmed her tenure.[35]On the other hand, her husband Mr. Niko Rapi was dismissed with the reasoning as follows:

" In line with Article 4, paragraph 2 of the Law No.84/2016, "On the Transitional Reassessment of Judges and Prosecutors in the Republic of Albania", the judging panel of the

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[31] Strasbourg rejects the complaint of former judge Altina Xhoxhaj 2021. Available at: https://www.reporter.al/2021/02/09/strasburgu-hedh-poshte-ankimin-e-ish-gjyqtares-altina-xhoxhaj/ (29. 9. 2022).

[32] ECHR judgment 2021. Judgment of February 9, 2021. Application no. 15227/19, *Xhoxhaj v Albania.* Available at: https://hudoc.echr.coe.int/fre# {%22itemid%22: [%22001-208053%22] (29. 9. 2022).

[33] ECHR judgment 2021. Judgment of February 9, 2021. Application no. 15227/19, *Xhoxhaj v Albania.* Available at: https://hudoc.echr.coe.int/fre# {%22itemid%22: [%22001-208053%22] (29. 9. 2022). Strasbourg rejects the complaint of former judge Altina Xhoxhaj 2021. Available at: https://www.reporter.al/2021/02/09/strasburgu-hedh-poshte-ankimin-e-ish-gjyqtares-altina-xhoxhaj/ (29. 9. 2022).

[34] Judge Miliana Muça faces the vetting 2020. Available at: https://www.reporter.al/2020/01/31/gjytarja-miliana-muca-perballet-me-vetingun/ (29. 9. 2022).

[35] Independent Qualification Commission of the Republic of Albania. Decision no. 234 of February 4, 2020. Available at: https://kpk.al/wp-content/uploads/2020/02/Vendim-Miliana-Muca.pdf (29. 9. 2022).

Independent Qualification Commission found that the subject of the revaluation, with his actions, has violated the public trust in the justice system. The said judging panel decided based on the overall evaluation of the case, considering several aspects, such as the balance between the right to the limited and public interest, the tool used in relation to the situation that dictated it, and the goal that was intended to be achieved. It referred to point and evidence c, paragraph 1 of Article 58, as well as to point d, paragraph 5 of Article 33 and paragraphs 3 and 5 of Article 61, of Law No. 84/2016. By doing so, the trial body of the aforementioned Commission, decided to dismiss the subject of re-evaluation, Mr. Niko Rapi, from the position of a judge of the District Court of Tirana."[36]

- Shpetim Reka and Flora Reka

The prosecutor of Durrës, Flora Reka, was confirmed in office by a majority of votes a few weeks after the dismissal of her husband from the position of a judge, for similar findings in the criteria of wealth and figure.[37] During the hearings, judge Shpetim Reka was faced with findings on suspicions of concealment of wealth, for the benefit of a land plot in Himara contrary to the law; as well as with other findings about the property for which he gave an explanation.[38] The conclusions of two decisions were totally different, since one spouse was confirmed in office, while the other spouse was dismissed, by using the same evaluation criteria.

To the public trust, the double standard review process is very problematic as it goes beyond the aim of the establishment of the Justice Reform and especially of the Vetting Law, and from the legal point of view is an infringement of the main constitutional principles such as legal certainty, the principle of impartiality, the principle of legality etc. The IQC justified the decision on the grounds of proportionality, arguing that two persons could not be punished administratively for the same matters. However, facing such a situation, the IMO has constantly asked the AC to rule on the case, by setting a standard for how these cases will be handled in the future.

4. EUROPEAN PATH OF ALBANIA TO JUSTICE REFORM

The Western Balkan's accession process to the EU has been one of the hardest roads that the region and its people have ever seen. One of its most difficult aspects are contained in the Copenhagen Criteria which are enshrined in Negotiation Chapter 23 for each candidate country respectively.[39] These criteria are explicitly connected with the Justice Reform that

[36] Independent Qualification Commission of the Republic of Albania. Decision no. 277, on July 21, 2020. Available at: https://kpk.al/wp-content/uploads/2020/10/Vendim-Niko-Rapi.pdf (29. 9. 2022).

[37] KPK confirms in office the prosecutor Flora Reka 2020. Available at: https://www.reporter.al/2022/03/25/kpk-konfirmon-ne-detyre-prokuroren-flora-reka/ (29. 9. 2022).

[38] KPK: Shpëtim Reka violated public trust while exercising his duties as a judge 2022. Available at: https://www.reporter.al/2022/04/11/kpk-shpetim-reka-cenoi-besimin-e-publikut-gjate-ushtrimit-te-detyres-se-gjyqtarit/ (29. 9. 2022). Independent Qualification Commission of the Republic of Albania. Decision no. 512, on February 25, 2022. Available at: https://kpk.al/wp-content/uploads/2022/03/Vendim-Shpetim-Reka.pdf (29. 9. 2022).

[39] Chapter 23: Judiciary and fundamental rights, Chapter 24: Justice, Freedom and Security & European

each Western Balkan country shall undertake towards the strengthening of the rule of law and fundamental rights in ensuring a stable and functional democracy dignified to join the EU. It should be noted that the vetting formula as presented in Albania can be considered a 'two-sided coin' of different values. The first side of the coin is that the EU has required it to be a pre-condition for the country's accession to the EU nevertheless that it implies entering into a costly process which will be a case study for the rest of the Western Balkan countries on their road to the EU membership.[40] The other side of the coin is that the reform and especially the vetting process is seen as an erroneous reform which is undesirable for the other countries in the EU accession process, such as North Macedonia, Bosnia, and Herzegovina or Kosovo*[41] as well as for those that have already opened the accession negotiations e.g. Serbia and Montenegro. All these countries have different approaches to the legal reforms of their justice system by perceiving the painful example of Albania.[42] Despite the continuous support of the Justice Reform by the international actors, Albanian scholars, lawyers, academics, and media stakeholders claim that the reform has been a 'failure' since it paralyzed the functionality of the country's institutions mainly of the courts and prosecution offices for more than 12 years.[43]

Since 2017, Albania went through a fundamental revision of its justice system in 'an attempt' to offer an unbiased, accountable, independent, and professional system in compliance with EU standards.[44] With the support of the EU and the USA,[45] the reform was consolidated on paper by making it the best possible solution for the EU agenda.[46] The EU Progress Report of 2021, has stated that the country has made 'steady progress in implementing a comprehensive justice reform, underpinned by the strengthened legislative framework and the unprecedented vetting process, which have continued to deliver tangible results'.[47] The fact that the Constitutional Court and High Court were able to function with the new appointments of the new justices into these courts was interpreted as positive remarks by the EU in the said progress report. Despite the actions taken, there is a need for serious attempts and measures in establishing a functioning judiciary in all instances.

Commission, Directorate-General for Communication, *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans: six new flagship initiatives to support the transformation of the Western Balkans,* Publications Office. 2018. Available at: https://data.europa.eu/doi/10.2775/902991 (29. 9. 2022).

[40] Nela, I. 2021. *Lessons learned from the justice reform in Albania*. Vienna: ÖGfE Policy Brief, p. 24.

[41] 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.

[42] Exit Staff 2022. *Former EU Integration Minister Levies Strong Criticism at Albanian Justice Reform. Exit.al.* Available at: https://exit.al/en/2020/10/12/former-eu-integration-minister-levies-strong-criticism-at-albanian-justice-reform/ (29. 9. 2022).

[43] On a public statement regarding the reform, President of the Republic Ilir Meta said: "If the reform had been successful, we would now have a functioning Constitutional Court".

[44] Assembly of Albania. 2020. *Justice Reform Albania.* Available at: https://euralius.eu/images/2020/JUSTICE-REFORM-BROCHURE-2020-03-30.pdf (29. 9. 2022).

[45] Joint press release announcing the constitution of the International Monitoring Operation Management Board 2017. Available at: https://www.eeas.europa.eu/node/20139_en (29. 9. 2022).

[46] Bakiasi, M. 2021. *Policy Paper: Albanian judiciary under construction.* Institute for European Policy, p. 2.

[47] European Commission. 2021. *Albania 2021 Report*. pp. 18-20.

When it comes to recommendations for Albania on the Justice Reform it should be mentioned that there is a need for further and quick advancement in the re-evaluation process of the judges and prosecutors. Another recommendation is to consolidate the capacity of the judicial system and governance of the institutions by finalizing and implementing the new judicial map.[48] These two recommendations have been formally fulfilled by the Albanian institutions. The first recommendation was approved within some months almost unanimously with 118 votes in extending the mandate of the key-justice vetting bodies until 31st of December 2024.[49] This action was taken in compliance with the Venice Commission Opinion that the extension was in line with European standards.[50] In the opinion issued by the Venice Commission, it was noted that there is a need for the country to increase the resources of the vetting bodies and to rationalize vetting procedures. It is the obligation of the Albanian legislature to ensure and prove that the vetting procedures are not artificially prolonged to avoid endangering of the proper functioning of the judiciary system.[51]

The second recommendation that the Albanian government fulfilled was the approval of the new judicial map by decreasing the number of the courts. More specifically, reorganization of five appeal courts into one appeal court in Tirana as of 1st of February 2023and merging of four Administrative Court into two administrative courts (one in Tirana and one in Lushnjë respectively) took place.[52] Despite the controversial consultation processes, the High Judicial Council and the Ministry of Justice did not take into consideration the lawyers' opposition and the statements of the important civil society organizations which criticized the new judicial map.[53] Their critique emphasized the inaccessibility of the courts due to infrastructural criteria, financial insufficiencies, and the backlog of cases that the Administrative Court of Appeals has for the time being amounting to 12,810 carryover cases. The approval of the new judicial map led to the boycott of the advocates in their representation in civil, criminal, and administrative judicial cases until 21st of July 2022 for around two months.[54] The Council of Ministers' Decision on the new judicial map will be appealed at the Constitutional Court by the National Chamber of Advocacy as stated by the Chair of this Chamber Prof. Dr. Maksim Haxhia.[55]

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[48] *Ibid*, p. 18.

[49] Albanian Parliament Extents Mandate of Justice-Vetting Bodies 2022. Available at: https://balkaninsight.com/2022/02/10/albania-parliament-extends-mandate-of-justice-vetting-bodies/ (29. 9. 2022).

[50] CDL-AD 2021)053-e. Albania - Opinion on the Extension of the Term of Office of the Transitional Bodies in charge of the re-evaluation of Judges and Prosecutors, adopted by the Venice Commission at its 129th Plenary Session, pp. 8. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)053-e (29. 9. 2022).

[51] *Ibid*, pp. 5.

[52] HCJ. 2022. *Vendim 'Përmiratimin e raportitvlerësuespërfundimatrmbirioganizimin e rrethevegjyqësoredhekompetencavetkoësoretëgjykatave*'. Available at: http://klgj.al/wp-content/uploads/2022/06/vendim-i-grupit-te-punes-1.06.2022.pdf (29. 9. 2022).

[53] See: Public Statement - Critique of Proposals for the New Judicial Map for Albania 2022. Available at: https://ahc.org.al/wp-content/uploads/2022/02/Judicial-Map-Legal-Critique.pdf (29. 9. 2022). The government ignores the criticism and approves the new judicial map 2022. Available at: *https://www.reporter.al/2022/07/21/qeveria-injoron-kritikat-dhe-miraton-harten-e-re-gjyqesore/* (29. 9. 2022).

[54] See: Lawyers announce 'indefinite boycott' over new judicial map 2022. Available at: https://www.dhka.org.al/index.php/hyrje/njoftime/247-njoftim-18 (29. 9. 2022).

[55] *Ibid*.

The outcome of this reform created almost an 'empty judiciary' by making the country's court paralyzed for a considerable time. For instance, during the vetting process, only one constitutional justice passed the vetting Mgj. VitoreTusha and consequently there was Constitutional Court for almost two consecutive years in Albania. In other words, it was not possible for citizens and other actors to have access to the court nor to challenge the constitutionality of the acts issued by the Government such as the case of the demolition of the National Theatre where we can say that the circumstances of not rendering a decision by the Constitutional Court led into the demolishing of the theatre. [56] In a similar vein, the decision of the National Assembly on the dismissal of President of the Republic H.Mr. Ilir Meta which was repealed by the Constitutional Court may serve as an illustrative example.[57] These examples are only the 'Aisberg' on the dysfunctionality of the justice system during the late years after the implementation of the reform.

During the evaluation process, the criteria pertaining to asset assessment were considered unjustified by most of the prosecutors and judges.[58] It should be emphasized that in a considerable number of cases some judges or prosecutors were dismissed if they could not justify their assets. In other words, the failure to fulfill one of three set criteria was sufficient to dismiss them by not taking into consideration the two remaining criteria (proficiency and background related criteria).[59] That can be explained by the fact that the fulfillment of assets criteria is fundamental to fight corruption within the system. However, it should be kept in mind that these decisions might jeopardize the trust of the public in the judicial institutions regarding their proficiency and efficiency since the evaluation was not made based on all three constitutionally defined criteria. Meeting the European standards does not mean just cleansing the system from the corrupted, unprofessional, and 'malicious' judges and prosecutors but there is a need to punish the magistrates who are or have had any kind of relationship with the criminal activities.

In this regard, the vetting process to meet European standards and to achieve designated goals is set at the very beginning by the Albanian Government with the support of the EU and the USA. It should be accompanied by a scrutinized process of punishing the crime-related magistrates.[60] In this regard, the IMO was established to monitor the vetting process. Despite the fact that the IMO does not have decision-making power, it plays a crucial role during the vetting process and has an active role in the filing of findings and different opinions. Such was a case with Mgj. Elisabeta Imeraj who was a Head of the Tirana

[56] Demolition of Albanian national theatre sparks angry protests 2020. Available at: https://www.reuters.com/article/us-health-coronavirus-albania-theatre-idUSKBN22T0FV (29. 9. 2022). Albania's Constitutional Court Suspends National Theatre Proceedings 2021. Available at: https://balkaninsight.com/2021/07/02/albanias-constitutional-court-suspends-national-theatre-proceedings/ (29. 9. 2022).

[57] See: Constitutional Court Decision of February 16, 2022, no. 1/22. Constitutional Court to Review First Ever Dismissal of an Albanian President by Parliament 2021. Available at: https://exit.al/en/2021/11/17/constitutional-court-to-review-first-ever-dismissal-of-an-albanian-president-by-parliament/ (29. 9. 2022).

[58] Skëndaj, E. *et. al.* 2020. *Vettinguigjyqtarëvedheprokurorëve (Përvendimmarrjendhedinamikën e veprimtarisësëinstitucionevetërivlerësimitkalimtar).* Albanian Helsinki Committee.

[59] Skëndaj, E. *et. al.* 2020. *Vettinguigjyqtarëvedheprokurorëve (Përvendimmarrjendhedinamikën e veprimtarisësëinstitucionevetërivlerësimitkalimtar).* Albanian Helsinki Committee, p. 7.

[60] The Netherlands wants Constitutional Court and media law prior to EU-Albania Talks 2020. Available at: https://europeanwesternbalkans.com/2020/11/03/the-netherlands-wants-constitutional-court-and-media-law-prior-to-eu-albania-talks/ (29. 9. 2022).

District Prosecution Office where the Public Commissioner with the active support of IMO appealed the decision of the FIC which confirmed Mgj. Imeraj in office.[61] The AC by the Constitutional Court dismissed Mgj. Imeraj bythe Decision no. 11, date 27.04.2022.[62] During the vetting process of Mgj. Imeraj, different NGOs submitted a claim to the Commissioner for the Right to Access to Information and Personal Data Protection in order to start an investigation on breaching of the private data and intimidation of two journalists by the families of the vetted magistrate.[63] This is a case where it can be shown that the high-profile vetted magistrates are usually pressuring and intimidating the journalists and free media by attempting to jeopardize the transparency and freedom of media in Albania.[64]

Although the Justice Reform is to be considered a lesson learned for Albania and the EU, it is noteworthy that the EU highly supports the Albanian authorities to increase their capacities and fill the gaps left by the reform to implement a more professional and trustworthy justice system. Aiming to achieve comprehensive reform in line with the EU Strategy for the Western Balkans,[65] the European Commission has approved the annual Action Plan for Albania for 2021 which will be implemented within three years with the amount of 15 million Euros. The said Action Plan is envisaged to support the capacity building of the Albanian justice system and particularly to introduce a modern case management system on the road to legal approximation and harmonization of the Albanian framework with EU standards.[66]

5. CONCLUSION

The accession process of Albania will be a hard and 'painful' process not only because the legal framework will be aligned with the EU *a*cquis, but also because such a framework must be properly implemented by competent and trustworthy institutions. In this regard, the EU judicial authorities will be able to rely on Albanian judicial authorities that the later will implement the decision properly. There is a continuous work on the alignment of Albanian legislation with the Roadmap Directives. However, the existence of the legal acts shall be guaranteed in practice to demonstrate the readiness of the country to join the EU.[67]

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[61] The Institution of Public Commissioners 2021. Press Release. Available at: http://ikp.al/en/2021/07/05/press-release-209/ (29. 9. 2022).

[62] Constitutional Court – Special Appeal College. Decision no. 42/2021 of July 27, 2021. Available at: https://kpa.al/wp-content/uploads/2022/06/Vendim_Elizabeta_Imeraj_anonimizuar.pdf (29. 9. 2022).

[63] Albania: RSF asks for effective investigations following the intimidation of journalists reporting on prosecutor's vetting 2022. Available at: https://rsf.org/en/albania-rsf-asks-effective-investigations-following-intimidation-journalists-reporting-prosecutor-s (29. 9. 2022).

[64] *Ibid.*

[65] European Commission, Directorate-General for Communication. 2018. *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans: six new flagship initiatives to support the transformation of the Western Balkans*. Publications Office. Available at: https://data.europa.eu/doi/10.2775/902991 (29. 9. 2022).

[66] ANNEX I to Commission Implementing Decision on the financing of the annual action plan in favour of Albania for 2021 - Action Document for "EU for Justice" 2021. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-01/C_2021_9730_F1_ANNEX_EN_V1_P1_1674609.PDF (29. 9. 2022).

[67] See: Roadmap to the EU: Membership through criminal justice reform in Albania 2020. Available at: https://crd.org/wp-content/uploads/2021/03/Roadmap-to-the-EU-ENG.pdf (29. 9. 2022).

The EU held the first intergovernmental conference with Albania on 19th of July 2022 and now the one-way road begins where the politics is in charge not only of implementing tectonic reforms for the country on paper but also to show tangible results with concrete agenda. If we carefully observe the EU reports on Albanian progress regarding the Justice Reform, we shall highlight that the reform started before the negotiation process and at this point, Albania is ahead of its Western Balkan siblings on the path toward the EU. What remains to be done is the well-functioning of the newly created institutions despite the difficult political times that the EU and Western Balkans are facing. The Justice Reform is considered by many as a skeptic movement by the government because it was executed in a difficult moment with a lack of institutional capacities and almost no political will. Nevertheless, it should be said that the Justice Reform is considered a lesson learned for Albania and the EU which hopefully will bring the country and regions towards successful endeavors in establishing a functional democracy and ensuring good governance throughout the country.

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SPECIFICITIES OF RECRUITMENT AND SELECTION IN THE DEFENCE SECTOR – THE CASE OF MONTENEGRO

The paper analyses key specificities of recruitment and selection in the defence sector, providing an example of Montenegro. Personnel in ministries of defence and armed forces are public servants and constitute a part of national administrations in a larger sense, which need genuine professionals. From the legal point of view, there are usually several categories of staff within the defence sector: civil servants, military officials and civilian personnel in the armed forces, which all have some specificities due to the nature of the work they carry out in the public service. The paper first analyses key international standards on recruitment and selection in the public service and those which are specific for the defence sector. The central part of the paper examines key contentious issues in the legal framework regarding recruitment and selection in the defence sector of Montenegro, especially exemptions from the open competition rule, ministerial discretion in appointing the candidate from an open list, and the lack of a possibility to challenge security clearance decisions of perspective candidates (for military personnel and civilian personnel in the army). The authors conclude that although it is relatively easy to pinpoint necessary legal changes to improve the current system, it is not very likely that the system will be changed without a strong and unwavering political support, which will be able to force the holders of excessive powers to release it and ensure the observance of the merit principle.

Keywords: legal framework, recruitment and selection, defence sector, Montenegro.

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1. INTRODUCTION

Over the past decades a demand for effective human resource management (hereinafter: HRM) in the military and for highly capable commanders, officers and soldiers of various specialties has increased. The ongoing horrors of war between Russia and Ukraine have additionally shed the light on the importance of the effective defence sector and motivated armed forces staff. Notwithstanding the changes of the nature of the military organisations in the XXI century, which are often described as "postmodern military organisation" with multipurpose mission (Moscos *et al*, 2011, pp. 5-6), the combat readiness and effectiveness of the professional army still increasingly depend on the quality of its fighters and leaders (Keegan, 1988. Kuronen & Huhtinen, 2015, p. 177).

HRM system in the defence sector often represents an arena of conflicting interests and ambitions of key defence system actors, including the political leadership, military officials, representatives of military intelligence services and civil servants (Hadzic, 2021, p. 6). In order to limit possibilities of discretionary powers of various actors involved, it is important to establish a sound legal HRM system, which will be able to, at least to some extent, absorb these various pressures and enable the application of the merit principle. If this cannot be achieved, all elements of the HRM system, especially recruitment in the military service (and later promotion and appointment to key military duties), may be subject to corruption practices, which further increases the possibilities for intrusion of clientelist links and even the criminal practices in the military and the defence systems (Hadzic, 2021, p. 6).

While the contentious issues of recruitment and selection in the civil service in Europe have been discussed quite extensively in the academic literature over the past decades (Ongaro, 2009. Kopecky *et al*, 2012. Vukašinović Radojičić, 2013. Van der Mer, 2015. Meyer-Sahling *et al,* 2015. Meyer-Sahling *et al,* 2019. Meyer-Sahling *et al,* 2021), the comparative literature on HRM in the defence sector has been much scarcer and more modest (Sofat, 2016. Cardona, 2022). In the South East Europe, issues of HRM in the defence sector are usually discussed at the national level (Cvijan, Reljanović 2007. Ignjatijević, 2020. Đokić, Ignjatijević, 2020. Lembolovska, 2020. Barjamspahić, 2020) and more rarely from the comparative perspective (Rabrenović, 2013. Milošević, 2013).

The objective of this paper is to shed more light on the specificities of the recruitment and selection in the defence sector, especially in the process of recruitment and selection. This shall be done by providing an example of Montenegro, which is a member state of North Atlantic Treaty Organisation (hereinafter: NATO) and a candidate for the European Union membership.

In order to attain this objective, the paper is organised within three key parts. The first section of the paper examines the international legal standards regarding recruitment and selection of the public sector employees, with the special focus on the defence sector, which serves as a benchmark for assessing the respective Montenegrin legal framework and its implementation. In the second, central part of the paper, the relevant provisions of the Civil Service Law and the Law on Armed Forces of Montenegro will be assessed. The concluding section of the paper shall attempt to define an explanatory framework for the

lack of effectiveness of the recruitment and selection rules and provide guidance on what would be the best ways to improve the current situation.

The methodology of writing the paper included primarily the analysis of the primary and secondary legislation regarding the HRM in the Montenegrin defence sector - civil service and military personnel. Reports of international organisations and NGOs were also used to shed the light on the actual HRM practices.

2. INTERNATIONAL RECRUITMENT AND SELECTION STANDARDS IN THE PUBLIC SERVICE

At the beginning of this discussion, it is important to bear in mind that all categories of staff in the defence sector, including civil servants, military officials and civilian personnel in the military are public servants and hence their recruitment and selection should be based on a principle of equality and merit. Civil servants and military officials are part of national administrations in a larger sense, which need genuine professionals (Cardona, 2022, p. 1). The principle of equality in the recruitment and selection of staff in the defence sector stems out of the constitutional principles that every citizen has a right to public employment, provided that he/she meets the general requirements established by law as well as the specific requirements set up in the vacancy notice (Cardona, 2006, p. 2). In a broader sense, the merit principle can be defined as the setting up of a special public administration value system, based on professionalism, competence and integrity to pursue the public interest (Ingraham, 2006, p. 486). It represents a counterbalance to that of political loyalty, popularly known as the "patronage or the spoils system", in which public administration posts are filled solely on the basis of political connections instead of professional merit (Pusić, 1973).

Although the area of HRM in the public sector is not, as such, subject to specific international standards, the observance of the merit principle in the recruitment and selection of civil servants is a cornerstone of the most international instruments. For example, the UN Convention against Corruption (2003) especially emphasizes the importance of merit and transparency in the recruitment process of public servants. In the similar vein, the Council of Europe's Recommendation No. R (2000) 6 on the Status of Public Officials in Europe, stresses the need for the existence of legal framework concerning the status of public officials and recruitment and selection based on merit and fair and open competition.

2.1. SIGMA/OECD standards on recruitment and selection in the public service

The European Commission's approach to HRM in the public service was for a long time based on the application of the European principles of administration and European Administrative Space (Sahling, 2011, p. 236). The concept of the European Administrative Space was developed in the late 1990s by SIGMA/OECD[1] on behalf of the European

[1] Having recognized the importance of well-regulated and organized state administration for compliance with membership requirements in all sector areas, in 1992, the European Union and Organisation for Economic Co-operation and Development (hereinafter: OECD) founded SIGMA - *Support for Improvement in Governance*

Commission, as a system of multi-level governance, which is based on principles of legal certainty and predictability, openness and transparency, legal accountability, efficiency and effectiveness (OECD, 1999, p. 14).

To provide a more detailed elaboration of the European Commission's HRM requirements, including recruitment and selection in the public service, SIGMA/OECD programme prepared a document entitled "Principles of Public Administration" (SIGMA/OECD, 2014) (hereinafter: Principles), which was produced in 2014 and revised and updated in 2017 (SIGMA/OECD, 2017). Recruitment and selection of public servants is one of the areas covered in the Principles, within the field of HRM. It is important to note that the Principles stress that they are applicable not only to the civil service positions, but also to other public service positions, which include those "ensuring the security and constitutional order of the state and permanent military defence of the state and related preparation" (SIGMA/OECD, 2017, p. 39).

The key SIGMA principles regarding recruitment and selection for public servants are presented in the table 1. below.

Table 1. SIGMA/OECD Principles of Public Administration - Public Service and HRM chapter – section on recruitment and selection

Principle 3: The recruitment of public servants is based on merit and equal treatment in all its phases
1. The recruitment and selection process in the public service, whether external or internal and regardless of the category/class of public servants, is clearly based on merit and equal opportunity.
2. The general eligibility criteria for applying for public service positions and general provisions ensuring the quality of the recruitment are established in the primary legislation. The detailed procedures, including specific requirements for entering each category/class, job descriptions, competency profiles, selection methods, scoring systems and composition of selection committees, are mainly covered by secondary legislation.
3. The recruitment and selection committees include persons with expertise and experience in assessing different sets of skills and competences of candidates for public service positions, and there is no political interference.
4. Candidates who are not appointed have the right to appeal against unfair recruitment decisions.[2]

If we look at the best European practices, we can see that the merit principle is further operationalised in recruitment and selection process through several mechanisms: public

and Management. This programme aims at supporting public administration reform activities of (potential) European Union candidate countries. SIGMA, largely financed through the European Union, represents one of the main European Commission's instruments for promoting the development of public administration capacity in Central and Eastern Europe, and providing technical assistance to (potential) candidate countries.

[2] SIGMA also underlies the need for eliminating any kind of discrimination in this process. We are not going to deal with issues of discrimination in the recruitment process and for those employeed, in accordance with the principle of equal treatment, as it goes beyond the limits of this research.

announcement of vacancies, which should be a mandatory method of entrance in the civil service without an exception, and which should include the following elements: job description and the main components of the recruitment process including tests to be carried out, the areas to be tested, the weights to be assigned to each component and any threshold points which will be used in the examination (Cardona, 2022, p. 4). Good European practice also requires tests to include both written examinations and oral tests – interviews (Meyer-Sahling, 2015, p. 29). Furthermore, the general rule should be that the best candidate is appointed at the advertised position, but if the appointing authority chooses other than the top person on the list of scores, a legitimate justification should be offered (Cardona, 2022, p. 5). Giving reasons for administrative decisions forms part of the European good administration principles (Article 41 of the Charter of Fundamental Rights of the European Union). Courts and reviewing instances should have the right to review all documents, tests and examinations which grounded the recruitment decision in its all and every aspect, including a possible security clearance of the candidate (Cardona, 2022, p. 5).

2.2. International standards on recruitment and selection in the military – still a long way to go?

It may be argued that a need for merit-based recruitment practices is even more pronounced in the military compared to the non-military organisations, such as the civil service. This is mostly because the military is recruiting mostly for entry level, and more rarely for middle career levels (Patrichi, 2015, p. 77). After the recruitment, the military staff is promoted within the armed forces only through different military ranks. Furthermore, advanced military technologies and new operational concepts require a different category of personnel in comparison to the needs of the previous centuries. For this reason, not only the quantity of the personnel matters, but the quality, i.e. specific competences of perspective candidates for the armed forces should have, such as integrating different platforms in an innovative and comprehensive way and being capable for innovation and assumption of calculated risks (Patrichi, 2015, p. 78).

In spite of the fact that SIGMA HRM principles are applicable to the public service, including the military officials, the specificities of HRM in the military do not appear to be adequately covered within this framework. There seems to be a lack of standardised rules and procedures for HRM in the military within the European continent. The only organisation which appears to attempt to deal with these issues is the NATO organisation, which has issued several reports and guidance on how to manage personnel in the military organisation for their member states.

One of the key NATO reports which deals with the issues of recruitment and selection was prepared in 2007 (NATO, 2007). The report pays special attention to good practices in recruiting and selecting professional military members, as well as in their retention, but does not deal with all the details of the recruitment and selection process. The report underlines that defence ministries have to be proactive in seeking candidates, while making sure that candidates are given detailed and realistic information about military service. Failure to meet initial expectations of employees leads to their dissatisfaction with the job

and higher rates of voluntary turnover. It is also recommended that in the recruitment process, managers and human resource specialists should cooperate closely with military leadership at all levels. The report stressed the importance of ensuring properly documented selection process, especially the oral interview, to provide evidence in case of appeals (NATO, 2017, pp. 3B-14).

In 2020, the NATO Defence Education Enhancement Programme has also developed the Non-Commissioned Officers Corps Professional Development Reference Guidance (NATO, 2020), presenting standards pertaining to non-commissioned officer resource management. This document serves as a reference for NATO member states, in their efforts to identify the areas that are critical for the development of professional non-commissioned officers. As concerns recruitment, emphasis is placed on focused campaigns to attract professional military personnel and to give tailored incentives for more demanding and challenging military positions. There is, however, again a lack of more detailed standards/instructions on how to manage the recruitment and selection and other aspects of HRM in the military.

3. RECRUITMENT AND SELECTION OF CIVIL SERVANTS IN THE MINISTRY OF DEFENCE IN MONTENEGRO

The majority of personnel in the Montenegrin MoD are civil servants, who fall under the legal regime of civil servants governed by the Civil Service Law.[3] Therefore, the MoD does not have much autonomy in the recruitment and selection process and is obliged to follow the procedures of the Civil Service Law and a Government Decree, which outlines recruitment and selection procedure in more detail.[4]

Recruitment and selection process is carried out by an *ad hoc* competition commission, which is established for each competition procedure. In case of lower and middle management civil service, a commission is comprised of a representative of the HRM Agency, a representative of the MoD and a professional evaluator for specific skills, i.e. an independent expert hired through an announcement.[5] In case of senior managerial positions, a commission is comprised of a head of an authority, senior manager and renowned independent expert.[6] In both cases, commission members include a smaller number of civil servants from the authority that is filling vacancies, and a bigger number of (at least formally) impartial persons, such as representatives of independent HRM bodies and independent experts. That should minimise the potential political influence of the authority to the applicant selection process.

A candidate selection is based on a written exam and an interview and is generally in line with the best international practices. For lower and middle management positions, the

[3] Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[4] Decree on the Criteria and Carrying Out of the Testing of Knowledge, Abilities and Competences and Skills for the Work in the State Authorities, *Official Gazette of Montenegro*, no. 50/2018.

[5] Article 46, para 3 of the Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[6] Article 56, para. 3 of the Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

written test comprises two parts: theoretical and practical, and it is done in an electronic form, under the code.[7] The objective of the theoretical part of the test is to check whether an applicant for a civil servant vacancy possesses an adequate level of knowledge in the field of public administration, necessary for the performance of civil servants' duties. The questions for the theoretical part are prepared by the HRM Administration. Minimum score for passing the test is 70 %, in which case a candidate goes to the second stage of the recruitment process.[8] In the second stage of the written test, applicants need to pass a more specific professional examination, which tests their competencies related to the specific post they are applying for. The questions for this test are prepared by the authority which initiated the announcement of the vacancy. Candidates who obtain more than 50% of the points of the written practical test, go to the next phase of the selection process, i.e. an interview.[9] The Commission prepares a report on the basis of which a list of shortlisted candidates is drawn up, which is then submitted to the manager of the public administration authority. The selection process for senior managerial positions also includes both the written test and the interview,[10] which is in line with the international standards, but there may be exceptions to this rule.

Although the legal regulation of the selection process is rather solid, there are still some weaknesses that undermine the application of the merit principle. The first one is a lack of well written job descriptions which are advertised in the vacancy announcements, which do not well specify work duties and responsibilities or the knowledge and other competencies required for carrying out of the job (SIGMA/OECD, 2021, p. 67). This makes it difficult for a commission to formulate relevant questions in the selection process. While the objectivity of the written tests appears to be secured by assigning a code to each candidate in order to preserve their anonymity, the interviews which follow the written test are not recorded and there are no standard guidelines on how to conduct them (SIGMA/OECD, 2021, p. 66), which is also not in line with the best international practices.

One of the key contentious issues in the selection process is a degree of discretion of the management of the MoD in the final state of the appointment process. In case of lower-level and mid-level civil servants, the competition commission comprises the list of the three best ranked candidates and can include more candidates if they have obtained the same mark during the selection process.[11] A head of the organizational unit in the MoD which initiated the recruitment process has a discretion to select one of the candidates from the list.[12] Before making a decision, he/she is obliged to conduct an interview with all candidates from the list. There is even a higher level of discretion in the process of appointments of

[7] Art. 6, paras. 1 and 2, Decree on the Criteria and Carrying Out of the Testing of Knowledge, Abilities and Competences and Skills for the Work in the State Authorities, *Official Gazette of Montenegro*, no. 50/2018.

[8] Art. 9, para. 1, Decree on the Criteria and Carrying Out of the Testing of Knowledge, Abilities and Competences and Skills for the Work in the State Authorities, *Official Gazette of Montenegro*, no. 50/2018.

[9] Art. 13, Decree on the Criteria and Carrying Out of the Testing of Knowledge, Abilities and Competences and Skills for the Work in the State Authorities, *Official Gazette of Montenegro*, no. 50/2018.

[10] Art. 56, para. 2, Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[11] Art. 47, Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[12] Art. 48, Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

the successful candidates for senior managerial positions. The commission proposes to the minister a list of three candidates, and the minister has the right to select any of the candidates from the list (after he/she conducts an interview with all of them),[13] without a need for written justification, which is also not line with international standards.

Although there is a general rule that the civil service is entered on the basis of the competition, there is an important exception to this rule within the Directorate for Security Intelligence Affairs of the MoD, where no competition procedure is required to hire staff. This is usually explained by the nature of the work this directorate is carrying out, which is often covered by a vail of secrecy. This exception is regulated explicitly by the Law on Military Intelligence and Security Affairs (Article 37), which states that work posts in the Directorate for Security Intelligence Affairs are filled without a competition, with the requirement of a probation work in the period of one year. This, however, goes against the principle of merit and may lead to the practice of recruiting personnel based on personal and political connections instead of professional competence. Although there are no set international standards in this specific area of intelligence security affairs, such a practice is also not in line with the practices in other European countries in intelligence security agencies (Cardona, 2022, p. 10).

There is also an additional important exception to the competition rule in the MoD and other civil service institutions in Montenegro, which is an appointment of so called „acting senior civil servants", in case when the previous appointment has been terminated, for the period of a maximum of six month.[14] The Civil Service Law envisages that appointments of acting managers are possible from any government institution and in cases in which no suitable candidate can be found. Under such circumstances, it is possible to appoint someone from outside of the civil service system for a limited period of time of up to six months.

Since the formation of the Krivokapić Government in 2020 and subsequently Abazović Government in 2022, all senior managerial staff in the MoD has had an acting status, which shows that there is still a lack of stability of the senior civil service level in the MoD. Although the category of acting manager may be a good option to use in exceptional circumstances, a category of "acting senior civil servant" has already been used overly in throughout the civil service (Muk, 2022) and is hence undermining the merit principle in the Montenegrin MoD and other civil service institutions in Montenegro.

Candidates who are not appointed have the right to appeal against unfair recruitment decisions (before an administrative instance and the court). The second instance body which decides on the appeals of candidates in the second instance procedure is the Appeals Commission,[15] and if not satisfied with the decision of the Appeals Commission candidates can bring an action to the Administrative Court.

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[13] Art. 59, Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[14] Article 61 paragraph 1, Law on Civil Servants and Employees, *Official Gazette of Montenegro*, no. 2/2018, 34/2019, 8/2021.

[15] Article 136 of the Law on Civil Servants and Employees, *Official Gazette of Montenegro,* no. 2/2018, 34/2019, 8/2021.

4. KEY STICKING POINTS IN RECRUITMENT AND SELECTION IN THE ARMY SERVICE

All persons who are admitted to the Armed Forces of Montenegro have a status of "a person in the army service" (*lice u službi u Vojsci*). Persons in the army service may have a status of a professional military pesonnel and civilians in the army.[16] Military personnel include categories of professional military personnel (commissioned and non-commissioned officers and contractual commissioned and non-commissioned officers and solgers), cadets, soldiers on training and personnel in reserve service of the army.[17]

An admission into the army service for all enlisted categories is done on the basis of a public announcement, which is in line with the international standards. There is also a possibility that a civil servant and an employee in the MoD may be recruited for service in the army and appointed to an appropriate formation position, on the basis of an internal announcement,[18] which is also not such an unusual practice in other countries.

Special attention is paid to the attraction of perspective cadets, who are also required to pass a competition procedure in order to be sent to study abroad at some international military academy, as Montenegro does not have an institution of a military academy. This is not surprising given a relatively small size of the country and the number of cadets needed each year. Each year military youth camps are organised in order to attract young population who would be interested in applying for cadets, which is in line with good international practices on proactive recruitment policies and NATO policy documents. Upon completion of their education abroad, cadets are admitted to service in the army without a public announcement if they meet the required conditions.[19]

Similar to the case of civil servants, the Law on Armed Forces of Montenegro requires a minister of defence to appoint an *ad hoc* selection committee to carry out a competition procedure for each category of personnel, but does not specify the details regarding the composition of the commission and the selection procedure. There is no requirement that the members of the commission need to be professional and competent to carry out the competition, which poses a risk for a political membership in such bodies and undue political influence in the procedure. Furthermore, the legislation does not outline any selection criteria and procedure which will be used in the competition. Instead of this, for each competition procedure an *ad hoc* membership of the commission develops special selection procedure (so-called "methodology"). This may undermine the principle of equality of candidates and may undergo different testing processes, depending on the composition of the individual commission. The procedure is also developed only after the announcement of a vacancy which does not allow the candidates to get familiarised with the process in advance, which is not in line with best international practices.

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[16] Article 5 of the Law on Armed Forces of Montenegro, *Official Gazette of Montenegro,* no. 51/2017, 34/2019.

[17] Article 6 of the Law on Armed Forces of Montenegro, *Official Gazette of Montenegro,* no. 51/2017, 34/2019.

[18] Article 49 of the the Law on Armed Forces of Montenegro, *Official Gazette of Montenegro,* no. 51/2017, 34/2019.

[19] Article 49, paragraph 6 of the Law on Armed Forces of Montenegro, *Official Gazette of Montenegro*, no. 51/2017, 34/2019.

The requirements for applying to post in the army service are rather explicitly established by the Law on Armed Forces of Montenegro. They are rather similar to those of civil servants and include, *inter alia*, the following elements: citizenship of Montenegro; minimum age (18 years old); health and psychological requirements; level of education; lack of criminal record for specific criminal offences related to constitutional system and security; humanity, rights of a man and citizen etc. and a security clearance.[20]

One of the key and perhaps the most controversial requirements during the selection process is a security clearance. It is interesting to note that security clearance is a pre-condition for all candidates applying for the army service and not for civil servants of the MoD and other civil service institutions. While the Law on Armed Forces of Montenegro just briefly mentions the security clearance as an application requirement, the security clearance procedure is governed by a separate set of legislation related to military intelligence and security affairs. It is regulated by the Law on Military Intelligence and Security Affairs[21] which was passed in 2020 and the Rulebook on Security Obstacles, adopted by the Minister of Defence in 2021.

In the past, the Agency of National Security was in charge of the security clearance, but this right has been taken away from its competence in 2020 and given to the Directorate for Security Intelligence Affairs of the MoD. The Directorate is authorised by the respective law to carry out security clearance for the perspective and existing staff in the army service[22] and to use special procedures and measures for this purpose.[23] Before the adoption of the new Law on Military Intelligence, security clearance for the military personnel and civilians in the military was in the hands of the Agency of National Security, which appears to be one of the key subjects of a (un)successful organisational and personnel reform, required by the NATO in order enable Montenegro to become a NATO member state (Petrović, 2020, p. 10).

In spite of detailed legal regulation, the security clearance in the selection procedure has been covered up by a veil of secrecy, as perspective candidates who wish to join Army service do not have the right to legally challenge it before any administrative instance or the court. This means that a candidate's application for a job in an Army service can simply be rejected on the grounds of negative security clearance decision, without obtaining any explanation for such a decision and a possibility to challenge it. This is against the constitutional provisions of Montenegro, which grant Montenegrin citizens the right to a legal remedy to any decision which concerns their right or their legally grounded interest.[24] What is more, all the provisions of the Rulebook on Security Obstacles have been classified, which means that the citizens and perspective candidates for the Army service are not able to understand the reasons for possible security vetting and how it is done.

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[20] Article 47, paragraph 1 of the Law on Armed Forces of Montenegro, *Official Gazette of Montenegro*, no. 51/2017, 34/2019.

[21] Law on Military Intelligence and Security Affairs, *Official Gazette of Montenegro*, no. 074/20.

[22] Article 5, para 2, point 8 of the Law on Military Intelligence and Security Affairs, *Official Gazette of Montenegro*, no. 074/20.

[23] Article 8 and Article 9 of the Law on Military Intelligence and Security Affairs, *Official Gazette of Montenegro*, no. 074/20.

[24] Article 20 of the Constitution of Montenegro, *Official Gazette of Montenegro,* no. 1/2007, 38/2013 - Amendments I-XVI.

It is also interesting to note that the the Directorate for Security Intelligence Affairs, which is in charge of the security clearance, is the only organisational unit of the MoD which is able to recruit its staff without a competition, which poses a significant risk for a professionalism of the staff in this unit. Such a special status and authorities of this directorate within the MoD and Armed Forces may pose a risk for a hidden and uncontrolled power of military security services over the other the personnel in the Montenegrin Army (Rabrenović, Hadžić, Ahmetović, 2021). Such strong powers of the military security services are, of course, not unknown in other developing countries and pose an additional threat for the already fragile democratic processes in the whole region (Hadžić, 2014).

Once the competition commission finalises the selection process, it compiles a ranking list of candidates who passed the procedure which is submitted to the Minister. Within 30 days from the day of the submission of the ranking list, the Minister makes a decision on the selection of candidates.[25] This is not in line with the international standards, which require that the best candidate from the list is selected. Although since 2020 the best ranked candidates were selected to the Army service, which is a positive practice, a minister's discretionary right to choose one of candidates from the list poses a serious risk for the observance of the merit principle.

There have also been serious allegations in the media that the regulations regarding recruitment and selection of military personnel were not observed in the period of 2016-2020, and that more than 30 cadets who were selected during the recruitment and selection process and sent to be educated at international military academies did not meet the required criteria of the competition. These allegations have been outlined in the Internal Investigation Report of the Ministry of Defence, prepared in December 2021, which was later submitted to the Agency for Prevention of Corruption, for the indications for corruption and other criminal offences which were done during the period of 2016-2020 (Vijesti, 2022). The Agency for Prevention of Corruption, however, did not respond to this report.

5. CONCLUSION

The recruitment and selection process in the defence sector of Montenegro faces important challenges. Even though the basic prerequisites for applying the merit principle have been relatively well established through the existing legislative framework, there are important exceptions to the general rules.

This is especially the case with exemption of the whole Directorate for Security Intelligence Affairs from the open competition requirement, which poses a serious risk for development of patronage and clientelist ties and corruption practices in this organizational unit of the MoD and in the defence sector in general. It appears to be quite a known fact in the civil service that an MoD can be entered through this directorate without any testing of knowledge and other competencies, which is fully against the principles of merit and citizens equality. Once they enter the system in this way, new recruits are able to move to other positions within the MoD and the armed forces,

[25] Articles 9, 10 and 11 of the Rulebook on the Manner of Admission of Persons into the Service in the Army of Montenegro, *Official Gazette of Montenegro,* no. 18/18.

which poses additional risks for professionalism of the whole defence sector. In order to address this issue, it would be necessary to amend the Law on Military Intelligence and Security Affairs, especially its Article 37 which allows this practice. In order to secure the confidentiality of the positions in the said directorate, a mechanism of an internal transfer/competition of personnel having already the status of military, security, or civil servants should be introduced instead.

For other civil service positions in the MoD, there is still a level of discretion given to the minister of defence to select one of the three best ranked candidates, which is also not fully in line with the best international practices, which require that the best candidate is appointed to an advertised position. This issue would require the attention of the Ministry of Public Administration, which is in charge of policy making and legislative drafting in the area of HRM in the civil service (i.e. Civil Service Law).

Recruitment and selection in the army service is also subject to important vulnerabilities. They are exemplified primarily in the inability of the perspective candidates to challenge a decision on security clearance. The right to an appeal should be clearly provided by the law and the rejection of the clearance should be grounded on legal and factual reasons, while preserving confidential information contained in the clearance procedure file, as it is the case in other European countries, such as France, Spain and Norway (Cardona, 2022). Overt discretion which a minister has in the final selection of the candidates from the open list of successful candidates should also be limited and a minister required by the Law on the Army to select the best candidate from the list. There have also been serious allegations for the breach of recruitment and selection regulations, especially in the selection of cadets who were sent to international military academies abroad, without meeting the basic formal requirements for the competition.

Although discussion on how to improve the legal framework regarding recruitment and selection in the defence sector in Montenegro appears to be underway at this moment, for an outside observer it is quite obvious that these necessary systemic changes shall not be easily achieved. This is primarily due to the traditional excessive powers of informal (or sometimes formal) centres of powers and difficulties of the political elites to control them, especially in unstable political environment, such as the case in Montenegro at the moment. In depth, systemic organizational, legal and personnel changes in any state institution require strong and unwavering political support, which itself promotes and holds integrity values, and which will be able to overcome the resistance for change and force the holders of excessive powers to release it. Only when these broader political and societal conditions are in place, would it be possible to make important strides in establishing the HRM system in the defence sector based on the principle of merit.

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REVERBERATIONS OF THE PLACE OF CONTRACTUAL PERFORMANCE ON DETERMINING THE COURTS' JURISDICTION IN THE FIELD OF AIR TRANSPORTATION

The paper focuses on the reverberations of the concept of 'place of performance of the contractual obligations' on the establishing of court's jurisdiction and the enforcement of judgments in civil and commercial matters, under the provisions of second indent of Article 7, para. (1)(b) of Regulation (EU) No 1215/2012, in the perimeter of air transportation. The first part of the article deals with the preliminary points that should be stated concerning the judicial action which falls within the concept of 'matters relating to main contractual provisions' within the meaning of Article 7(1)(a) of Regulation No 1215/2012, in the hypotheses which cover the claims brought by air passengers for compensation for the long delay of a connecting flight, made under Regulation No 261/2004, against an operating air carrier with which the passenger concerned does not have a contractual nexus. As emphasised in the second part of the paper, particularly in the field of contracts concluded for the provision of services (air transport), as reflected in CJEU recent jurisprudence (Case C-20/21), in the case of flight consisting of a confirmed single booking and performed in several flight segments by two separate air carriers, under the provisions of art. 7 of Regulation (EC) No 261/2004, the common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, the claim for compensation brought against the air carrier operating that first flight segment falls under the territorial competence of the court from the place of arrival of that first flight. Thirdly, the reverberations of the place of contractual performance on determining the courts' jurisdiction become ostensible since the place of arrival for that first flight segment may not be classified as a 'place of contractual performance' within the meaning of the legal provisions.

Keywords: contractual performance, jurisdiction, territorial competence, air transportation, passengers, right of compensation.

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1. INTRODUCTORY REMARKS

1.1. Preliminary aspects concerning the subject of the establishing of court's jurisdiction

The reverberations of the concept of 'place of performance of the contractual obligations' on the establishing of court's jurisdiction and the enforcement of judgments[1] in civil and commercial matters represents a core issue in specialised judicial scholarly work, especially under the provisions of the second indent of Article 7, para. (1)(b) of Regulation (EU) No 1215/2012. The preliminary points that should be stated concerning the judicial action which fall within the concept of 'matters relating to main contractual provisions'[2] within the meaning of Article 7(1)(a) of Regulation No 1215/2012 are contoured by invoking the notion of 'place of contractual performance', mainly in the hypotheses which cover the claims brought by air passengers for compensation for the long delay of a connecting flight, made under Regulation No 261/2004, against an operating air carrier with which the passenger concerned does not have a contractual relationship. As emphasised in the following sections, particularly in the field of contracts concluded for the provision of services (air transport), as reflected in Court of Justice of the European Union (hereinafter: CJEU) recent jurisprudence (Case C-20/21), in the case of a flight consisting of a confirmed single booking and performed in several flight segments by two separate air carriers, under the provisions of Article 7 of Regulation (EC) No 261/2004, the common rules on compensation and assistance to passengers[3] are essential in the event of denied boarding and of cancellation or long delay of flights; it is crucial to observe the procedural rules applicable to the claim for compensation brought against the air carrier operating the first flight segment fall under the territorial competence of the court from the place of arrival of that first flight. Saliently, the importance of the place of contractual performance on determining the courts' jurisdiction become ostensible, since the place of arrival of the first flight segment may not be classified as a 'place of contractual performance' within the meaning of the legal provisions.

By remedies for non-execution of the contract, we are referring to those possibilities available to the creditor[4] confronted with the debtor's refusal to perform or with a delayed

[1] See Țiț, N.-H. & Stanciu, R. 2019. *Legea nr. 310/2018 pentru modificarea și completarea Legii nr. 134/2010 privind Codul de procedură civilă: comentarii, explicații, jurisprudență relevantă*. Bucharest: Hamangiu, pp. 83-87. Țiț, N.-H. 2016. *Executarea silită. Partea generală*. Bucharest: Hamangiu, pp. 28-36.

[2] See Činčurak Erceg, B. & Vasilj, A. 2019. Current Affairs in Passengers Rights Protection in the European Union. In: *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement. EU and Comparative Law Issues and Challenges Series 2*. Available at SSRN: https://ssrn.com/abstract=3841170 (26. 9. 2020). Julien, J. 2019. *Droit de la consommation*. 3rd ed. Paris: L.G.D.J, pp. 89-94; Pellier, J.-D. 2021. *Droit de la consommation*. 3rd ed. Paris: Dalloz, pp. 121-126. Picod, N. & Picod, Y. 2020. *Droit de la consommation.* 5th ed. Paris: Sirey, pp. 78-92. Piedelièvre, S. 2020. *Droit de la consommation*. 3rd ed. Paris: Economica, pp. 116-119.

[3] See Pap, A. 2016. *Transportul aerian și drepturile pasagerilor în legislația Uniunii Europene. Sinteze de jurisprudență*. Bucharest: Universul Juridic, pp. 78-92.

[4] Țiț, N.-H. 2018. *Încuviințarea executării silite.* Bucharest: Universul Juridic, pp. 58-72. Țiț, N.-H. 2020. Încuviințarea executării silite a debitorului consumator-exigențe europene, realități naționale. *Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, seria Științe Juridice*, 66(2), pp. 91-110. Țiț, N.-H. 2022. A Potential Legality Problem of the Enforcement Procedure: The Prorogation of Jurisdiction in theCase of the Bailiff. *AnaleleStiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi – Stiinte Juridice*, 68(1), pp. 145-163. Țiț, N.-H.,

or improperly conducted contractual performance. Saliently, when referring to the legal means available to the creditor in order to restore the contractual balance, we must bear in mind that the latter, in addition to the legal interest that is at guidance when invoking a certain remedy, must consider the legislative benchmarks or possible limitations that are imposed[5] in expressing the creditor's option. In any case, the creditor must first identify the cause that led to the non-performance of the obligations exactly as they were assumed by the debtor; therefore, it must be checked whether the non-performance was unjustified, or if it was justified by unforeseen events not imputable to the debtor's conduct.

On the other versant of the discussion, it is important to remember that the right to damages is, in principle, cumulative with any other legal remedy, specifying that, when the issue of accidental non-performance arises, this right will not be able to be requested. This emerges from the provisions of Article 1530 of the Romanian Civil Code, which expressly provides for the creditor's right to damages for reparation of the damage caused by the debtor and which is the direct and necessary consequence of the unjustified or, as the case may be, culpable non-performance of the obligation. Particularly, it follows from the mentioned regulation of remedies that the creditor remains able to choose whether to invoke a certain remedy or not, and this choice can only be exercised within the limits of mandatory legal provisions.

Consequently, it follows from the regulation of the creditor's rights that the additional term of contractual performance represents an intrinsic condition for invoking other remedies, since there is a legal obligation incumbent on the creditor to grant, prior to invoking of any other legal remedy (except for the requesting of damages consequential to contractual non-performance), a supplementary term, during which the debtor would be able to deliver the performance of the contractual obligations, unless the debtor is legally placed in a situation in which the creditor can invoke other enforcement remedies, within the limits of mandatory legal provisions. According to the provisions of Article 1516 of the Romanian Civil Code, the creditor's right to obtain the exact performance of the obligation entitles the creditor to obtain by enforcement the performance owed by the debtor, except where such performance has become impossible. Therefore, the remedy of enforced performance can be invoked by the creditor only when there is a prior delay, be it on demand, or by the incidence of unforeseen, extraordinary events.

1.2. The principles of invoking contractual remedies

Several meta-rules that govern the enforcement of contractual performance are fundamental for invoking of the legal remedies that the creditor is entitled to, are, since the principles of invoking remedies are the ones that regulate the application criteria

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2021. Certain Aspects Regarding the Parties' Agreement in Civil Procedure. In: *Challenges of the Knowledge Society*. Bucharest: Nicolae Titulescu University Editorial House, pp. 305-310.

[5] Ginter, C. & Härginen, K. & Linntam, A. 2019. Passengers Are Not Automatically Responsible for Fines Imposed on Airlines Estonian Court Declares a Lufthansa Standard Term Unfair. *European Review of Private Law*, 27(5), pp. 985-993.

corresponding to the legal remedies[6] as mentioned in the first paragraph of the of Article 1516 of the Romanian Civil Code. Therefore, we first identify the principle of the right to a compliant execution, a rule that establishes the creditor's right to obtain adequate performance, namely the right of the creditor to the full, accurate and timely fulfilment of obligations, as enshrined in the first paragraph of Article 1516 of the Romanian Civil Code. If thisright is violated, i.e., if the performance does not correspond quantitatively, qualitatively but also temporally to the contractual provisions, this allows the creditor the possibility to obtain the promised performance in an equivalent manner.

The principle of the right to a compliant execution is also applicable in the domain of air transportation contracts[7]. In that regard, in relation to a direct flight operated between two Member States by the airline with which the passenger concerned has a contractual relationship, the CJEU has held that the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of providing the services which are the subject of an air transportation contract. Nevertheless, when establishing the courts' jurisdiction, under the second indent of Article 7(1)(b) of Regulation No 1215/2012, to deal with claims for compensation founded on the transportation contract and in the light of the provisions of Regulation No 261/2004, it is crucial that, at the applicant's choice, to select the court which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in the contractual clauses (according to the CJEU judgment of 9 July 2009, in case *Rehder*, C-204/08[8], paragraphs 43 and 47).

In this regard, it should be noted that the issue of the existence of a 'confirmed reservation' is of legal interest from the perspective of establishing the scope of the provisions of Regulation no. 261/2004. Namely Article 3 of the mentioned regulation substantially regulates its scope by imposing, pursuant to the second paragraph of Article 3(a), that the passenger must possess a confirmed reservation for the cancelled flight in order to qualify for compensation. Regulation no. 261/2004 does not define the syntagm 'confirmed reservation', instead describing the notion of 'flight reservation' in terms of the existence of a proofing document. Tthe notion of 'booking' the flight/seat is defined in Article 2(g) of this Regulation as referring to the fact that 'the passenger is in possession of a ticket or other supporting document indicating that the reservation has been accepted and recorded by the air carrier or tour operator'. From this

[6] Țiț, N.-H. 2015. How Far Have We Reached in European Cooperation in Civil Matters? A View on European Enforcement. *CES Working Papers*. Iași: Alexandru Ioan Cuza University of Iași, Centre for European Studies, Vol. 7(2), pp. 637-647.

[7] Goicovici, J. 2022. *Dreptul relațiilor dintre profesioniști și consumatori*. Bucharest: Hamangiu, pp. 517-546. Goicovici, J. 2021. Consumer's Domicile, as a Criterion for the Selection of the Courts' Territorial Competence. Efficiency of the Derogatory Unusual Terms. *Analele Științifice ale Universității Alexandru Ioan Cuza din Iași Științe Juridice*. 47(2), pp. 71-83. Goicovici, J. 2021. The inapplicability of personal exceptions between joint debtors and creditors under Romanian and French private law. In: Dalvinder, S, Popa Tache, C. E. & Săraru C.-S. (eds.), *Looking for New Paths in Comparative and International Law*. Bucharest: ADJURIS – International Academic Publisher, pp. 85-98. Goicovici, J. 2020. Drepturile pasagerilor: zboruri anulate în circumstanțe excepționale. In: Dimitriu, O. (ed.), 2020. *Probleme și soluții legale privind criza COVID-19*. Bucharest: C. H. Beck, pp. 346-368. Goicovici, J. 2019. Co-Active Performance, Good Faith versus Creditor's Fault in the Matter of the Obligation of Moderating the Damage. *Romanian Review of Private Law*, 2019(3), pp. 183-196.

[8] See the CJEU decision 2009. Decision of July 9, 2009. C-204/08, *Rehder*. Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=76299&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3919923 (26. 9. 2022).

definition it follows that a reservation can be constituted by 'other supporting document' which certifies that the reservation has been accepted and registered either by the air transport operator or by the tour service operator. Consequently it follows from the quoted text that a reservation accepted and registered by the tour service operator (with which the consumer contracts a package of tourism services including air transport services) has the same legal value as the seat reservation accepted and registered by the air transport operator.

Therefore, it can be concluded that, if the passenger has 'another supporting document' within the meaning of Article 2(g) of Regulation No. 261/2004, issued by the tour service operator, this supporting document is equivalent to a 'reservation' in the sense of the same provision in the cited legal text.

2. PROLEGOMENA FOR IDENTIFYING COURTS' JURISDICTION

As it has been established in the CJEU decision in case C-20/21[9], regarding the adequate interpretation of the provisions of Article 5(1)(a) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which can be applied to the corresponding provisions of Regulation No 1215/2012, as set out in Article 7(1)(a), the Court held that the concept of 'matters relating to a contract' covers a claim brought by air passengers for compensation for the long delay of a connecting flight, made under Regulation No 261/2004[10], against an operating air carrier with which the passenger concerned does not have contractual relations. The conclusions were similar to those extracted from the CJEU judgment of 7 March 2018, in cases C-274/16, C-447/16 and C-448/16[11], *Barkan and others.*

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[9] See the CJEU decision 2022. Decision of February 3, 2022. C-20/21, *LOT Polish Airlines*. Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=253283&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3872952 (26. 9. 2022). By judgment of April 22, 2020, the court rejected the request as inadmissible on the ground that, having regard to the provisions of Regulation No. 1215/2012, as interpreted by the national court, it did not have jurisdiction to hear the dispute, since neither the place of departure nor the place of arrival of the flight provided for in the contract of carriage concerned was located within its jurisdiction. As resumed in Recitals 10 and 11 of the CJEU decision, the applicants in the main proceedings brought an appeal against that judgment before the referring court (which was the Regional Court, Frankfurt am Main, Germany). According to the applicants, the court of first instance had to base its international jurisdiction on Article 7(1)(b) of Regulation No 1215/2012 and the fact that Warsaw and Malé constitute places of performance of the obligation arising from that contract of carriage does not preclude the existence of other places which could also be classified as places of performance of the contractual obligations.

[10] See Fox, S. J. & Martin-Domingo, L. 2020. EU Air Passengers' Rights Past, Present, And Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study). *Journal of Air Law and Commerce (JALC),* 85(2), 2020, pp. 271-278.

[11] The questions referred in these cases concerned the following aspects: 'Is Article 5(1)(a) of Council Regulation (EC) No 44/2001 1 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that the concept of 'matters relating to a contract' also covers a claim for compensation made under Article 7 of Regulation (EC) No 261/2004 2 of the European Parliament and of the Council of February 11, 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 which is brought against an operating air carrier which is not a party to the contract with the passenger concerned?' Secondly, insofar as Article 5(1) of Regulation (EC) No 44/2001 is applicable: Where passengers are transported on two flights without any significant stopover at the connecting

Previous CJEU decisions[12] have established that, under Article 7(1)(a) of Regulation No 1215/2012, in matters relating to contractual performance, a debtor established in a Member State may be sued in another Member State in the courts for the place of performance of the obligation in question, since the second indent of Article 7(1)(b) of that regulation states that, unless otherwise agreed, as regards the provision of services, the place of contractual performance is the place in a Member State where, under the contractual stipulations, the services were provided or should have been provided. Nevertheless, it is apparent from the previous CJEU case-law[13] that, where there are several places at which services are provided to the creditor in different Member States, 'the place of performance must, in principle, be understood as the place with the closest connecting factor between the contract and the court having jurisdiction, which, as a general rule, will be at the place of the main provision of services' and that, as a procedural rule, the place of performance must be deduced, as far as possible, mainly from the explicit (and implicit) contractual provisions.

Secondly, regarding the establishment of the existence of a direct flight operated between two Member States by the airline with which the passenger concerned has a contractual relationship, the Court has held that the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract. Therefore, as resulting from the mentioned CJEU jurisprudential benchmarks, when establishing the courts' jurisdiction, under the second indent of Article 7(1)(b) of Regulation No 1215/2012, in cases dealing with claims for compensation founded on the air transportation contracts and on Regulation No 261/2004, one must select the national court, either which has territorial jurisdiction over the place of departure or the place of arrival of the aircraft, provided those places had been agreed in the stipulated contractual clauses (according to the CJEU judgment of 9 July 2009, *Rehder*, C-204/08, recitals 43 and 47).

Thirdly, as regards a confirmed single booking for the entire journey and divided into several legs on which air transportation services are performed by two different air carriers, in the previous CJEU jurisprudence it has been held that the 'place of performance', within the meaning of the provisions of EU regulations, can be a bicephalic one, since both the place of departure of the first leg of the journey[14] (i) and the place of arrival of the last leg of the journey (ii) are eligible in order to establish the courts' jurisdiction, regardless

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airports, is the passenger's final destination to be regarded as the place where the services were provided under the second indent of Article 5(1)(b) of Regulation (EC) No 44/2001 even when the claim advanced in the application for compensation under Article 7 of Regulation (EC) No 261/2004 is based on a disruption to the first leg of the journey and the action is brought against the operating air carrier of the first flight, which is not party to the contract of carriage? A synopsis of the Request for a preliminary ruling in cases C-274/16, C-447/16 and C-448/16 , *Barkan and others*, is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=185510&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4043271 (26. 9. 2022).

[12] See the Request for a preliminary ruling 2018. C-274/16, C-447/16 and C-448/16 , *Barkan and others, cit. supra.*

[13] *Ibid.*

[14] See the CJEU decision 2020. Decision of February 13, 2020. C-606/19, *Flightright GmbH vs. Iberia LAE SA Operadora Unipersonal.* Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=223641&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4049236 (26. 9. 2022).

of whether the passengers' claim for compensation is brought against the first air carrier operating the leg in question (not involved in a direct contractual relationship to the creditor of the right to compensation) or against the second air carrier with which the passenger concerned has previously established a contractual relationship. As resulting from recitals 31-32 of the CJEU decision in case C-606/19, while observing that the place of contractual performance presents a sufficiently close link with the substantial elements of the dispute and, therefore, ensures the close connection required by the rules of special jurisdiction set out in Article 7(1) of Regulation No 1215/2012 between the contract for carriage by air and the competent court or tribunal, it also 'satisfies the objective of proximity underlying those rules'. It has also been underlined that the mentioned bicephalic or binomial solution (of selecting either the place of departure of the first leg of the journey, or the place of arrival of the last leg of the journey as eligible criteria in order to establish the courts' jurisdiction) also 'fulfils the principle of predictability pursued by those rules in so far as it allows both the applicant and the defendant to identify the court or tribunal for the place of departure of the first leg of the journey, as it is set out in that contract for carriage by air, as the court or tribunal before which actions may be brought'[15].

3. JURISPRUDENTIAL BENCHMARKS ON THE CONSUMER'S RIGHT TO COMPENSATION

From the recitals of the CJEU decisions[16], it can be resumed that, in line with the conclusions of the Court's previously cited decisions, the time of actual landing/disembarkation, which, if it falls within the originally provided schedule (which does not exceed it by three hours, even though by hypothesis, the aircraft took off late, yet it recovered this delay along the journey), will not represent an adequate legal basis for the consumer's request for compensation. On the other side of the debate, the CJEU judgment in *Sturgeon* case[17] remains relevant for marking a point of collision between the view that the prolonged delay of the flight would represent a different situation from the situation of cancelled flights, explicitly held by the Court, in the second point of the decision, that, on the contrary, the two types of situations can be assimilated and that the prolonged

[15] *Ibid*, Recital 32.

[16] CJEU decision 2022. Decision of April 7, 2022. C-561/20, *United Airlines*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=257491&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2021. Decision of April 22, 2021. C-826/19, *WZ vs. Austrian Airlines AG*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=240222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2021. Decision of March 23, 2021. C-28/20, *Airhelp*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=239181&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2020. Decision of March 26, 2020. C-215/18, *Primera Air Scandinavia*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=224725&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022).

[17] CJEU decision 2009. Decision of November 19, 2009. *Sturgeon* C-402/07, *Sturgeon.* C-432/07, *Böck / Lepuschitz*, C-402/07, *Condor Flugdienst GmbH*. C-432/07, *Air France SA*. C-402/07 & C-432/07, Joined Cases. Available at: https://curia.europa.eu/juris/document/document.jsf?text=sturgeon&docid=74448&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3926956#ctx1 (26. 9. 2022).

delay of a flight (beyond the admissible limit of three hours based on the original landing schedule) generates the same rights for passengers[18] as those recognized for them in the case of a genuine cancellation of the flight, since the discomfort caused to the passengers and the 'disruption' from their legitimate expectations regarding compliance with the original schedule are similar to those in which an actual flight cancellation occurs. From recitals 33-38 of the decision CJEU in *Sturgeon* case, one can extract a suite of legal nuances which are relevant to the determining of the category of 'cancelled flights':

(a) the extended duration or the exorbitant duration of the delay (for example, flight delay durations of more than 20 hours compared to the original schedule) do not *per se* represent situations of 'cancelled flights', since the duration criterion is not being singularly applied, but has te be combined with the other available criteria of determining the exorbitant duration of the delay. Thus, as it was emphasized by the CJEU in the mentioned decisions, according to the provisions of Article 2(l) of Regulation (EC) No. 261/2004, unlike in the case of flight delay, when the flight cancellation is the consequence of the fact that the previously scheduled flight did not take place, it follows that, in this respect, cancelled flights and delayed flights constitute two distinct categories of contractual non-performance. Therefore, it cannot be inferred from the provisions of Regulation (EC) No. 261/2004 that a delayed flight can be qualified as a «cancelled flight» for the reason that the duration of the delay is prolonged, regardless of whether this delay was indeterminably prolonged;

(b) as a starting assertion, it can be resumed that a delayed flight, regardless of the duration of the delay, even if it is prolonged, cannot be considered a cancelled flight if the departure is carried out in accordance with previously provided scheduling;

(c) the providing of an alternative flight remains a decisive element in assessing the existence of a 'cancelled flight' situation, as follows from recital 35 of the CJEU decision in *Sturgeon* case: to the extent that passengers are transported with a flight whose departure time is delayed compared to the originally scheduled departure time, the flight cannot be qualified as 'cancelled', unless the air transport operator ensures the transportation of passengers with an alternative flight, the previous schedule of which differs from that of the flight previously provided;

(d) from recital 36 of the CJEU decision in *Sturgeon* case, it follows that the criterion of abandoning the initial schedule remains decisive in assessing the existence of a 'flight

[18] CJEU decision 2019. Decision of July 11, 2019. C-502/18, *České Aerolinie*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216062&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2019. Decision of April 11, 2019. C-464/18, *Ryanair.* Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=212906&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2019. Decision of July 10, 2019. C-163/18, *Aegean Airlines*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216037&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3920981 (26. 9. 2022). CJEU decision 2019. Decision of April 4, 2019. C-501/17, *Germanwings*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=212663&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3919923 (26. 9. 2022). CJEU decision 2018. Decision of September 12, 2018. C-601/17, *Vueling Airlines.* Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=205608&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3919375 (26. 9. 2022). CJEU decision 2018. Decision of April 17, 2018. C-195/17, *Krüsemann vs. TUI Fly GmbH*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=201149&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3919722 (26. 9. 2022).

cancellation' situation; therefore, in principle, it can be concluded that a flight is cancelled when the previously scheduled and delayed flight is transferred to an alternative flight. In other words, this is the casewhen the original flight schedule is abandoned and the passengers of the latter flight join those of another scheduled flight, regardless of the flight schedule for which the passengers thus transferred had made their reservations;

(e) the informing of a flight cancellation on airport display boards are not *per se* an admissible criterion (much less a determinative or decisive criterion) for delineating the (legal) category of 'cancelled flights' in which case the passengers are entitled to compensation. According to recital 37 of the CJEU decision in *Sturgeon* case, in principle, it cannot be concluded that a flight is delayed or cancelled on the basis of the informative content displayed on the digital board in the airport or that was given by the air transport operator's staff in the sense that a flight has been 'delayed' or 'cancelled'. Similarly, the fact that passengers recover their luggage or obtain new boarding documents is not a decisive element in assessing the existence of the right to compensation. Thus, these circumstances are not related to the objective characteristics of the cancelled flight as such, since they can be attributed to qualification errors or factors that prevail in the flight scheduling in question, or they can be imposed considering the waiting time and the need of accommodation for the passengers concerned;

(f) as noted in recital 38 of the CJUE judgment in *Sturgeon* case, particularly, it is not decisive either that the initial group of passengers, holders of a reservation, is essentially identical in composition to the group of passengers carried subsequently to the flight cancellation. Thus, to the extent that the delay to the originally scheduled departure time is prolonged, the number of passengers forming the first of these groups may decrease as a result of the fact that several passengers have been offered a re-routing on an alternative flight and other passengers have waived for personal reasons to board the delayed flight. Conversely, to the extent that seats have been released on the previously scheduled flight, no other restriction prevents the air carrier from admitting other passengers before the take-off of the plane whose flight was delayed.

4. CONCLUDING REMARKS

The analysis enhances the theoretical understanding and the practical assessment of criteria used to determine the courts' jurisdiction, especially in the field of air transportation, as connected to the concept of the 'place of contractual performance'. Analyzing the CJEU jurisprudence permits the extracting of the conclusion that, in cases in which the creditor of the right to compensation intends to sue the air carrier in charge of the final leg of the journey before a court or tribunal which has territorial jurisdiction over the place of departure of the first leg of the journey, the latter may serve as an eligible criterion for establishing the national courts' jurisdiction. It must be observed that, while the solution remains bicephalic or binomial, the rule of special jurisdiction for matters relating to a contract set out in Article 7(1) of Regulation No 1215/2012 does not require, as a decisive criterion, the existence of a contractual nexus between the debtor of the non-performed obligation and the creditor entitled to compensation. Yet, under the mentioned provisions,

the existence of a legal obligation freely consented to by the debtor in respect of reciprocal contractual performance and on which the claimant's action or the creditor's right to compensation is based, remains decisive, as resulting from the analyzed jurisprudential benchmarks.

Secondly, it resulted that the second indent of Article 7(1)(b) of Regulation No 1215/2012 has been interpreted in previous CJEU jurisprudence as referring to the 'place of contractual performance'; therefore, in respect of a flight consisting of a confirmed single booking for the entire journey and divided into several legs, a dichotomic criterion may be used to confirm the courts' jurisdiction, selecting either the place of departure of the first leg of the journey, or the place of arrival (where transport on those legs of the journey is performed by two separate air carriers) and the claim for compensation brought on the basis of Regulation No 261/2004 arises from the cancellation of the final leg of the journey). The importance of the 'place of contractual performance' in establishing courts' jurisdiction over compensation claims remains crucial, especially when indicating the contractual elements which could justify, concerning the efficacious conduct of judicial proceedings, the existence of a 'sufficiently close link' between the facts of the dispute and its jurisdiction. Congruently, in the absence of such information extracted from the contractual clauses, the 'place of performance' within the meaning of the second indent of Article 7(1)(b) of Regulation No 1215/2012 can therefore be the place of departure of the first leg of the journey as one of the places of the main provision of services that are the subject of the contract of air carriage.

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OPEN BALKAN INITIATIVE – WHAT CAN WE LEARN FROM THE EU AREA OF FREEDOM, SECURITY AND JUSTICE?

Initiative for enhanced cooperation among Western Balkan states was proposed by leaders of Albania, North Macedonia and Serbia with the aim to establish free movement of goods, services, people and capital in line with the EU single market. Over the three-year period, between 2019-2021, a series of high-level meetings were organised to achieve an agreement on the legal framework for the Open Balkan Initiative. Four agreements were signed in December 2021 to enable the free movement of people/workers and goods, followed by additional agreements in June 2022. Successful implementation of the Open Balkan Initiative could be accompanied by several challenges that the EU faced when the Schengen Agreements were signed and entered into force. One of the biggest challenges for the open EU was the free movement of criminals and, therefore, the challenge of securing cross-border cooperation in criminal matters and increased security risks. In the article, the author will analyse lessons learnt from the EU and the reason for the establishment of the EU area of freedom, security and justice as a response to the risks raised with the free movement across the EU. The author will address the topics that need to be covered in future agreements within the Open Balkan Initiative to prevent the increase in cross-border criminal activities.

Keywords: open Balkan initiative, EU area of freedom, security and justice, free movement, security risks.

1. OPEN BALKAN INITIATIVE

The Open Balkan was initiated in 2019 by Albania, North Macedonia and Serbia as an economic project that should facilitate trade between members, remove barriers, allow the workforce to move and freely find employment, for the business investment to be made where it could bring the most results, and goods and services to cross borders without

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delays. Border controls between the three countries are scheduled to be removed by 2023.

Over the one-year period, from June 2021 until June 2022, the three countries signed three memorandums of understanding and ten interstate agreements with the aim of deepening their political and economic cooperation.[1]

Three memorandums signed in June 2021, namely the Memorandum on Cooperation in the Event of Catastrophe, Memorandum to Facilitate Trade, and Memorandum on Labour Licence, are the basis for the creation of free access to the labour market in the region and free movement of goods. If they are implemented, these proposals will enable citizens from all three countries to access employment opportunities across the region under the same conditions as domestic citizens. The same applies to the free movement of goods. Several interstate agreements were signed to enable the achievement of the goals set. With the aim to enable free access to the labour market, the three countries signed the Agreement on Conditions for Access to the Labour Market, Agreement on the Interconnection of Electronic Identification Schemes for Citizens of the Western Balkans, Agreement on Mutual Recognition of Academic Qualifications, and Agreement on Cooperation in the Field of Tax Administrations in the Western Balkans. The additional agreements were signed to ensure free movement of goods: Agreement on Cooperation in the Areas of Veterinary, Food and Feed Security and Phytosanitary Areas in the Western Balkans, Agreement on Mutual Recognition of Certificates of Authorized Economic Operators, and Agreement on Cooperation of the Accreditation Agencies.

One of the measures to facilitate the free movement area is establishing of separate lanes at the border crossings for citizens and goods coming from the Open Balkan participating countries where no checks will be conducted.

Considering that Open Balkan is a relatively new initiative and the focus of the discussion is on its possible economic and political impact, the author would like to emphasise the importance of security and justice. In the article, the author will analyse lessons learnt from the EU and the reasons for the establishment of the EU area of freedom, security and justice as a response to the risks raised with the free movement across the EU. The author will tackle the topics that need to be covered in future agreements within the Open Balkan Initiative to prevent the increase of cross-border crime.

2. LINKS BETWEEN THE OPEN BALKAN INITIATIVE AND THE EU FREE MOVEMENT RULES

The reason for comparing the Open Balkan Initiative with the EU experience is that the proclaimed description of the Open Balkan Initiative corresponds to the EU's four freedoms, *i.e.* freedom of movement of goods, services, capital and people. The goal behind the creation of the EU (EC) was economic integration that can take various forms and was developed gradually over time (Craig, 2002, p. 3). In 1986, thirty years after the establishment of the European Economic Community, the member states agreed on the Single European Act that enabled the establishment of the internal market and the four

[1] All agreements and memorandums are listed on the website of the Chamber of Commerce. Available at: https://pks.rs/open-balkan-sporazumi/potpisani-sporazumi (2. 10. 2022).

freedoms: free movement of goods, workers, establishment and the provision of services and capital. The basic economic aim of the four freedoms is the optimal allocation of resources within the EU. That is facilitated by allowing the factors of production to move to the area where they would be the most valued.

Thus, the provision of the Single European Act, and later, the provisions of the Treaty on Functioning of the EU (Article 26) on the free movement of goods ensure that goods can move freely, with the consequence that those most favoured by consumers will be most successful, irrespective of the country of origin. The same is true for the free movement of workers. Labour as a factor of production may be valued more highly in some areas than in others. The value of labour within the EU is maximised if workers can move to the area where they are the most valued. The same idea applies to the freedom of establishment.

An internal market was defined as an area without internal frontiers where a free movement of goods, persons, services and capital could take place.[2] The degree of realisation of an area without internal frontiers can be assessed on the basis of whether border controls apply to the movement of goods, people, services and capital. However, it is more difficult to determine how freely goods, people, and capital can move within the EU, even when border controls have been removed (Ehlermann, 1987, p. 371).

The EU used two different approaches to ensure the establishment of the internal market and the operation of four freedoms. EU prohibits national rules that hinder cross-border trade because they discriminate against goods or labour from other member states or render access to the market more difficult. This is reinforced through, what is known as, mutual recognition, which requires a member state to accept, subject to certain exceptions, goods that have been made in accordance with the regulatory rules of another member state (Armstrong, 2002, p. 233). Intentions of the Western Balkans leaders are similar to the EU approach as they should lead to the mutual recognition among member states of academic qualification, certificates of authorised economic operators and other documents relevant for free access to the labour market and free movement of goods.

The creation of a single market also requires positive integration. Barriers to integration may flow from diversity in national rules on matters such as health, safety, technical specification, consumer protection, etc. Many such barriers may only be overcome through harmonisation of diverse national laws through the EU directives. That is known as positive integration attained principally on the basis of Articles 114 and 115 of the Treaty on Functioning of the EU.

The Open Balkan and the general proposal are intended to go in the direction of the EU's four freedoms. However, the EU experience showed that their achievement takes time and effort to harmonise legislation and remove barriers to free movement beyond those represented in the border controls.

[2] More on the internal market: https://eur-lex.europa.eu/EN/legal-content/glossary/internal-market.html (2. 10. 2022).

3. CAN FREE MOVEMENT EXIST WITHOUT SECURITY AND JUSTICE?

Successful implementation of the Open Balkan initiative could be accompanied by several challenges related to security and justice. It could be expected that Western Balkan countries would face the same challenges as the EU countries had faced when the internal market was created, and borders were removed. Although some lessons could be learned from the EU, the security challenges are even greater in the Western Balkan region. Abolishing of border controls could lead to an increase in drug trafficking, human trafficking and various other criminal activities. The European Commission has already highlighted that the Western Balkan countries face challenges of a high level of corruption, organised crime and their officials often being engaged in acts of corruption with impunity. The removal of border controls could lead to an increase in crime.[3]

The authorities of the Western Balkan countries should not repeat the same experience the EU passed through because it had initially conceived the free movement as an exclusively economic process. During the process of economic integration, the EU neglected the relevance of security and criminal law (Garland, 1996, p. 448). For the establishment and functioning of the EU common market (Vukadinović, 2012, p. 28), it was necessary to gradually harmonise the economic policies of the member states, as well as to undertake the harmonisation of national and the adoption of European regulations. The founders of the European Communities underestimated the importance of criminal law for the implementation of the Community policies and rights (Vervaele, 2014, p. 11). However, it soon became apparent that it is not enough to harmonise the law of the common or internal market, but that it is also needed to protect the interests of the common market and the financial interests of the European Community. Initially, criminal law was not included in the jurisdiction of the European Community, as the predecessor of the European Union (Wasmeier, Thwaites, 2004, p. 613). Nevertheless, the development of the four freedoms, *i.e.* the free movement of goods, people, capital and services and the single market, created the need to protect the interests and goods of the European Union, as well as to, after the creation of a single Schengen area and the abolition of national borders, provide citizens with an adequate degree of security and protection. Due to the provisions of the 2007 Treaty of Lisbon, the EU citizens can expect the EU to provide freedom of movement accompanied by appropriate measures to prevent and fight crime (Article 3) and to ensure safety in the area of freedom, security and justice,[4] while applying standards of the rule of law and the protection of human rights, due to the inclusion of the European Charter of Fundamental Rights as a binding source of the EU law (Vervaele, 2013, p. 212).

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[3] In its 2018 Communication on enlargement and the Western Balkans COM (2018) 65 final, the European Commission clearly acknowledged the serious rule of law situation in the region, stating that there were "clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests".

[4] The area of freedom, security and justice incorporates three elements. The area of freedom includes free movement of people, goods, services and capital, while the area of security relates to the common policy against crime and the area of justice means equal access to justice for all EU citizens and judicial cooperation in civil and criminal matters. See: Harlin-Karnell, E. 2019. *The Constitutional Structure of Europe's Area of 'Freedom, Security and Justice' and the Right to Justification*. Hart Publishing.

In a period when judicial and police cooperation in criminal matters within the European Communities was at a standstill, five member states[5] interested in closer cooperation signed the Schengen Agreements (Šegvić, 2011, p. 21), which includes the Schengen Agreement of June 14, 1985, on the gradual abolition of border controls and the Convention on Implementation of the Schengen Agreement (CISA) of June 19, 1990, which entered into force on March 26, 1995. These agreements were concluded outside the institutional framework of the European Communities and have an intergovernmental character. However, the Convention on the Implementation of the Schengen Agreement contains provisions dedicated to police and judicial cooperation in criminal matters in response to the removal of internal border controls and increased security risks.[6] The Schengen agreements contributed to the improvement of operational cooperation in police matters by introducing measures that allowed police officers to conduct cross-border surveillance[7] and the prosecution of criminals across the border into the territory of other signatory states.[8] In addition to the above, the Schengen agreements enabled the establishment of an information system with data on persons,[9] the cross-border application of the principle *ne bis in idem*,[10] the facilitation of extradition[11] and the transfer of execution of criminal judgments between the signatory states.[12] However, the Schengen Agreements became part of the institutional framework only with the entry into force of the Treaty of Amsterdam in 1997.

In addition to Schengen Agreements, an important step towards the creation of the area of freedom and security was the adoption of mutual recognition instruments that facilitate more efficient cooperation among police and judicial authorities of the EU member states. The abolition of borders enabled perpetrators to move across the EU without control or to avoid prosecution, while the police and the judicial authorities were bound by formal and non-efficient rules on cross-border cooperation. The mutual recognition instruments and the newly established institutional framework were taken as a response to these challenges. The first instrument was the European Arrest Warrant as a response to the terrorist attack on the towers in New York in 2001 (Fichera, 2011, p. 73). The adoption of the European Arrest Warrant represents realisation of the Conclusions adopted at the Council in Tampere, namely their point 35, which provided for the abolition of formal procedures for extradition between the member states.

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[5] These states are France, Belgium, Luxemburg, Germany and the Netherlands.

[6] Article 9 of the Schengen Agreement states that all signature states will improve cooperation between tax and police bodies in the fight against crime, especially against illegal trade of drugs and arms, illegal entry and stay of people and tax and customs fraud and smuggling. To achieve the goal, the signature states will, in line with national legislation, improve the exchange of information relevant to other parties in the fight against crime.

[7] Article 40 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[8] Article 41 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[9] Articles 92 and 94 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[10] Article 54 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[11] Article 59 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[12] Article 67 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

4. MUTUAL RECOGNITION AND POLICE AND JUDICIAL COOPERATION AS THE MAIN PILLARS OF THE AREA OF FREEDOM, SECURITY AND JUSTICE

Mutual recognition in the context of criminal cooperation was mentioned for the first time at the European Council in Cardiff in 1998.[13] The Council in the Conclusions of the Presidency, in point 39, emphasised the importance of effective judicial cooperation as part of the fight against cross-border crime. Following the Council Conclusions, the Vienna Action Plan OJ C 19/1 from 1999 stated that within a period of two years after the entry into force of the Treaty of Amsterdam, a process should be initiated that would facilitate the mutual recognition of decisions and the enforcement of judgments in criminal matters.

The success of mutual recognition lies in the fact that, instead of embarking on a visible attempt to harmonise national criminal laws, the EU member states could promote judicial cooperation by not having to change their criminal laws but by simply agreeing to accept judicial decisions originating from other member states (Mitsilegas, 2006, p. 279). The initiative on the application of the mechanisms for mutual recognition in the field of criminal law was placed forward by the United Kingdom, which pointed to the significant differences between the legal systems of the member states (Willems, 2021, p. 48). The moment in which the idea of applying mutual recognition in criminal matters was proposed was also important. The proposal came after the *Corpus Juris,* an ambitious project on harmonisation of criminal law, was rejected in 1997 (Spencer, 1999, p. 355).

At the European Summit in Tampere in 1999, mutual recognition was formally approved, and it was concluded that it should become the cornerstone of judicial cooperation in civil and criminal matters. In the Conclusions from the Tampere Summit, in points 36 and 37, it was emphasised that mutual recognition would also apply to the decisions from the pre-trial phase of the criminal procedure, especially to those related to securing evidence and freezing assets.

In Communication COM (2000) 495 from 2000 on mutual recognition of final decisions in criminal matters, the European Commission stated that mutual recognition is "a principle that is widely accepted and based on the view that even if another country does not regulate a certain issue in the same or similar way as their own state, the results are such that their decisions are accepted as equal to the decisions of their own state".

The principle of mutual recognition allows decisions to move freely from one country to another, avoiding the situation in which the national authorities of another member state present obstacles due to the cross-border element. In this way, mutual recognition opposes the argument of foreign decision; that is, it prevents the case from being rejected in another country only because of its foreign origin (Allegrezza, 2010, p. 572). The mutual recognition of court decisions in criminal matters represents the free movement of court decisions that have effect throughout the EU.

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[13] European Council in Cardiff, 15-16 June 1998, Presidency Conclusions, para 39. H. Satzger, F. Zimmermann. 2008. From Traditional Models of Judicial Assistance to the Principle of Mutual Recognition: New Developments of the Actual Paradigm of European Cooperation in Penal Matters, In: C. Bassiouni, V. M. & H. Satzger (eds.), *European Cooperation in Penal Matters: issues and perspectives*, CEDAM, pp. 337–361.

Mutual recognition is a basic concept in the area of freedom, security and justice because it is the only way to overcome the difficulties that arise between different national justice systems. For the development of mutual recognition, it is necessary to have a high degree of mutual trust between the member states, which is based on strict compliance with the high standards of protection of individual rights in each of the member states (Ouwerkerk, 2011, p. 39). To ensure this, in 2003 the European Commission adopted the Green Book COM (2003) 75 on procedural measures for the protection of suspects and defendants in criminal proceedings in the European Union, on the basis of which legal acts were later adopted to protect the rights of suspects and defendants.

One should bear in mind that the principle of mutual recognition in criminal matters was introduced to avoid the necessity of harmonisation of criminal law in the European Union (Suominen, 2011, p. 51). Mutual recognition, on the one hand, enables efficient cooperation of judicial systems despite differences in substantive and procedural legislation, and on the other hand, ensures the preservation of the sovereignty of the member states in that area.

According to some authors, the principle of mutual recognition in criminal matters represents an alternative to harmonisation (Asp, 2005, p. 31). However, other authors, as well as its application in practice, have shown that mutual recognition and harmonisation should not be seen as alternatives, but as complementing each other (Bondt, Vermeulen, 2009, p. 94). As could be seen after the Cassis de Dijon case, the mutual recognition paved the way for the establishment of a single market (Murphy, 2011, p. 225). The application of mutual recognition to the field of criminal law resulted in the convergence of EU law and the law of member states.

The Western Balkan decision-makers should bear in mind that while they are negotiating and adopting inter-state agreement on mutual recognition, which should facilitate the free movement of people and goods, there is a need to establish a basis for the exchange of information on criminal records and mutual recognition of some judicial decisions (*i.e.* freezing of assets, arrest). Discussion should be guided by the lessons learnt from the EU, especially on the type of decisions that should be recognised and crimes to be covered by the mutual recognition instruments.

4.1. Application of mutual recognition

The concept of mutual recognition was defined in the EU policy documents, but the issue of its application was challenging for the member states. Point 33 of the Tampere Program states that mutual recognition should apply to judicial decisions. According to the Communication of the Commission on Mutual Recognition of Final Decisions in Criminal Matters, mutual recognition should apply to final decisions but also to procedural decisions. In the Communication, the Commission defines final decisions as all decisions which decide on the essence of the criminal case and against which no regular legal remedy is allowed, or legal remedy is allowed but does not have a suspensive effect.[14] Also, the Commission defines as a final decision any act that resolves a specific issue in a binding manner.

[14] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM (2000) 495 final, p. 5.

EU institutions, in their legal acts, often refer to mutual recognition as the basis of judicial cooperation in criminal matters. The same approach the European Council had in the Conclusions from Tampere,[15] and was as such stated in a great number of acts,[16] EU documents,[17] as well as in the decisions of the EU Court of Justice.[18]

Mutual recognition is applied at all stages of criminal proceedings, before and during the proceedings and after a conviction, but the mode of its application depends on the nature of the decision. The mechanism for mutual recognition contributes to legal certainty by ensuring that a decision adopted in one EU member state is not contested in another member state.[19]

In ideal conditions, mutual recognition should take place automatically, as opposed to international cooperation in criminal matters, which leaves room for the discretion of the national authorities whose cooperation is sought. The aim of mutual recognition is to remove the possibility of political influence and re-examination of the decision in a specific case. In the case of mutual recognition, it is necessary to determine whether the decision was made by an authority of another member state, but the content of the decision is not examined. It is also necessary to point out that although the authorities of one member state recognise the act of another member state, this decision is not based on the principle of reciprocity (Miettinen, 2013, p. 32).

When applying procedures for mutual recognition, only the minimum of the necessary formalities is required. However, the application in practice is more demanding. When the decision is written in a language that is not the official language of the requested country or institution, it must be translated into the language of that country. In addition, it is necessary to check whether the decision originates from the authority that is competent to make such decisions. If a member state decides to limit the scope of mutual recognition, the confirmation procedure should include a step that reviews whether the decision was made within the competence of the institution. With each additional step for which verification is foreseen before the decision is recognised in the executing Member State, the validation procedure becomes more complicated and longer, thus reducing the efficiency as one of the main advantages of mutual recognition.[20]

[15] Para. 35 of Conclusions, 1999. Presidency Conclusions, European Council Tampere October 15-16, 1999.

[16] For example: para. 6 of the Framework Decision of the Council 2002/584/JHA of June 13th, 2002 on European Arrest Warrant; para. 1 of the Framework decision of the Council 2003/577/JHA of July 22nd, 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 195/45 of August 2nd, 2003.

[17] See: Commission of the European Communities (1999): 'Mutual recognition in the context of the follow-up to the Action Plan for the Single Market', communication from the Commission to the Council and the European Parliament, COM(1999) 299 final, p. 2; Commission of the European Communities (2000): 'Mutual Recognition of Final Decisions in Criminal Matters', communication from the Commission to the Council and the European Parliament, COM(1999) 495 final, p. 3; Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, *Official Journal of the European Communities*, C 12/10 of January 15th, 2001.

[18] See: CJEU decision 2007. Decision of May 3, 2022. C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261, para. 4. CJEU decision 2008. Decision of December 1, 2008. C-388/08, PPU Criminal proceedings against Artur Leymann and Aleksei Pustovarov, ECLI:EU:C:2008:669, para 49.

[19] Para. 5. of the Introduction of Programme of measures to implement the principal of mutual recognition of decisions in criminal matters (EU) OJ C 12/10 of January 15, 2001.

[20] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, communication from the Commission to the Council and the European Parliament, COM (1999) 495 final, p. 17.

Over the years, a set of mutual recognition instruments was created, which led to the coordination of national criminal justice systems. The mutual recognition of court decisions[21] is also met with considerable resistance in the member states, so for now there is no single act that would regulate this issue and that would embrace all judicial decisions in criminal matters, but the EU applied a selective approach and a number of instruments were adopted. As a consequence, this area is regulated in a patchy manner (the European arrest warrant, the European investigation order, the European freezing order). The only general document that stands out is the Program of 24 measures for the implementation of decisions on mutual recognition in criminal matters.[22] The Program refers to the basic procedural and substantive rules that must be considered when assessing whether a court decision of one member state can be accepted in another member state. Furthermore, the Program included provisions on principles such as *ne bis in idem*, rules on obtaining evidence and individualisation of criminal sanctions, rules on confiscation of the property of the perpetrator of a criminal offence, etc.

The purpose of all these measures and instruments is to improve the efficiency and duration of judicial cooperation, to improve the principle of mutual recognition between the judicial systems of member states, as well as to facilitate cross-border investigations and indictments by establishing direct contact between judges and prosecutors of member states.

From the above, it can be concluded that mutual recognition is limited to the recognition of formal acts in specific areas. Also, the obligation to recognise a certain act does not mean the harmonisation of substantive criminal law (Fichera, 2011, p. 48). This position was confirmed by the EU Court of Justice in case number 303/05 *Advocaten voor de Wereld*,[23] where is stated that nothing in Articles 31 and 34 of Chapter VI of the EU Treaty, which are listed as the legal basis of the Framework Decision, does not condition the application of the European arrest warrant on the previous harmonization of criminal law in the member states.

In addition, mutual recognition does not depend on the harmonisation of procedural rules. Mutual recognition can be understood as a harmonised system of providing and requesting mutual assistance (Klip, 2012, p. 363). In the *Advocaten voor de Wereld* case, the Court of Justice stated in point 29 that, with regard to the application of the European Arrest Warrant, mutual recognition requires harmonisation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters.

The recognition of a court decision of one member state in another member state results in a court decision with an extraterritorial effect (Nikolaidis, 2007, p. 682). The cross-border effect of such a decision limits the sovereignty of the member state that executes the decision, and therefore an additional element of mutual recognition is necessary, which is mutual trust between the member states and their institutions (Mitsilegas, 2009, p. 119).

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[21] It would be more accurate to use the term judicial decisions since, in some countries, decisions that are subject to mutual recognition are adopted by a public prosecutor.

[22] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. 2001. OJ C 12/02. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF (2. 10. 2022).

[23] CJEU decision 2007. Decision of May 3, 2022. C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261.

4.2. Mutual trust as an element of mutual recognition

Understanding the concept of mutual trust is important for the Western Balkans authorities if they are interested in the successes of the Open Balkan Initiative. In the EU, the existence of mutual trust was considered a prerequisite from the very beginning of the development of the principle of mutual recognition in criminal matters. Although in the Tampere Program from 1999, mutual trust was not explicitly stated in the context of mutual recognition, the European Commission expressed already in the 2000 Communication the position that mutual trust is an important element of mutual recognition. The European Commission emphasised that mutual trust includes not only trust in the regulations of another member state, but also trust that the regulations will be adequately applied.[24] Already the following year, the Program of Measures for the Implementation of the Principle of Mutual Recognition explicitly states in the introductory part that the application of the principle of mutual recognition in criminal matters is based on the assumption that member states have mutual trust in their criminal justice systems. [25]

The direct link between mutual recognition and mutual trust is essential for the implementation of mutual recognition instruments and EU policy in the criminal law field. The rationale for mutual trust is based on the common values on which the EU is based, which are stated in Article 2 of the Treaty of Lisbon, namely the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of minorities. This formalistic approach to mutual trust does not take into account differences in the level of protection of human rights in EU member states, nor does it answer the question of whether mutual trust is the result of cooperation and integration or a prerequisite for such cooperation.

The assumption of mutual trust first introduced by the Program of Measures remained the central point and standard of mutual recognition. The European Commission, in its Communication from 2004, indicates that greater mutual trust between member states is necessary for the development of mutual recognition.[26]

Relatively shortly after the introduction of mutual recognition in criminal matters, it became clear that mutual trust cannot be implied, especially considering that fundamental rights are not equally protected in all EU member states. To overcome the identified challenge, the European Commission published the Judicial Agenda for 2020: Strengthening trust, mobility and growth within the EU.[27] The rule of law is the main point of the European Commission's view on the future of the area of freedom, security and justice, which is why in 2014, it adopted the Communication on the rule of law, which emphasises that the rule of law is a key element for the development of the area of freedom, security and justice.

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[24] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM (2000) 495 final.

[25] Introduction of Programme of measures to implement the principal of mutual recognition of decisions in criminal matters (EU) OJ C 12/10 of January 15, 2001.

[26] COM (2004) 401 final.

[27] COM (2014) 158 final.

Having in mind that Western Balkan countries are having challenges related to the rule of law, there is an imminent risk in the project for the establishment of the area of freedom and security in these countries.

4.3. Institutional framework for police and judicial cooperation

The need for closer police cooperation within the EC was triggered by the terrorist attacks which took place in the '70s of the XX century,[28] when the Trevi group was established (Mitsilegas, Monar, Rees, 2003, p. 22). The jurisdiction of the Trevi group was broadened to other crimes, such as illegal migration, drug trafficking and international crime (Baker, Harding, 2009, p. 29), but the Trevi group presented initial structure which aim was practical cooperation and exchange of information. The creation of an internal market and the removal of borders provided an incentive for the development of Europol in 1999, but only as an international organisation, not as an EU body.

The first attempt to coordinate the EU activities in the field of judicial cooperation in criminal matters was the establishment of the European Judicial Network in 1998 by Joint Action 98/428/JHA, which consisted of national contact points that provided legal and practical information to local judicial bodies in other countries to prepare a complete request for cooperation. Although the European Judicial Network was the first structured mechanism of judicial cooperation in the European Union that became operational, the idea of creating Eurojust persisted because it was necessary to establish effective cooperation at the level of the European Union.

The European Council in Tampere represents a turning point in the development of the EU bodies in the field of cooperation in criminal matters because the Conclusions overlooked the establishment of these bodies and their role. Given that these bodies were created within the framework of the third pillar of the EU, they were the result of the compromise of the member states and their willingness to leave part of the jurisdiction in criminal matters to the European Union. Thus, in a relatively short period, bodies were established, the competencies of which partially overlap and their roles and positions are not regulated in detail in legal acts. An example is represented by the European Judicial Network, as a network of contact persons, and Eurojust, as a transitional solution between a purely national public prosecutor system and the EU public prosecutor (Peers, 2011, p. 855). The gradual evolution of EU bodies in the field of police and judicial cooperation in criminal matters lead to the establishment of Eurojust, which has the task of coordinating the activities of national investigative bodies, OLAF, which can conduct administrative investigations, and the European Public Prosecutor Office, which has shared jurisdiction with the national public prosecutor's offices (Matić Bošković, 2022, p. 105).

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[28] The proposal to establish the Trevi Group was made by the United Kingdom in the face of problems and terrorist attacks by the Irish Republican Army, which was responsible for bombings in London, Birmingham, and other cities during the first half of the seventies in the last century. The initiative was supported by other EU member states that were facing similar problems of political violence. Germany, for instance, in that period had problems with the Baader Meinhof Group or Red Army Faction, while Italy faced violence caused by the Red Brigades.

The European integration in criminal matters has been improved in recent decades by the establishment of the EU bodies and organisations responsible for police and judicial cooperation in the field of criminal law. In the European Union, there are now two groups of actors: one is the national police and judicial institutions of the member states, and the other is the bodies of the European Union. Some of the EU bodies for police and judicial cooperation, such as the European Police Office (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust), were established under the third pillar, while others have a hybrid status based on the Community law, such as the European Anti-fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO). The establishment of these bodies was accompanied by discussions on their powers and different views on these bodies as centralised EU agencies, on the one hand, and as a form of intergovernmental cooperation, which has had an impact on the development of EU criminal law, on the other.

5. CONCLUSION

Although Open Balkan is a relatively new initiative, over three years, the three Western Balkan countries signed a significant number of instruments (memorandums and inter-state agreements) with the aim to facilitate free trade and free access to the labour market. Without going into a discussion on the economic implications of the signed agreements and the need to harmonise legislation that regulates trade, there is a need to highlight the security issues. The announced removal of the borders between the three Western Balkan countries increases the risk of free movement of crime and offenders, including of committing cross-border crimes or hiding criminals in another member country where the legislation is milder. While the removal of the borders will facilitate the movement of crime, the cooperation between police and judiciary will be bound by rules on legal cooperation in criminal matters that are formalistic and relatively slow.

To overcome these challenges, the Western Balkan authorities should learn from the EU experiences in establishing the internal market and the area of freedom, security and justice. The adoption of the mutual recognition agreement in the area of trade and commerce should be accompanied by the adoption of mutual recognition instruments in criminal law that should enable the exchange of information and more efficient investigations and prosecutions. The creation of an institutional structure should follow the adoption of legislative instruments. The creation of the regional police bodies is not visible, but at least the contact points and the channels for direct communication between police and judiciary should be provided. However, the mutual recognition instruments and enhanced cooperation in the EU are based on mutual trust and the common rule of law values, while the Western Balkan countries are still facing various challenges when it comes to the achievement of the rule of law standards. These challenges could jeopardise the whole Open Balkan initiative and bring additional risks to the fight against organised crime and corruption in the Western Balkan countries.

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INTERACTION BETWEEN EU LAW AND DOMESTIC LAW IN THE CONTEXT OF BREXIT

The study analyses some contemporary issues and challenges related to the interaction between EU law and domestic legal systems of the EU member states in the context of Brexit. The focus of the work is on the legal system of Great Britain, exploring the dualist approach of UK law to the law of the European Union. The Brexit process has raised issues of legal pluralism in the implementation of the EU integration law in the UK's legal system, which will also be addressed in the paper.

Keywords: European Union, legal order, interaction, dualism, pluralism, Brexit.

1. INTRODUCTION

The European Union, during its functioning and development, has formed its own unique legal order, within which it regulates the entire set of legal phenomena that arise within the framework of this international integration association, which reflects the modern trend of international law focusing mainly on domestic legal regimes (Sweet, 2003).

According to H. Kelsen, in law, a special place is occupied by the international legal order, which determines the territorial, personal and temporal spheres of the validity of national legal orders, making the simultaneous existence of different states possible. At the same time, international law determines the content of national law, regulating those issues that states would otherwise freely regulate unilaterally. In this regard, the relationship between international law and national law is "reminiscent of the relationship between the national legal order and the internal norms of a corporation" (Kelsen, 2007, p. 191).

A special place among these legal orders is occupied by the interstate "integration" legal order. The legal order of the EU manifests itself as a process of integration due to its formation on the basis of the unification and "melting" of separate, independent national legal systems and legal orders operating on their basis into a fairly stable and integral supranational legal entity.

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Despite the perception and recognition of coherence and supremacy of EU law and its implementation in the national legal orders of the member states, EU law cannot ignore the constitutional and legal foundations of the legal orders of its member states, according to which their national legal systems interact with each other and with international and EU law. Thus, the effectiveness of the process of transposition of EU law into the national law of the member states will depend on the place of EU law in the «pyramids" of national norms. Moreover, this place in each country differs, first of all, from the way the national legal system regulates the relationship between international and national law, which for many comes down to the issue of choosing between monism and dualism, the two concepts which for a long time represent the two principal frameworks through which this issue is approached (Von Bogdandy, 2008, p. 399).

2. EU LAW, AS AN INTEGRATIONIST LEGAL ORDER, SEEN THROUGH THE MONIST AND DUALIST THEORY

The legal systems of the EU member states can be divided into two groups according to the way in which they approach the presence of international norms in their national legal orders. The first adheres to the monist concept of interaction of national and international law, and the other is dualist. The way international law is integrated into the national legal order, *i.e.* its operation and interaction with the national law, depends on whether the country applies the monist or the dualist approach.

In the continental legal systems, monist theory prevails. The dualist approach is characteristic, first of all, for states adhering to Anglo-Saxon legal traditions. In the UK legal system, ratification by the Parliament is mandatory for international treaties affecting the rights of individuals or requiring amendments to common law or statutes, treaties in the field of financial obligations and taxes. If an international treaty can be implemented within the limits of existing laws, then an administrative act of incorporation is adopted by the government or a competent ministry, which can take various forms. In the literature, this approach of the United Kingdom has been called the "Westminster tradition" (Council of Europe, 2001, p. 93).

British courts adhere to the rule that if there were no special national act of incorporation, the international treaty is not valid; that is, it does not apply in the national legal practice. In other words, the court applies the norms of a legislative act issued on the basis of an international treaty for its incorporation, while such a law does not have advantages over other laws of the state (Mendez, 2013). Material incorporation excludes a direct conflict between subsequent national legislation and international treaties. However, the law on the basis of which the incorporation of an international treaty is carried out is influenced by the principle "*lex posterior derogat legi priori*". In the event of a conflict, national legislation takes precedence over an international treaty and, although in practice subsequent law is adopted by taking into account the provisions of an existing international treaty, British courts proceed from the fact that such law should ensure consistency and not cause controversy because the UK Parliament when concluding the international treaty intends to fulfil its international obligations under international

law, and not be held responsible for their violation. The texts of international treaties are often used as a means of interpretation. It should be noted that such a dualist approach is based on the principle of separation of the branches of government in Great Britain, the essence of which lies in the fact that the right to ratify treaties belongs to the Royal Power, which could to a certain extent carry out legislative activities without the consent of the Parliament (Brownlie, 1998, p. 43).

In parallel with the expansion and transformation of the European Communities, the development of the very integration law of these entities took place. EU law is an independent and special legal system, the norms of which are integrated into the national law of the member states, and which regulate the development of complex integration processes between states and peoples united in the organisation of political power under the supranational entity called "the European Union". One of the fundamental principles of EU law is its supremacy over national legal systems. After the entry of Great Britain into the European Communities, not only the question of the relationship between national and European law but also questions of a constitutional order emerged. We are talking about the competition between the different forms of sovereignty because if the law of the European Communities had supremacy in relation to national legal systems, this conflicts with the constitutional principle of the supremacy of the Parliament of the United Kingdom in the legislative sphere.

Today, EU law's supremacy is recognized by all member states. And there is no dispute about the formula that in the event of a conflict between the norms of national law and EU law, the latter prevails (Entin *et al*, 2013, p. 77). It is noteworthy that most scholars in the field note the universal nature of the principle of the supremacy of EU law. Such "universality" is manifested in the fact that, firstly, this principle operates on the territory of all member states. Secondly, in relation to the provisions of national law, not only the founding treaties, as a kind of European constitutional acts, but also all other regulatory legal acts of the EU (the so-called "communitarian law") have priority. Thirdly, EU law has primacy not only in relation to the norms of ordinary national legislation but also to constitutional law.

3. UK LAW AND EU LAW FROM THE HISTORICAL PERSPECTVE

Great Britain became a member of the EU in 1973. The Treaty on the accession of the United Kingdom to the European Economic Community and the European Atomic Energy Community was concluded in Brussels on January 22, 1972. On the same day, the Council of the European Communities decided on the UK's accession to the European Coal and Steel Community. These international treaties were incorporated into the national legislation of Great Britain on October 17, 1972, when the Parliament adopted the European Communities Act.[1] As the researchers in the field have pointed out, the EU law, which derives from the Treaty of Rome and subsequent treaties, such as the Lisbon Treaty of 2007, and was developed by the EU Court of Justice, fundamentally limited the concept of parliamentary sovereignty in the UK (Leyland, 2012, p. 52). At the same time,

[1] European Communities Act 1972. Available at: https://www.legislation.gov.uk/ukpga/1972/68/contents (1. 8. 2022).

the European Communities Act did not contain special constitutional provisions but, in general terms, laid down the procedure for the direct application of the EU law and the supremacy of the law of the Communities. Accordingly, the practice of the EU Court of Justice and British courts was of great importance for eliminating the problems that arose as a result of the implementation of EU law in the national legal system, in particular, in coordination with the fundamental constitutional principle of the UK parliamentary sovereignty in the context of the dualist concept of the relationship between British law and EU law. The conflicts, which arose as a result of the interaction of two legal orders, were identified and eliminated.

The *Macarthys Ltd. vs Smith* (1979) case played a key role in the process of implementing EU law into the UK legal order. In his judgement, Lord Justice Denning stated that acts of the British Parliament must be interpreted in accordance with EU law unless the legislator provides otherwise.[2] At the same time, he noted that "[…] Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not, however, envisage any such situation. […] But if Parliament should do so, then I say we will consider that event when it happens. Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty" (Leyland, 2012, p. 52). Since the decision was made, a new stage has begun in the development of the British judicial practice and the national legal system, where the British judiciary managed to make room for effective interaction between EU law and the British legal system (Brownlie, 1998, p. 46). Thus, the foundation was laid for the recognition of the principles of the supremacy and direct application of EU law in the British legal order, which were expressed in the fact that, in the event of conflicts between the national law of Great Britain and EU law, communitarian law will take precedence in cases where this is possible.

Another important case that contributed to the interaction of the EU and UK legal orders was the *Factortame* case, during which, in the UK Court of Appeal, Lord Bridge stated that "the presumption that an act of Parliament is compatible with Community law as long as it recognised as such shall be as strong as the presumption that the delegated legislation is valid until otherwise established" (Barnett, 2000, p. 351). In particular, it was stated that "the effectiveness of Community law as a whole would be threatened if national law could prevent the Court from deciding on the introduction of provisional measures of judicial protection, which concerned Community law, which would guarantee the absolute effectiveness of this judicial decision and confirm the existence of rights claimed under Community law" (Barnett, 2000, p. 351). Therefore, Community law must be interpreted in such a way as to require national courts to disregard rules of the national legal system that become an obstacle to deciding on provisional remedies (Hartley, 1998, pp. 224-225). In fact, in this case, the judgement once again confirmed the supremacy of European law

[2] Court of Appeal (Civil Division), 1979. *Macarthys Ltd. vs Smith*. Available at: https://vlex.co.uk/vid/macarthys-ltd-v-smith-793944417 (1. 8. 2022).

and filled in the gaps in legal regulation that arose as a result of the interaction of two legal orders — the EU and the UK.

As noted, in the *Factortame* case, such an important step of the House of Lords as the issuance of a ban that suspends the operation of a law passed by the Parliament was not accompanied by a discussion of the impact of this decision on the essence of the principle of the sovereignty of Parliament (Elliott, 2004, p. 549). This case brought a rather indirect assessment of the impact of the EU "supremacy principle" on the decisions of the Parliament. The court also did not sufficiently explain the nature of the relationship between the two legal orders — the national and EU legal order (Gordon, 2016).

Thus, many perceived *Factortame* as a decision that confirmed the supremacy of the EU law over British law and by which the sovereignty of the British Parliament in the domain of law-making was significantly undermined. However, in our opinion, there was no violation of parliamentary sovereignty. The courts did not set aside the relevant piece of legislation but only tried to interpret it in accordance with the British obligations under EU law by applying a dualist approach to the interaction of two legal orders. By repealing the law, the House of Lords actually forced the Parliament to voluntarily limit its sovereignty. In relation to this, Lord Justice Bridge noted that "whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972, it was entirely voluntary".[3] Moreover, under the provisions of the 1972 Act, the courts are required to interpret UK law in accordance with EU law. The decision in the *Equal Opportunities Commission*,[4] another important ruling on the matter, called into question and, in relation to communal law, cancelled the validity of the concept of implied non-application of EU law according to the principle "*lex posterior derogat legi priori*". The 1972 Act was considered a special constitutional law that could not be repealed by a subsequent law without a special decision of the Parliament.

Subsequently, the case of *Thoburn v Sunderland City Council* [2002] offered a more thorough constitutional and legal analysis of this issue. In the decision, the court recognised the primacy of EU law over the laws adopted by the UK Parliament, with only one exception. The British Parliament may, by derogating from the principle of the supremacy of EU law, change the effect of a provision of European law in the territory of the United Kingdom only if, in passing the Act, in an explicit way, it would communicate its desire to do so. By this, the Parliament's sovereignty is preserved since it could at any time express its intention to repeal any law. In this way, the House of Lords was able both to uphold the principle of parliamentary sovereignty and secure the supremacy of EU law.

While evaluating its own approach to the problem of competition of sovereignties, the Administrative Court noted in § 64 of the *Thoburn* judgment that: "This development of the common law regarding constitutional rights, and […] constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and

[3] House of Lords, 1990. Factortame Ltd, R (On the Application Of) v Secretary of State for Transport. Available at: https://www.casemine.com/judgement/uk/5a8ff8de60d03e7f57ecec34 (1. 8. 2022).

[4] House of Lords, 1994. Equal Opportunities Commission v. Secretary of State for Employment. Available at: https://www.casemine.com/judgement/uk/5a8ff8cb60d03e7f57ecd7ed (1. 8. 2022).

the flexibility of our uncodified constitution". In this context, Lord Judge J. Laws noted that "[t]he conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has, in my judgment, been modified. It has been done by the common law, wholly consistent with the constitutional principle".[5] British scholars analyzing the *Thoburn* case agree that the Administrative Court, in this decision, for the first time provided a convincing legal interpretation of the status of EU law in the constitutional order of Great Britain. At the same time, the proposed version of the solution to the constitutional dilemma regarding the competition of sovereignties successfully combines the legal sovereignty of the Parliament with what can be called the pragmatic supremacy of the European Union legal norms (Elliott, 2004, p. 551).

However, the judgment in the *HS2* case added further nuance to the relationship between the EU "supremacy principle" and the parliamentary sovereignty in the absence of any clear guidance from the 1972 Act.[6] The UK Supreme Court held that where EU law requires that one of the key manifestations of the doctrine of the Parliament's sovereignty — the ban on judicial review of legislative procedure — has been suspended, the court will not be able to conduct such a review. In such a situation, the Supreme Court held, the EU law's supremacy may have to give way to the supremacy of the UK legislature.[7]

4. UK LAW AND EU LAW AFTER BREXIT: A SWITCH TO PLURALISM

The UK's decision to withdraw from the European Union raised a number of issues of international and national legal significance, in particular, with regard to the place of EU law in the country's legal system and the interaction of the two legal orders. In the *Miller* case, further clarification of the relationship was given by the Supreme Court. In order to answer a question on the exercise of prerogative powers on the application of Article 50 of the EU Treaty, the internal constitutional status of the EU law and the 1972 Act had to be analyzed anew. While addressing this question, the Supreme Court concluded that the impact of EU law on the UK legal order was of "unprecedented" character, so that the 1972 Act made EU law not only a source of law in the UK but also created "an entirely new, independent and overriding source of domestic law", which "takes precedence when compared with all other sources of law, including statutes".[8] Moreover, the Supreme Court found that although the 1972 Act gives effect to EU law, "it is not itself the originating source of that law". However, all the exclusivity that surrounded the 1972 Act as a constitutional statute and EU law as a special source of national law ultimately depended on the power of the UK Parliament to decide on the UK's membership in the EU and repeal the 1972 Act. Thus, despite its exceptional nature, the role of EU law in the legal order of the United

[5] High Court, 2002, Thoburn v Sunderland City Council. Available at: https://www.bailii.org/ew/cases/EWHC/Admin/2002/195.html (1. 8. 2022).

[6] Supreme Court, 2014. R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport [2014] UKSC 3. Available at: https://www.supremecourt.uk/cases/uksc-2013-0172.html (1. 8. 2022).

[7] Supreme Court, 2014. R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport [2014] UKSC 3. Available at: https://www.supremecourt.uk/cases/uksc-2013-0172.html (1. 8. 2022).

[8] Supreme Court, Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3) [2017] UKSC 5. URL: http://www.bailii.org/uk/cases/UKSC/2017/5.html (1. 8. 2022).

Kingdom was ultimately subject to the "rule of recognition", which defines Parliament as the supreme source of law under the constitution. According to that, the Parliament could repeal the 1972 Act, and EU law would cease to be the source of the national legal system in accordance with the constitution. Thus, EU law can only have a status of a source of law consistent with the principle of Parliamentary sovereignty.

An analysis of the key features of the adopted legislative and judicial measures regarding the interaction of the national legal order and the EU integration legal order in the context of Brexit reveals the transition from a specific internal organizational and legal mechanism for the implementation of EU law to the ambiguity regarding the specific status of EU law in the UK legal system and the relationship between the principle of the supremacy of EU law and the principle of sovereignty of the British Parliament. As noted in the doctrine, this particular "non-regulation" of the status of EU law in the UK quite clearly illustrates the pluralistic approach characterizing the interaction between the legal orders of the UK and the EU (Walker, 2014, p. 529).

Legal pluralism can be viewed through the prism of the possibility of the coexistence of various, potentially conflicting legal norms within the same legal system, which can have an exclusionary effect on each other. Although the doctrine states that due to legal pluralism, the existing conflict between legal norms expressed and enshrined in legal acts of different legal force can be overcome (Jansen, 2012), in our opinion, in practice, it is extremely difficult to create a legal mechanism for a selective application of norms in order to avoid the occurrence of conflict of laws in this or any other legal system. At the same time, until recently, when the scope of international law was expanded through international treaties, legal pluralism was viewed exclusively through the prism of a clear distribution of monist national legal orders and common, but limited in regulatory terms, international law, which, as a rule, did not intersect (Tanchev, 2014, p. 1053). In the context of Brexit, at the national level, are already applied not only the national legal norms and the integrated norms of the EU law but also the norms of international treaties ratified by the UK, as well as the norms of international treaties concluded between the UK and third countries, as well international organizations which, in contrast to the interaction of national and integration legal orders during the period of EU membership, now creates numerous problems and obstacles for effective legal regulation.

The idea is that within one state, different legal orders can coexist, given that there is a pluralism of legal forms and plurality of legal orders, and that no ethnic or state hierarchy exists in this regard. Thus, active cooperation and the functioning of various legal orders within a certain legal field are possible. Where a plurality of normative legal orders exists, each, together with a valid constitution, recognizes the legitimacy of the other within its own jurisdiction as long as neither imposes constitutional precedence over the other (MacCormick, 1999). Legal pluralism is possible thanks to a wide range of different instruments, which do not need necessarily be of a purely legal character, through which conflicts are resolved and social relations regulated (Twining, 2000, p. 84). The stable coexistence of various legal orders is provided through the fulfilment of certain requirements for the supremacy of relevant laws in order to avoid the emergence of legal chaos when an individual invokes only the norms belonging to his/her own legal order.

Some researchers analyse legal pluralism seen as a sum of inherently different regulatory orders that intersect, interact and are characterised by internal diversity. These national, regional and global regulatory orders can often be applied simultaneously beyond the national borders of states (Santos, 1995, p. 473), which, in its own way, can cause numerous problems of legal regulation.

Legal pluralism is an ambiguous concept that can be used both to denote the plurality of existing legal norms within one legal order and to the plurality of legal orders existing at the global level (Besson, 2008). The meaning of this concept is reduced to the fact that such a legal field is being created in which different legal orders interact and compete with each other regarding a set of actions that relate to the legal regulation of social relations of the same kind (Viola, 2007). This position is especially clearly and vividly reflected in the example of Brexit and the subsequent interaction of the EU integration legal order with the UK national legal order, modifying and thereby emphasizing its pluralistic nature.

Accordingly, one of the fundamental constitutional changes brought about by Brexit was the severing of the structural link between the UK constitution and the EU legal order and between the UK and EU courts based on the 1972 Act. As explained in Article 1 of the European Union (Withdrawal) Act of 2018, the 1972 Act will be cancelled on the "exit day".[9] Thus, it seems that relations between EU and UK law end with the formal repeal of the 1972 Act. It could be expected that, in the future, the interaction between the two legal orders will move towards a pluralistic approach, which is facilitated by a number of features of the agreements concluded between the two parties that regulate the future relations between the legal orders of the EU and the UK after Brexit.

The first important feature of the Withdrawal Agreement is that it does not, as might be expected with the repeal of the 1972 Act, repeal all EU laws in force in the UK prior to the exit day.[10] To a greater extent, it explicitly incorporates all EU acts in force prior to Brexit into the UK legal system by keeping existing EU law in force until the day of exit. Moreover, much of the provision of EU law retained in the UK legal system under this Act have the same effect as the highest norms of domestic law adopted by the UK Parliament.[11] According to the EU Court of Justice, the retained right of integration of EU law is preserved in the Withdrawal Agreement in such a way that the "validity, meaning or operation" of any EC law in force in the legal order of the UK before the day of withdrawal is to be interpreted and applied in accordance with the case law of the EU courts in relation to these communitarian acts.[12] Thus, when it comes to the need to secure the validity of the

[9] European Union (Withdrawal) Act 2018. Available at: https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted (1. 8. 2022).

[10] Agreement of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. OJ L 29, January 31, 2020, pp. 7-18. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (1. 8. 2022).

[11] Agreement of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. OJ L 29, January 31, 2020, pp. 7-18. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (1. 8. 2022).

[12] Agreement of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. OJ L 29, January 31, 2020, pp. 7-18. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (1. 8. 2022).

EU law in the British legal system in the period after Brexit, the Withdrawal Agreement created the most pluralistic relationship between the two legal orders that was possible.

An essential factor in the development of the pluralistic approach was the obligation to recognize and apply EU law in the British legal system and to recognize the authority of the EU Court of Justice as the final interpreter of the European Union law. The changes made in this respect by the Withdrawal Agreement are significant as they assumed that the UK courts would not be bound by the jurisprudence of the EU Court of Justice and would not be able to issue pre-trial requests after the withdrawal. However, as noted above, the courts in the United Kingdom are obliged to apply the "retained" EU laws from the date of withdrawal in accordance with the case law of the Court of Justice of the EU, which is binding on them.[13] More importantly, the link between the EU courts and the UK courts in matters concerning the "post-withdrawal" EU law has not been completely severed. Article 6 of the European Union (Withdrawal) Act of 2018 provides that:

"2. […] a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal".

Thus, as it is clear from Article 6, the decisions of the EU courts are not completely excluded from the UK legal order upon exit. There is still a statutory link between the UK courts and the EU courts, preserved by the Withdrawal Agreement and the UK national legislation. However, it is much weaker than the similar obligation under the 1972 Act. The fact that the UK courts are required by the statute to take into account "anything done" by the EU courts if it relates to any relevant matter, provides an essential link between the two legal orders.

Moreover, the Withdrawal Agreement, in contrast to the 1972 Act and the subsequent European Union Act of 2011, for the first time legislated the principle of the supremacy of EU law, which will continue to apply "on or after the day of withdrawal" to the extent in which it refers to the application of "retained" EU law (Agreement 2020). In this regard, it can be expected that the existing EU law, as adopted by its institutions, including EU courts, will continue to play a role in the UK's national legal order after the country's withdrawal from the Union. If future EU laws or decisions of the EU courts change, revise or develop the areas of EU law retained in the UK legal system under the Withdrawal Agreement, both during and after the "transition period", this might be decisive for the interpretation and application of the EU-related UK legislation laws for the foreseeable future (Mac Amhlaigh, 2019). Indeed, if, after Brexit, the UK continues to apply the relevant EU regulation, then the importance of the role that future EU law will play in the UK national legal order might become even more pronounced (Craig, 2018). This is a logical result of the retention of the existing EU law in the UK legal system even upon its departure from the Union. If there are gaps, deviations or ambiguities in the interpretation of this body of Union law, its interpretation by the EU courts could not but affect how the UK courts interpret and apply the retained law, even if it might seem to conflict with the post-Brexit statutes of the British Parliament.

[13] Agreement of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. OJ L 29, January 31, 2020, pp. 7-18. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (1. 8. 2022).

5. CONCLUSION

In our view, EU law will have a significant impact on UK constitutional law after leaving the EU, given the relationship between the UK courts and the EU courts provided for in the 2018 Act. The types of situations that have led to constitutional pluralism — multiple sources of law claiming power, interacting and conflicting with each other — are supported to a certain extent by the structural link established between the courts under Article 6 of the 2018 Act. As already noted, its provisions provided that the UK courts may take into consideration a decision of an EU institution even post-Brexit, provided that it "is relevant to any matter before a court or tribunal».[14] The scope for recognition of the EU acts, in particular judgments of the EU Court of Justice, is particularly broad given that it applies to "any question" before a court or tribunal and is not limited to the interpretation or application of the retained EU law. Moreover, the interpretation and meaning of the term "take into account" is equally broad and, therefore, open to the British courts' own interpretation. In the context of Brexit, despite the Withdrawal Agreement's formal removal of the structural links between the EU and the UK courts established in the 1972 Act - which maintained a pluralistic relationship between them - the statutory norm allowing the courts to take into account future decisions of the EU institutions could have enormous pluralistic potential.

Despite the traditional adherence to the dualist conception of the relationship between international law and the national law of Great Britain, the analysis of the legal mechanisms created in the process of the UK's withdrawal from the European Union points to a pluralism of interactions between the law of the EU and the United Kingdom, which is expressed in the presence of at least two legal orders of equal status, each claiming supremacy by acting side by side and interacting through the transformational 1972 Act (Walker, 2016, p. 333). Moreover, unlike monism or dualism, pluralism explicitly rejects any universal solution for the prevalence of one system over another. Rather, these two orders are mutually adaptable without directly challenging the authority of one or another (MacCormick, 1999, p. 117), which can result in the reduced effectiveness of legal regulation.

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GENDER DISCRIMINATION AND DOMESTIC VIOLENCE IN THE REPUBLIC OF CROATIA AND BOSNIA AND HERZEGOVINA

Gender discrimination and domestic violence against women are critical points of the human rights system in the Republic of Croatia and Bosnia and Herzegovina, and due to the crisis caused by the Covid 19 pandemic, the situation has worsened. The legal framework and the envisaged institutional mechanisms in both countries are at a satisfactory level, so the question arises as to what are the key causes of the discrepancy between the normative and the actual state of affairs as well as the aforementioned deterioration. This work starts from the assumption that the root of the problem rests in: traditional heritage, economic dependence of women on men, and inadequate institutional protection of victims of gender discrimination and domestic violence.

Keywords: Republic of Croatia, Bosnia and Herzegovina, gender discrimination, domestic violence, Covid 19.

1. INTRODUCTION

Prohibition of discrimination based on gender is one of the elements of the principle of prohibition of discrimination or, as Barić Punda points out (2005, p. 28) principles of non – discrimination, freedom from discrimination, principles of equality, and harmony in differences. Discrimination based on gender is the root cause of gender-based violence. In the Republic of Croatia and Bosnia and Herzegovina, both phenomena are widespread, and the Covid 19 virus pandemic has further worsened the situation.

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The Croatian and Bosnian – Herzegovinian legal and strategic framework, standards and practice in the areas of non – discrimination and gender equality are presented. The actual state of affairs in both countries is presented through authoritative reports and analyses.

Given that protection against discrimination based on gender and gender-based violence in both countries is not at a satisfactory level, despite the satisfactory normative framework, the causes of this discrepancy are detected and basic guidelines for solving the problem are proposed. The starting point is certainly raising awareness of gender equality through the fight against prejudices and stereotypes, which, as Stantić and Bilbija point out (2014, p. 449), is much more difficult in this part of Europe than in the more developed ones, and is a prerequisite for other types of fight against gender discrimination.

2. INTERNATIONAL HUMAN RIGHTS LAW – PROHIBITION OF DISCRIMINATION, GENDER EQUALITY AND PROTECTION FROM GENDER-BASED VIOLENCE

Making a distinction between men and women does not always constitute discrimination in itself. Only those distinctions that have no reasonable justification with regard to the goal and consequences of the procedure or where there is no proportion between the means used and the goal to be achieved (principle of proportionality) are considered discriminatory. Zorić et al. deal with this in detail (2018, p. 14 and 15).

The existing international European and United Nations instruments, which form the international and European legal framework for the implementation of the prohibition of discrimination and gender equality, are generally accepted by almost all modern countries that, through their constitutions and other legal acts, legally regulate this issue.[1]

[1] The most important documents that make up the international and European legal framework for achieving the prohibition of discrimination and gender equality are: Universal Declaration of Human Right (1948), International Covenant on Civil and Political Right (196), International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of All Forms of Discrimination Against Women – CEDAW (1979) with Optional Protocol, General Recommendation 19 of the UN Committee on the Eliminations of All Forms of Discrimination Against Women (1992), International Convention on the Elimination of All Forms of Racial Discrimination (1969), Convention on the Rights of the Child (1989), United Nation Declaration on Elimination of Violence against Women – DEVAW (1993), Beijing Declaration with Platform for Action (1995), Millennium Development Goal (1990 – 2015)/UN Millennium Declaration (2000), Agenda for sustainable Development until 2030 (Sustainable Development Goals – SDG), Convention on the Rights of Persons with Disabilities (UN, 2006), UN Resolution 1325 Women, Peace and ecurity (2000), European Convention for the Protection of Human Rights and Fundamental Freedom (1950) and additional protocols, European Social Charter (1961, 1966), Council of Europe Convention on Preventing and Combating Violence againt women and dometic violence (CAHVIO, Istanbul, 2011), Declaration on the Equality of Women and Men of the Council of Europe (1988), EU Council Directive 75/117/EC on February 10, 1975. on the harmonization of the laws of member states with regard to the principle of equal pay for women and men, Social Security Directive (on the progressive application of the principle of equal treatment of men and women in matters of social security) – 1997 (79/7/EEC – OJ L 6), Recommendation R(856), no.4, of the Committee of Ministers to member states on domestic violence, Recommendation R(98), no.14, of the Committee of Ministers to member states on integrating the gender aspect into public policy, Recommendation R(2003), no. 3, of the Committee of Ministers to member states on the balanced participation of women and men in political and public decision – making, Recommendation R(2007), no. 17, Committee of Ministers to meber states on standards and mechanisms for gender equality, the EU Charter of Fundamental Rights, from 2000, which confirms the prohibition of discrimination and the obligation to ensure the equality of men and women in all areas, the Conventions of the International Labor Organization of the UN (ILO): Convention 100 on the equal

Violence against women is any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or private life.[2]

As expressed in Article 3b of the Convention on Preventing and Combating Violence Against Women and Domestic Violence (otherwise known as the Istanbul Convention) - domestic violence (family violence) means any act of physical, sexual, psychological or economic violence that occurs in the family or household, or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same household with the victim.

3. CROATIAN LEGAL AND STRATEGIC FRAMEWORK, STANDARDS, AND PRACTICE IN THE AREAS OF NON – DISCRIMINATION AND GENDER EQUALITY

Gender equality, based on Article 3. of the Constitution, is one of the highest values of the constitutional order of the Republic of Croatia and at the same time the basis for the interpretation of all constitutional provisions. The general bases for promotion and protection and fundamental values are determined by the Law on Gender Equality. It also determines the way to protect against gender discrimination, but also to create equal opportunities for men and women. It is very significant that, based on Article 14, Paragraph 4 of the Act on Suppression of Discrimination, the Ombudsman and special Ombudsman are required to report all records of cases of discrimination under their jurisdiction by gender.

The Law on Gender Equality was adopted in 2008, and the Law on Amendments to the Law on Gender Equality in 2017. Nothing significant has been changed by it; the only significant addition is Article 1.a. which expressly states that the entire law is harmonized with the relevant acts of the European Union. Regarding the compliance of the Law of Gender Equality with international democratic standards, its Article 4 is of exceptional importance, as it determines that the provisions of the said law „must not be interpreted or applied in a way that would limit or diminish the content of guarantees on gender equality that stem from the general rules of international law, the acquis of the European Community, the United Nations Covenant on Civil and Political Rights, i.e. economic, social and cultural rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The Law on Gender Equality determines the positive obligations of state authorities whose purpose is to promote gender equality and combat discrimination and, in accordance

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remuneration of men and women for work of equal value (1951), Convention 103 on maternity protection (revised in 1952), Convention 111 on discrimination inemployment and occupation (1958), Convention 156 on equal opportunities and treatment for male and female workers – worker with family responsibilities (1981).

[2] United Nations. 1993. United nations on the elimination of violence against women – Devaw. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf. (14. 7. 2022).

with the international democratic standard that encourages unequal treatment of unequals precisely for the purpose of achieving equality and abolishing discrimination, approves the establishment of special measures. The law defines special measures as „specific benefits that enable people of a certain gender to participate equally in public life, eliminate existing inequalities or ensure rights that were previously denied to them" (Art. 9, paragraph 1). They are temporary in nature, they must be determined by law or other legal regulation and as such are not considered discrimination. These are, for example, the special rights of pregnant women and mothers. Numerous positive obligations (Art. 11) with the aim of achieving gender equality, precisely with regard to these special measures, are prescribed for state administration bodies and legal entities predominantly owned by the state. They are obligated not only to apply special measures, but also to adopt action plans for the promotion and establishment of gender equality. Special measures also aim to achieve equal participation of women and men in bodies of legislative, executive and judicial power, including public services (Art. 12).

Among the fundamental principles in the Family Law are the principle of equality between men and women, and the principle of prohibition of discrimination based on gender. (Art. 3) The prohibition of discrimination on the basis of gender is normatively fully and consistently respected and developed in all forms and elements of family relations by the Family Law.

The Law on Protection from Domestic Violence and the Criminal Code are still not aligned with the Istanbul Convention, because they do not provide adequate protection from the violence that occurs between current and former intimate partners.[3] The ombudsman went on to point out that violence against women does not only take place in married and extramarital unions, but to a large extent includes violence against women who are (or were) in an intimate partnership. The ombudsman recommends that Croatian legislation be harmonized with the Istanbul Convention as soon as possible in order to create a comprehensive framework, policies and measures for the protection and assistance of all victims of violence against women, including women who are in intimate current or former partner relationships. Pursuant to Article 16 of the Law on Gender Equality, the media are obligated to promote awareness of gender equality. Article 16, paragraph 2 explicitly prohibits the public display and presentation of women and men" in an offensive, belittling or humiliating manner, with regard to gender and sexual orientation."

With the new Law on protection against domestic violence, which entered into force on January 1, 2020, and with the accompanying implementing documents,[4] in the Republic

[3] Definition of domestic violence as a criminal offence under Art. 179a of the Penal Code reads: anyone who seriously violates the regulations on protection against domestic violence and thus causes a family member or close person to fear for his or her safety or the safety of those close to him or her or puts them in a degrading position or state of prolonged suffering, and thus no serious crime has been committed, will be punished with a prison sentence of 1 to 2 years.

[4] Protocol on handling in the case of sexual violence, Rulebook on the implementation of protective measures of mandatory psychosocial treatment, Rulebook on the method of implementation of protective measures prohibiting the approach, harassment or talking of a victim of domestic violence and removal from the joint household, Rulebook on the method of implementation of the protective measure of mandatory addiction treatment, Rulebook on the method of collection, processing and delivery of statistical data and reports from the area of application of the Act on protection against domestic violence, Rulebook on the implementation of the protective measure of mandatory psychosocial treatment.

of Croatia, this area is regulated in accordance with international democratic standards.

A comprehensive set of documents were adopted for the implementation of positive anti-discrimination legislation in practice. However, they were only partially implemented. [5]

4. BOSNIA AND HERZEGOVINA'S LEGAL AND STRATEGIC FRAMEWORK, STANDARD AND PRACTICE IN THE AREA OF NON – DISCRIMINATION AND GENDER EQUALITY

Law on Gender Equality in Bosnia and Herzegovina (hereinafter: BiH) (in addition to entity constitutions, the Law on Prohibition of Discrimination and international documents and relevant entity laws and the generally applicable legal framework of the Federation of Bosnia and Herzegovina, the Republic of Srpska and Brčko District of Bosnia and Herzegovina) regulates, promotes and protects gender equality, guarantees equal opportunities and equal treatment of all persons regardless of gender, in the public and private sphere of society, and regulates protection against discrimination based on gender.

According to Article 6, paragraph 4, competent authorities are obligated to take appropriate measures to eliminate and prevent gender-based violence in the public and private spheres of life, and to provide instruments for providing protection, assistance and compensation to victims. The law provides definitions of direct and indirect discrimination, and allows the establishment of special measures with the aim of promoting gender equality and eliminating existing practices of discrimination. It is particularly important to point out that in the field of combating gender-based violence and changing traditional gender roles in society, the Law in Article 6, Paragraph 5, recognizes the obligation of educational activities and raising the awareness of the population in order to eliminate prejudices, customs and all other practices based on the idea of the inferiority or the superiority of any gender, as well as the stereotypical roles of men and women. Further, Articles 10 to 24 of the Law prohibit discrimination on the basis of gender and establish rights and obligations in accessing and enjoying all rights and services established by valid laws within BiH in all forms of social life (education, employment, work and access to all types of resources, social protection, health care, sport and culture, public life, media, statistical records, judicial protection, and obligations of competent authorities).

It is specifically stipulated that competent authorities take special measures to protect and improve women's reproductive health (Article 18, Paragraph 3). The law also prescribes the obligation for competent authorities at all levels of government in BiH to take all

[5] Namely, the Office for Human Rights and the Rights of National Minorities of the Government of the Republic of Croatia adopted the National Plan for the fight against discrimination for the period from 2017 to 2022. He adopted the Action Plan for the implementation of the National Plan for Combating Discrimination 2017-2019. The same office initiated the process of drafting the National Plan for the Protection and Promotion of Human Rights and Suppression of Discrimination for the period from 2021 to 2027 and two accompanying implementation documents: Protection Action Plan and the promotion of human rights for the period from 2021 to 223 and the Action Plan for combating discrimination for the period from 2021 to 2023. The Ministry of Demography, Family, Youth and Social Policy adopted the National Strategy for Protection from Dometic Violence for the period from 2017 to 2022. The ministry, which has since been renamed the Ministry of Labour, Pension System, Family and Social Policy, monitors the implementation and measures from this strategy, and cities are required to submit annual reports to it.

appropriate and necessary measures to implement the provisions of the Law on Gender Equality, as well as measures and activities from the Gender Action Plan of Bosnia and Herzegovina (Article 24).

Gender Action Plan of Bosnia and Herzegovina is an important strategic document in BiH for the realization of gender equality in all areas of social life and work, in the public and private sphere, the adoption of which is envisaged in the Law on Gender Equality in Bosnia and Herzegovina. This strategic document covers all areas of social life; however, it determines priority and transferal („cross-cutting") areas, as well as areas related to strengthening systems, mechanisms and instruments for achieving gender equality, and strengthening cooperation and partnership. Prevention and suppression of gender-based violence, including domestic violence as well as human trafficking is defined as a special program. In accordance with the constitutional division of jurisdiction in BiH, legislation in this area of protection against domestic violence is adopted at the entity level. [6]

The principle of non – discrimination, equal treatment and equal opportunities for women and men and gender equality are particularly important for BiH's accession to the European Union. In the Declaration of the Council of Europe on the equality of women and men, gender equality is defined as one of the basic principles of democracy. There

[6] Significant legal acts and the strategic framework include: Criminal Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bonia and Herzegovina,* no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/216, 75/17, Criminal Code of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 64/17, 104/2018 – Decision US, 15/2021 (Domestic violence is regulated as a criminal offence. In 2019, the National Assembly of RS adopted the Law on Amendments to the Law on Protection from Domestic Violence "in order to improve protection, assistance and support for victims of domestic violence as well as to harmonise this special law with the Istanbul Convention. This confirms the seriousness and responsibility when it comes to fighting and preventing domestic violence in such a manner that it is no longer classified as a misdemeanour but rather a criminal offence, by insisting on the application of provisions of the Criminal Code of RS that define domestic violence as a criminal offence. The Law on Amendments to the Law on Protection from Domestic Violence of RS was adopted during a meeting of the National Assembly of RS on 27 September 2019. The key change relates to the abolition of the definition of domestic violence as a misdemeanour and application of provisions of the Criminal Code of RS that define domestic violence as a criminal offence." See: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Report submitted by Bosnia and Herzegovina pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) Received by GREVIO on 6 February 2020 GREVIO/Inf(2020)12, Published on 3 July 2020), Law on Protection from Domestic Violence of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 22/05, 51/06, 20/2013, 75/2021 Family Law on the Federation of Bosnia and Herzegovina, *Official Gazette of The Federation of Bosnia and Herzegovina*, no. 33/05, 41/05, 31/14, Law on Protection from Domestic Violence, *Official Gazette of the Republic of Srpska*, no. 102/12, 108/13, 82/15, 84/2019, Family Law of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 54/02, 41/08, 63/14, Strategic plan for the prevention and fight against domestic violence in the Federation of Bosnia and Herzegovina – 2009 – 2010, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 77/08, Law on Criminal Procedure, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14, 74/20, Strategy for preventing and combating domestic violence (2013 – 2017), *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 95/13, Strategy for Suppression of Domestic Violence of the Republic of Srpska (2014 – 2019*), Official Gazette of the Republic of Srpska*, no. 63/14, Strategy for Suppression of Domestic Violence of the Republica of Srpska (2020 – 2024), Banja Luka, June 2020, Republic of Srpska, Ministry of Family, Youth and Sports, *Official Gazette of Bosnia and Herzegovina*, no. 89/14, Action plan for the implementation of UNSCR 1325 in Bosnia and Herzegovina for the period 2018 – 2022, and legal and strategic documents in the field of access to justice – in particular, the right to free legal aid.

are numerous European Union (hereinafter: EU) directives that treat the field of gender equality, most notably those in the field of employment and social protection. The EU Charter of Fundamental Rights, from 2000, confirms the prohibition of discrimination and the obligation to ensure the equality of men and women in all areas. In 2006, the EU adopted a Roadmap for equality between women and men. For Bosnia and Herzegovina, it is the following assertion, included in its last chapter, is of particular importance:

„... countries entering the European Union must accept the basic principles of equality between women and men. They are obligated to provide and consistently arrange legislation with appropriate administrative measures and the legal system. Monitoring the transition, implementation and introduction of European Union legislation related to gender equality is a priority in future inclusion processes."

The BiH Gender action plan for the period 2018 – 2022 contains measures that will be implemented in order to realize three strategic goals aimed at creating, implementing and monitoring a program of measures. The purpose is to improve gender equality in government institutions in priority areas (in particular: prevention and suppression of violence based on gender, including domestic violence and human trafficking, work, employment and access to economic resources, public life and decision – making and further strengthening of cooperation at the regional and international level), building and strengthening systems, mechanisms and instruments for achieving gender equality, as well as establishing and strengthening cooperation and partnership. In 2013, a new Law on protection from domestic violence was adopted, introducing certain novelties, such as specifying the concept of domestic violence, prescribing an emergency procedure in the imposition of protective measures bearing in mind their purpose of protecting the victim of violence, prescribing other forms of protection for the victim of violence, such as:

1. determining the source of funding for the safe houses
2. adopting a program of measures at the federal and cantonal levels for the prevention
3. protection and fight against domestic violence
4. the obligation to establish referral mechanisms for dealing with the procedure of protecting victims of violence in each local community
5. the obligation of a multidisciplinary approach in providing protection to victims of violence including the obligation to keep statistical data on reported cases of violence.

The basis of the sustainability of work on the implementation of international and domestic legal acts, and the prevention and fight against violence against women with an emphasis on domestic violence is guaranteed through Article 36 of the Law on Protection from Domestic violence, which stipulates the obligation to adopt a strategic document in this area. In this regard, the Government of the Federation of Bosnia and Herzegovina adopted the Strategy for the prevention and fight against domestic violence (2013 – 2017), implementing also the obligations from international. Chapter 8 of the Strategy defines the method of developing annual action plans and reports to the government, thus enabling continuous planning, implementation of activities and reporting to the Government of the Federation of Bosnia and Herzegovina. The activities foreseen in the Strategy become integral parts of the work plans of the relevant ministries, and in this way, the funds for the implementation of the document are secured. Due to new regulations on strategic planning

at the level of the Federation of Bosnia and Herzegovina) the validity of the document was extended by a special Decision of the Government of the Federation of Bosnia and Herzegovina, and it was to be implemented until 2021. The Government of the Federation of BiH prepares Action Plans for the implementation and monitoring of the Strategy.

5. VICTIMS OF DOMESTIC VIOLENCE, PREVENTION, SUPPRESSION AND SANCTIONING OF GENDER – BASED VIOLENCE

As written in the manual „Proceedings in cases of domestic violence" (2017, p. 8) domestic violence exists in all countries in the world, regardless of their democratic tradition, economic strength, level of education or culture. It is „... a global phenomenon that is present in all societies of the world and represents any form of physical, sexual, psychological or economic violence or the threat of such violence to which one of the family members is exposed. Violence is not an isolated, single event, but a pattern of repetitive behaviours."

In Recommendation no. 19 United Nations Committee for the Elimination of All Forms of Discrimination against Women (1992) it is emphasized that „... gender-based violence is a form of discrimination that seriously threatens women's ability to enjoy rights and freedoms on the basis of equality with men". In addition, women victims of domestic violence are a doubly threatened group, because they are more prone to falling into poverty. This is observed when poverty indicators are monitored, as, for example, the Croatian Statistical Office did from 2002 to 2004 and issued a report (2005). Gender – based violence limits opportunities in society and increases the risk of social inclusion, as can be seen from the examples in the World Bank Economic Vulnerability and Welfare Study.[7]

"The cause of domestic violence lies in the learned pattern of behaviour, and the educational continuity to which educational, sociological, economic, health and other factors contribute. As there are no significant differences in the occurrence of domestic violence based on living standards, financial status and educational status, it can be concluded that domestic violence is a learned pattern of behaviour integrated into the construction of both individual identities and, ultimately, the social collective that considers this behaviour acceptable with direct connection with the patriarchal society." This was also written in the manual „Proceedings in cases of domestic violence" (2017, p. 8).

The social context, as pointed out in the manual created as a part of the development program of the United Nation in Croatia, also has a considerable influence on the position of women within the family.[8]

„...one of the risk elements that contribute to violence against women in the family: the consequences of the war, the increased threshold of tolerance for violence, men who returned from war with a diagnosis of PTSD, the transition that hit women particularly hard and the re-traditionalisation of society. For structural changes at the political level,

[7] World bank. 2000. Economic vulnerability and welfare study. Available at: http://web.worldbank.org/archive/website00978/WEB/PDF/ECONOMIC.PDF (25. 7. 2022).

[8] *Unconnected: Faces of social excluion in Croatia.* 2006. Zagreb: United nations development program (UNDP) in Croatia. Available at: https://planipolis.iiep.unesco.org/sites/default/files/ressources/croatia_nhdr-2006-eng.pdf (19.8.2022), pp. 98-99.

cooperation between NGOs and relevant governmental and other institutions (centres for social welfare, police, judiciary) is necessary, as well as work on clearly and precisely defining the obligations of individual institutions and sanctions for non – compliance."

Research on the well-being and safety of women in BiH conducted by the Organization for Security and Cooperation in Europe shows that three out of five women believe that violence against women is a common occurrence in their communities. Likewise, four out of ten women in BiH stated that they experienced psychological, physical or sexual violence after the age of 15, by their partner or other persons. Almost half of the surveyed women believe that domestic violence is a private matter, and over 40% of them do not know what to do if they experience violence. Unfortunately, most women do not report the violence they experience, citing shame, material dependence/problems, lack of information, mistrust of services and ultimately, fear, as reasons for not reporting violence to the relevant institutions.[9]

Also, the conclusions of the aforementioned research indicate that social norms and attitudes are changing, but the number of reports of violence is at a low level, there is no proper implementation of the law, and most women are directly affected by gender–based violence.

The case law is still dominated by the practice of pronouncing conditional sentences, milder qualifications for the crime of domestic violence, reluctance to prosecute domestic violence together with other crimes, and sentencing at or below the limit prescribed by law (Petrić & Radončić, 2014, p. 52. Ćehajić – Čampara, Veljan, 2018, pp. 12).

Previous research shows that we cannot evaluate the sanctioning of the criminal act of domestic violence as satisfactory, and the question arises as to whether such punishment achieves the purpose of general and special prevention. The above is most authentically presented in the analysis and recommendation of the OSCE mission in Sarajevo and in the report and analysis of Petrić and Radončić.

The judicial response is very important for both the victim and the perpetrator, because it represents social condemnation or social tolerance of certain behaviours. The verdict, its content, sanction, and explanation play a key role for the victim who wants to obtain legal satisfaction for the violence suffered through the verdict. This is proven in the Atlantic Initiative Report.[10]

„Considering that the most frequent violence occurs between partners, and it is perpetrated by men against women, violence against women and girls (Violence Against Women & Girls – VAWG) is a universal issue both in times of peace and in times of conflict, but also in all other emergency situations. The crisis caused by the Covid – 19 pandemic contributed to the worsening of the situation when it comes to violence. Key instruments of the fight against the spread of the pandemic, such as social isolation, movement restrictions and curfews, have created an ideal environment for the increase and escalation of violent behaviour against women (and children) due to increased and

[9] OSCE. 2018. Research on the well – being and safety of women. Available at: https://www.osce.org/files/f/documents/8/6/445501.pdf (1. 8. 2022).

[10] *Re – reading and analysis of judgements on family violence in Bosnia and Herzegovina.* 2019. Sarajevo: Atlantic initiative. Available at: https://atlantskainicijativa.org/wp-content/uploads/Ponovno-citanje-i-analiza-presuda-nasilja-u-porodici-u-Bosni-i-Hercegovini-web.pdf (15. 8. 2022), p.23.

constant 24 – hour control over the victim. In addition, changes in the way mechanisms for protection against domestic violence are organized (reduced human/professional capacities, shortened working hours, lack of basic protective equipment for professional workers in the field) favoured the abusers, as the victim's access to protection subjects was made even more difficult and limited primarily to the police and centres for social work. Considering the presented data and statements, both from the governmental and non – governmental sectors, it can be concluded that in Bosnia and Herzegovina there has been a certain increase in events that may represent domestic violence during the Covid – 19 pandemic. The most significant reasons for the increase in domestic violence are stress about the financial future, limited movement, loss of employment and similar." (Grbić Pavlović, N. 2020, pp. 3, 18)

In relation to the crisis caused by the COVID – 19 pandemic, the Ombudsman of the Republic of Croatia warns in her report for 2020 (2021), that it „must not become an excuse for ignoring or marginalizing social problems related to gender equality, primarily gender-based violence, because the crisis period could be fertile ground for their deepening or expansion." Unfortunately, when comparing the Ombudsman's report to the period before the pandemic with those for 2019 and 2020, one comes to the conclusion that this is exactly what happened.

During the pandemic, there was a significant increase in domestic violence of a criminal nature, and women are still, in the vast majority, victims of domestic violence. According to the data of the Ministry of Internal Affairs, which are harmonized with the data of the Ombudsman, a total of 36 murders were recorded in 2020: in 14 of these case the victims were women, and in 9 of those cases, women were killed by their intimate partners. The number of murdered women is increasing again. Compared to 2018, there is a more than 50% increase in of murdered women, almost in both key parameters – in the total number of murdered women and in the number of women murdered by former or current intimate partners (current/former spouse, current/former extramarital partner, current/former partner). On the other hand, comparing the number of murders of women from the reporting year with the monitored period from 2016, shows that for the fifth year in a row, a high percentage of over 50 % of women killed by men with whom they were in an intimate relationship has been maintained. There is a multi–year trend of decreasing the number of reported perpetrators and the number of victims of domestic violence in the field of misdemeanour legal protection, with a multi–year and continuous increase in cases in the field of criminal legal protection. The above leads to the conclusion that the Croatian system of combating violence against women and in the family in the long term deters victims of violence from reporting milder forms of violence until the situation escalates and passes into the sphere of criminal legislation, which is when the violence is no longer tolerated or hidden because the consequences are usually tragic. Therefore, the misdemeanour legal system is ineffective in this segment.

As for the criminal offences "Domestic violence" from Art. 179a of the Criminal Code, the police recorded a total of 1,578 of them in 2020, which is 39.2 % more than in 2019, when a total of 1,134 such crimes were recorded. In relation to gender, 1,330 female victims were recorded.

In 2020, the Ombudsman continued to receive the most complaints in the field of work, employment and social security – which accounts for a share of 48.3%. Women complained most often because they account for: the majority of the unemployed, the majority in underpaid sectors, the majority as a victim of sexual harassment at the workplace, those underrepresented in high business decision–making positions and those who encounter the "glass ceiling" (12.6% in management and 22,3% in supervisory boards), do not have equal opportunities for promotion (there are still no adequate measures to effectively encourage the participation of women in economic decision – making positions) and have lower salaries and pensions – a salary gap of around 13.3% and a pensions gap of 22.3%. According to the complaints of female citizens, age and motherhood continue to be the main challenges of gender discrimination of women in the labour market. In addition to the trend of an increasing number of complaints, this year also saw a trend of anonymous reporting of sexual harassment. A large number of victims still do not trust the system of protection and the effectiveness of prosecution and the justice of the quick conviction of the perpetrator, o they submit complaints anonymously or do not submit them at all, or, in some cases, complaints are submitted by third parties on their behalf, anonymously reporting this type of crime, but without information about applicants and victims. (p.242)

Failure to report to competent judicial institutions due to gender discrimination and/or violence against women also has roots in the non– -functioning system of free legal aid. Victims of violence often do not have the financial means to pay court costs and lawyers, and the system of free legal aid, it is evident from Ombudsman's Report, does not work.

In the Summary of the Report of the Ombudsman for 2020 it is pointed out that there are positive developments in the reporting of gender-based violence, but sensationalist terms are still used for the perpetrator, in order to shock the readership and thus induce them to read.[11] Often, according to the report, the perpetrators of violence or femicide are indirectly justified by shifting the focus from their responsibility to the decisions or behaviour of the victim as the reason and trigger for the violence committed against her; the identity of the victims and their children is indirectly revealed by reporting on the location where the femicide was committed, the personal impressions of neighbours are quoted, which often reflect an idyllic description of the relationship between the perpetrator and the victim, although facts such as, for example, a court restraining order, a report due to domestic violence and the confiscation of a firearm speak of a completely different situation that preceded the fatal outcome.

The most persistent media trend is still the objectification of the female body and the evaluation of women based on their physical appearance, regardless of whether appear ine advertisements or are figures from the media, entertainment, business, politics or sports. While some media strive to improve their way of reporting in accordance with their legal obligations to respect the principle of equality between women and men, a number of media, including the public broadcasting service, often in their responses to the Ombudsman show a lack of understanding of what gender stereotypes are, as well as the lack of will to in terms of educating, that is, changing their media practice.

[11] Summary of the Report of the Ombudsman of the Republic of Croatia for 2020. Available at: https://sabor.hr/sites/default/files/uploads/sabor/2022-04-01/153503/IZVJ_PUCKA_PRAVOBRANITELJICA_2021_SAZETAK.pdf (17. 6. 2022), p. 17.

6. INSTEAD OF A CONCLUSION: GENDER (IN)EQUALITY – CHALLENGES AND PERSPECTIVES?

According to research findings and available data, as written in UN Women research about gender equality profile in BiH (2021, pp. 11-13), "despite the carefully designed legal, strategic and institutional mechanism for strengthening gender equality in Bosnia and Herzegovina, women are still faced with many challenges and obstacles on the way to full equality in all areas of life. The main challenges for realizing gender equality in political participation and –decision-making in BiH are based on the perception of traditional gender roles, i.e. cultural factors based on the conviction of acceptable gender roles when it comes to participation in politics and decision–making. Although in the Croatian public space there is no question of the unacceptability of women participating in political life and decision–making, there is still a significantly lower number of women than men in high political positions, indicating the presence of the belief that these are not gender – acceptable roles for women. [12]

When it comes to achieving gender equality in the economic environment in the Republic of Croatia and Bosnia and Herzegovina, the main challenge stems from gender-based discrimination in employment and the labour market, a well as sexual harassment and mobbing in the workplace.

Women in rural and remote areas are at greater risk of poverty as they suffer most from lack of access and control over productive resources such as land, property, financial resources, education, profitable skills and access to information and modern technologies.

Achieving gender equality in social and health care entails characteristic challenges, which are mostly related to insufficiently funded specialized services for victims of gender–based and domestic violence, specifically, shelters for women who have survived domestic violence. There are not enough shelters for victims of violence either in the Republic of Croatia or in Bosnia and Herzegovina. The fact that crisis centers for rape victims have not yet been established in Bosnia and Herzegovina. A unique method of collecting data on violence against women, including cases of domestic violence and violence perpetrated by an intimate partner, is still being developed. Additional training is needed to sensitize police officers to dealing with survivors.

The main challenges for achieving gender equality in education relate to gender stereotypes, i.e., the strengthening of stereotypes about gender roles in all layers of society, which normalizes gender–based violence and further supports gender inequality. Gender segregation by occupation continues to be a significant challenge.

Some of the measures aimed at protecting victims of domestic violence, as one of the marginalized – socially excluded categories of the population, can be the following:

initiating educational programs for civil servants who in their work encounter women who are victims of domestic and their children; establishing/fosteringcooperation between

[12] A significant step forward was observed in the local elections held in May 2017. Namely, in those elections, the quota of 40 percent of women on the lists prescribed by the Law on Gender Equiality was fully respected for the first time. The number of female candidates thus doubled compared to the previous local elections. Although the number of councillors in the city councils and county assemblies has increased, still no woman has been elected to the position of county councillor, and only 10 per cent of them have been elected mayors.

the governmental and non-governmental sectors; promoting greater engagement of all social stakeholders; providing continuous funding for scientific research work on the problem of domestic violence; conducting systematic work to eliminate gender stereotypes; illuminating the problem of violence against women, its recognition in wider circles, and ensuring proper presentation.[13] At the same time, a synergistic approach is needed at all levels of health care in order to minimize the risk of reducing the availability and quality of health care. Numerous international organizations within the EU and beyond have warned about the above. In this sense, it is particularly necessary to deal with ensuring the guaranteed right to termination of pregnancy through the positive legislation of both countries. Conclusions of the ombudsman of the Republic of Croatia regarding the media, as written in Summary of his Report for 2020 (2021, p.18), are equally applicable to both countries: devise a systematic education of media workers in accordance with national legislation and standards elaborated in European documents related to combating sexism and gender stereotypes in media content, increase the number of content that, instead of stereotypical gender roles, promotes various results and successes of women in different areas of life, increase the representation of topic related to issues of the principle of gender equality (e.g. related to multiple discrimination of women with disabilities, women in rural areas, members of national and ethnic minorities, women victims of violence in the Homeland War as and issues related to sexual harassment in the workplace, female veterans, victims of prostitution and human trafficking, raped women, etc.), do not base advertisements and advertising campaigns on the objectification of the female body.

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[13] More details about this can be found in the research on the face of social exclusion in Croatia conducted within the United Nations program (2006, p.100).

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THE ROAD TOWARDS THE EUROPEAN UNION GLOBAL HUMAN RIGHTS SANCTIONS REGIME

On 7 December 2020, the Council of the European Union adopted two legal instruments, the Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses and the Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, which together make up the European Union Global Human Rights Sanctions Regime as a relatively new tool in its "human rights and foreign policy toolbox" that focusses on serious human rights violations. This article focuses on the Action Plan on Human Rights and Democracy 2020 – 2024 as part of the Joint Communication adopted in March 2020 by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission since the European Union Global Human Rights Sanctions Regime is a key deliverable proposed in the Action Plan. More specifically, the article examines whether the European Union Global Human Rights Sanctions Regime has provided greater flexibility to target those responsible for serious human rights violations and abuses worldwide, as well as whether the said regime could be seen as an European Union response to a transnational security threat.

Keywords: European Union, human rights, sanctions regime, foreign policy, transnational security threat.

1. INTRODUCTORY REMARKS

Today it is agreed that the promotion and protection of all human rights is a legitimate concern of the international community (Siatitsa, 2022, p. 7). As stated in the European Union (hereinafter: EU) Strategic Framework and Action Plan on Human Rights and Democracy, "human rights are universally applicable legal norms".[1] In accordance with Article 2 of the Treaty on European Union (hereinafter: TEU), "Union is founded

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[1] EU Strategic Framework and Action Plan on Human Rights and Democracy (Council of the EU). No. 1185/12 of June 25, 2012, p1.

on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".[2] According to the 2021 Annual Report on Human Rights and Democracy in the World, "the European Union maintained its leadership in the universal promotion and protection of human rights, democracy and the rule of law in multilateral fora".[3]

As we are all aware, serious human rights violations and abuses take place in many parts of the world - frequently without any consequences for the perpetrators. The EU is not prepared to stand by while serious violations and abuses of human rights are committed. The establishment of the EU Global Human Rights Sanctions Regime (hereinafter: EUGHRSR) is considered „a landmark initiative that underscores the EU's determination to enhance its role in addressing serious human rights violations and abuses worldwide".[4] Formally, the EUGHRSR has a global reach. It offers a legal framework to adopt sanctions against any particular person or group of persons for example, following any incident of grave human rights violation. As argued by Rettman, the EUGHRSR is "meant to end exemption even for the servants of powerful and strategically important states" (Rettman, 2020, p. 261). EU sanctions help to achieve key EU objectives such as preserving peace, strengthening international security, and consolidating and supporting democracy, international law and human rights. They are targeted at those whose actions endanger these values, and intend to reduce as much as possible any adverse consequences on the civilian population.[5]

On 7 December 2020, the Council of the EU adopted two legal instruments, the Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses (hereinafter: Council Decision (CFSP) 2020/1999) and the Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses (hereinafter: Council Regulation (EU) 2020/1998). Those two acts together make up the EUGHRSR as a relatively new tool in its "human rights and foreign policy toolbox" that focusses on serious human rights violations. The article argues that the EUGHRSR is a transnational response to a changing landscape when it comes to security challenges and ensuring the respect of human rights. The main goal of this article is to underline the importance that EU places with regard to promoting and protecting human rights globally. This article will endeavour to examine the activities of the EU institutions which are aimed at promoting and protecting human rights, especially with respect to the adoption of the important acts. Accordingly, the EU Action Plan on Human Rights

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[2] Consolidated version of the Treaty on European Union (EU). *O. J. C 326/01, of October 26, 2012.*

[3] 2021 Annual Report on Human Rights and Democracy in the World - Report of the EU High Representative for Foreign Affairs and Security Policy (EU) of April 19, 2022, p. 161. Available at: https://www.eeas.europa.eu/eeas/2021-annual-report-human-rights-and-democracy-world-report-eu-high-representative-foreign_en (02. 07. 2022).

[4] European Union External Action. (The Diplomatic Service of the EU). Questions and Answers: EU Global Human Rights Sanctions Regime of December 7, 2020. See: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (02. 07. 2022).

[5] The EU had about 40 different sanctions regimes in place in 2020. See: PRESS RELEASE - Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide, October 19, 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (03. 07. 2022).

and Democracy 2020 – 2024 (hereinafter: EU Action Plan) will be examined since the EUGHRSR is a key deliverable proposed in the EU Action Plan which reaffirms the EU's commitment to promoting and protecting these values worldwide.[6]

2. EUROPEAN UNION GLOBAL HUMAN RIGHTS SANCTIONS REGIME AS A RELATIVELY NEW TOOL IN ITS "HUMAN RIGHTS AND FOREIGN POLICY TOOLBOX"

The EU is a powerful and uniquely representative actor on the international scene (Alston, 1999, p. 7). Human rights and the rule of law are regarded as cornerstones of the EU, playing a key role in both the EU's internal order and the accession of new Member States to the EU (Wetzel, 2011). The main goal of the new EUGHRSR is to enable the EU to stand up in a more tangible and direct way for human rights, which constitute one of its fundamental values. Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights underpin the EU's external action. Acts such as genocide, crimes against humanity, torture, slavery, sexual and gender-based violence, enforced disappearances, or human trafficking are unacceptable. Putting an end to these violations and abuses of human rights worldwide is considered a key priority for the EU.[7] The EUGHRSR highlights the importance the EU places on promoting and protecting human rights globally.[8]

2.1. Background

Over the past decades, the EU has undergone a significant transformation – from a primarily economic integration project whose founding treaties were totally silent on human rights, to a political union of values that puts human rights front and centre (Wouters *et al*, 2020, p. 1). The Treaty of Lisbon,[9] which entered into force on 1 December 2009, had been widely regarded as the high point of the EU's journey in that direction (*Ibid*). Not only did the Treaty of Lisbon recognise human rights as one of the EU's founding values, the guiding principles and objectives of all EU external action, but it also gave the Charter of Fundamental Rights of the EU[10] the same legal value as the Treaties and obliged the EU to accede to the European Convention on Human Rights (Wouters *et al,* 2020, p.1).

[6] The EU Action Plan constitutes part of the Joint Communication which is adopted in March 2020 by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

[7] See: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (02. 07. 2022).

[8] Joint Brussels Office of the Law Societies. EU targets individuals, entities and bodies with new global human rights sanctions regime. Available at: https://www.lawsocieties.eu/news/eu-targets-individuals-entities-and-bodies-with-new-global-human-rights-sanctions-regime/6001547.article (3. 7. 2022).

[9] *Treaty of Lisbon* amending the Treaty on European Union and the Treaty establishing the European Community (EU). *O.J. C 306 of December 17,* 2007.

[10] The Charter of Fundamental Rights of the EU brings together the most important personal freedoms and rights enjoyed by citizens of the EU into one legally binding document. It was declared in 2000, and came into force in December 2009 along with the Treaty of Lisbon. See: Charter of Fundamental Rights of the European Union (EU). OJ C *326 of October 26,* 2012. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (03. 07. 2022).

The EU has been awarded the 2012 Nobel Peace Prize for helping to „transform most of Europe from a continent of war to a continent of peace". Announcing its decision on 12 October, the Nobel Peace Prize committee stated: "The Union and its forerunners have for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe".[11] More than an award for previous achievements, the prize constitutes a challenge for future EU action in the areas of peacebuilding, democratization, and in particular human rights (Thiel, 2017, p. 1).

On 19 October 2019, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy presented a Joint Proposal for a Council Regulation concerning implementation of restrictive measures or sanctions against serious human rights violations and abuses worldwide.[12] Namely, the Joint Proposal for a Council Regulation is one of the legal acts that was required by the Council in order to continue with the establishment of the new human rights sanctions regime. The said proposal complemented the Council Decision proposed by High Representative of the Union for Foreign Affairs and Security Policy Josep Borrell. After its adoption by the Council, the Joint Proposal has established the EUGHRSR.

These proposals strongly illustrate the EU's commitment to support human rights, democracy, the rule of law and the principles of international law around the globe. They respond to the political agreement by EU Foreign Ministers at the Foreign Affairs Council in December 2019 to move forward with the establishment of such a regime.[13]

The EUGHRSR provides a legal ground for the EU to target individuals, companies and bodies - including those who are and those who are not associated with national governments i.e. state and non-state actors - that are responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred.[14] As the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President for a Stronger Europe in the World Josep Borrell[15], said:

> "Human rights are under attack around the world. The new EUGHRSR will be a powerful tool to hold accountable those responsible for serious human rights violations and abuses around the world. This is an opportunity for Europe not only to stand up for its values but to act".[16]

[11] EU wins 2012 Nobel Peace Prize: "This prize is for all EU citizens". See: https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20121012STO53551/eu-wins-2012-nobel-peace-prize-this-prize-is-for-all-eu-citizens (4. 7. 2022).

[12] See: Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (03. 07. 2022).

[13] *Ibid.*

[14] Summary of Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998, concerning restrictive measures against serious human rights violations and abuses. Document 32020R1998. See more at: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=uriserv:OJ.LI.2020.410.01.0001.01.ENG (5. 7. 2022).

[15] Josep Borrell Fontelles is High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission for a Stronger Europe in the World since 2019. See: https://stateoftheunion.eui.eu/2022/02/28/josep-borrell-fontelles/(3. 7. 2022).

[16] Remarks by the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President Josep Borrell. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (3. 7. 2022).

2.2. Adoption of legal instruments

In accordance with Article 288 of the Treaty on the Functioning of the European Union (TFEU), the institutions shall adopt regulations and decisions, along with other acts in order to exercise the EU's competences. As stated in the same Article, "a regulation shall have general application and it shall be binding in its entirety and directly applicable in all Member States", while "the decisions shall be binding in its entirety" and "if a decision specifies those to whom it is addressed it shall be binding only on them".[17]

On 7 December 2020, the Council of the EU adopted two legal instruments, the Council Decision (CFSP) 2020/1999[18] and the Council Regulation (EU) 2020/1998[19], which together make up the EUGHRSR. They entered into force on 8 December 2020. It is important to note that the Council Regulation (EU) 2020/1998 was applied automatically and uniformly to all of the EU Member States as soon as it came into force, without needing to be transposed into national law. It has been amended by the Implementing Regulations (EU) 2021/371 of 2 March 2021 and (EU) 2021/478 of 22 March 2021.[20] The Council Regulation is needed to detail the measures of the sanctions regime established by the Council Decision that can affect the functioning of the EU's internal market. It is directly binding on the national administrative authorities and on private operators, whereas the Council Decision is legally binding on EU Member States.[21]

2.2.1. Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses

The Council Decision (CFSP) 2020/1999 was adopted under the *CFSPC* powers (Article 29 TEU).[22] The importance of its Preamble is multifold. Firstly, it declares that, "the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". Further, it states that „Union is committed to protect those values, which play a key role in ensuring peace and sustainable security, as cornerstones of its external action".[23] In addition, it underlines that "states have primary responsibility to respect, protect and fulfil human rights, including

[17] Article 288 of the Treaty on the Functioning of the European Union (EU). O.J. C 326/49 of October 26, 2012.

[18] Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, pp. 13-19.

[19] Council Regulation 2020/1998, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, pp. 1-12.

[20] See: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=uriserv:OJ.LI.2020.410.01.0001.01.ENG (5. 7. 2022).

[21] PRESS RELEASE - Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide, 19 October 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (3. 7. 2022).

[22] Article 29 of the TEU (ex Article 15 TEU): "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions". See: Consolidated version of the Treaty on European Union (EU). O. J. C 326/01, of October 26, 2012.

[23] Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 13.

ensuring compliance with international human rights law" since "human rights violations and abuses worldwide remain of great concern, including the significant involvement of non-State actors in human rights abuses globally as well as the severity of many such acts".[2425]. The Preamble of the Council Decision (CFSP) 2020/1999 is further relevant as it reveals that "the Council emphasises the importance of international human rights law and of the interaction between international human rights law and international humanitarian law when considering the application of targeted restrictive measures under this Decision". When it comes to the applicability of the Council Decision (CFSP) 2020/1999 the third countries, this Preamble specifies that "the Decision does not affect the application of other existing or future Council decisions under the common foreign and security policy establishing restrictive measures in view of the situation in certain third countries, and which address human rights violations or abuses".[26] According to Article 10, "the Decision shall apply until 8 December 2023 and shall be kept under constant review".[27]

2.2.2. Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses

The Council Regulation (EU) 2020/1998 was adopted under Article 215 of the TFEU.[28] In accordance with Article 20 of the said Regulation, "the Regulation shall be binding in its entirety and directly applicable in all Member States".[29] As stated in its Article 19, the Council Regulation (EU) 2020/1998 shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or vessel under the jurisdiction of a Member State; (c) to any natural person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the EU.[30]

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[24] Preamble of the Council Decision (CFSP) 2020/1999 of 7 December 2020, concerning restrictive measures against serious human rights violations and abuses, O. J. (L 410 I), p. 13.

[25] See: Consolidated version of the Treaty on European Union (EU). O. J. C 326/01, of October 26, 2012.

[26] Preamble of the Council Decision (CFSP) 2020/1999, concerning restrictive measures against serious human rights violations and abuses (CFSP). O. J. (L 410 I) of December 7, 2020, p. 13.

[27] Article 10 of the Council Decision (CFSP) 2020/1999, concerning restrictive measures against serious human rights violations and abuses (CFSP). O. J. (L 410 I) of December 7, 2020, p. 18.

[28] Article 215 paragraph 1 of the TFEU (ex Article 301 TEC): "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof". Article 215 paragraph 2 of the TFEU states "Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities". See: Consolidated version of the Treaty on European Union (EU). O. J. C 326/01, of October 26, 2012.

[29] Article 20 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 9.

[30] Article 19 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 8.

2.3. Restrictive measures or sanctions as a key tool of the European Union's Common Foreign and Security Policy

Human rights and democracy, founding values of the EU, are a cornerstone of EU's external action.[31] The EU has a set of tools available to address human rights violations and abuses. This includes political dialogue, multilateral partnerships, but also sanctions.[32] Based on the previous analysis, it can be concluded that restrictive measures or sanctions are a key tool of the EU's CFSP.[33] The sanctions seek to bring about a change in the policy or conduct of those targeted, with a view to promoting the objectives of the CFSP.[34]

When it comes to the EUGHRSR as a question may arise what the Regime means for EU citizens and economic operators. The answer should be that EUGHRSR „contributes to the respect for human rights, a fundamental value of the EU by attaching a cost to serious human rights violations and abuses in the form of banning perpetrators from the EU and freezing their assets in the EU".[35] We should also bear in mind that the restrictions set out in the EUGHRSR also mean that EU operators are obliged to freeze the assets of the perpetrators listed[36] and must not make funds or economic resources available to them.[37]

The next important question is whether sanctions imposed under the EUGHRSR can have unintended consequences for the civilian population. We should keep in mind that „all EU sanctions are targeted to minimise risks of unintended consequences on the general population" and that „the EUGHRSR only includes individual measures (a travel ban, an asset freeze and a prohibition to make funds and economic resources available), which only apply to the perpetrators listed".[38] These sanctions, as all EU sanctions, should not impede the supply of humanitarian aid, including medical assistance. Specific exceptions for humanitarian purposes are foreseen. In particular, these individual measures include all usual standard exceptions, e.g. the satisfaction of basic needs of designated persons and their dependent

[31] Thematic Programme on Human Rights and Democracy Multi-Annual Indicative Programming 2021-2027, December 2021, p. 4. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6695 (5. 7. 2022).

[32] European Union External Action. The Diplomatic Service of the European Union. Questions and Answers: EU Global Human Rights Sanctions Regime. Brussels, 7 December 2020. Available at: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (5. 7. 2022).

[33] European Commission. Overview of sanctions and related tools. An essential tool through which the EU can intervene where necessary to prevent conflict or respond to emerging or current crises. Available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en (5. 7. 2022).

[34] See: How and when the EU adopts sanctions. Available at: https://www.consilium.europa.eu/en/policies/sanctions/ (6. 7. 2022).

[35] European Union External Action. The Diplomatic Service of the European Union. Questions and Answers: EU Global Human Rights Sanctions Regime. Brussels, 7 December 2020. Available at: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (6. 7. 2022).

[36] Annex I, List of natural or legal persons, entities or bodies referred to in Article 3 of Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 10.

[37] See: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (6. 7. 2022).

[38] *Ibid*.

family members, including payments for foodstuffs, medicines and medical treatment[39]. In addition, the EUGHRSR includes a dedicated so-called humanitarian derogation. The derogation means that a restricted or prohibited action can be carried out after a Member States' national competent authority[40] has granted an authorisation.[41] More concretely, the derogation allows Member States to grant an authorisation to humanitarian operators. As a result, certain frozen funds or economic resources can be released, or certain funds or economic resources can be made available, if this is needed for humanitarian purposes, such as delivering or facilitating the delivery of assistance, including medical supplies, food, or the transfer of humanitarian workers and related assistance or for evacuations[42].

The increasing engagement with community interests in international law marks the transformation of international law from a legal system primarily based upon bilateral legal relations among states to a system where respect for certain common fundamental values is brought to the forefront (Siatitsa, 2022, p. 1.). The notion of serious violations of international humanitarian law appears increasingly alongside serious violations of human rights in international practice (Siatitsa, 2022, p. 209). It follows from the above that all restrictive measures adopted by the EU are fully compliant with obligations under international law, including those pertaining to human rights and fundamental freedoms.[43] Under the authority of High Representative/Vice-President Josep Borrell, EU Special Representative for Human Rights, Eamon Gilmore,[44] continued the implementation of his mandate, which promotes EU foreign policy on human rights, as well as compliance with international humanitarian law and support to international criminal justice (2021 Annual Report on Human Rights and Democracy in the World). Through his high-level and targeted engagement, the EU Special Representative[45] contributed to the coherence,

[39] See Articles 2 and 3 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, pp. 15-17. For more details see: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (6. 7. 2022).

[40] For specific details of national competent authorities, you can see Annex II of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 11.

[41] See: European Union External Action. The Diplomatic Service of the European Union. Questions and Answers: EU Global Human Rights Sanctions Regime. Brussels, 7 December 2020. Available at: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (6. 7. 2022).

[42] Article 4 of Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 17; Questions and Answers: EU Global Human Rights Sanctions Regime. Available at: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (6. 7. 2022).

[43] See: How and when the EU adopts sanctions. Available at: https://www.consilium.europa.eu/en/policies/sanctions/ (6. 7. 2022). For more details about the restrictive measures (sanctions) you can see: Restrictive measures (Sanctions). 2022. The EU Best Practices for the effective implementation of restrictive measures. No. doc. 10572/22, Brussels: Council of the European Union, June 27, 2022, pp. 1-39.

[44] Eamon Gilmore is the EU Special Representative for Human Rights (since March 2019) and has also served as EU Special Envoy for the Columbian Peace Process since October 2015. See more information about the activities of Eamon Gilmore. Available at: https://www.gilmore.ie/about/ (8. 7. 2022).

[45] The tasks of the EU Special Representative for Human Rights are to enhance the effectiveness and visibility of EU human rights policy. The Special Representative has a broad, flexible mandate, which provides the

visibility andeffectiveness of the EU's human rights actions and actions in the field of international humanitarian law, ensuring a leading role in supporting human rights globally, and at the regional and multilateral level.[46]

When it comes to the authority to propose sanctions under the EUGHRSR, as stated in Article 5 paragraph 1 of the Council Decision (CFSP) 2020/1999, it is important to know that the High Representative of the European Union for Foreign Affairs and Security Policy and EU Member States can put forward proposals for listings.[47] In line with Article 5 paragraph 2 of the Council Decision (CFSP) 2020/1999, the Council shall decide on those listings.[48] It follows from the above that the Council, acting by unanimity upon a proposal from a Member State or from the High Representative, identifies those targeted by sanctions. In other words, every name on the list is agreed unanimously by all the Member States.

Currently, Member States have very different definitions of what constitutes a violation of restrictive measures and what penalties should be applied in the event of such a violation. This could lead to different degrees of enforcement of sanctions and a risk of these measures being circumvented. This is why, on 30 June 2022, the Council requested the European Parliament's consent on a decision to add the violation of restrictive measures to the list of 'EU crimes' included in the TFEU.[49] A unanimous decision to add the violation of restrictive measures to the list of 'EU crimes' will allow, as a further step, the adoption of a directive containing minimum rules concerning the definition of criminal offences and penalties for the violation of EU restrictive measures. This will ensure a similar degree of sanctions enforcement throughout the EU and will dissuade attempts to circumvent or violate EU measures.[50] It is also important to know that the EU sanctions map is available for a visual

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possibility of adapting to evolving geopolitical circumstances. The Special Representative works closely with the European External Action Service, which provides full support to his work. See more information. Available at: https://www.gilmore.ie/eu-special-representative/ (8. 7. 2022).

[46] 2021 Annual Report on Human Rights and Democracy in the World - Report of the EU High Representative for Foreign Affairs and Security Policy of April 19, 2022, p. 13. Available at: https://www.eeas.europa.eu/eeas/2021-annual-report-human-rights-and-democracy-world-report-eu-high-representative-foreign_en (8. 7. 2022).

[47] Article 5 paragraph 1 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020 states: "The Council, acting by unanimity upon a proposal from a Member State or from the High Representative, shall establish and amend the list set out in the Annex".

[48] Article 5 paragraph 2 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, p. 17 states: "The Council shall communicate the decisions referred to in paragraph 1, including the grounds for listing, to the natural or legal person, entity or body concerned, either directly, if the address is known, or through the publication of a notice, providing that natural or legal person, entity or body with an opportunity to present observations".

[49] See: *How and when the EU adopts sanctions.* Available at: https://www.consilium.europa.eu/en/policies/sanctions/ (6. 7. 2022).

[50] Under Article 83 (1) of the TFEU, the Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension. The areas of crime currently listed in the said Article are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime. On May 25, 2022, the European Commission presented a proposal for a decision to extend the list of these areas of crime to

overview of sanctions adopted by the Council.[51] Namely, the EU sanctions map provides comprehensive details of all EU sanctions regimes and their corresponding legal acts, including those regimes adopted by the UN Security Council and transposed at EU level.[52]

In 2021, the EU adopted restrictive measures targeting persons and entities from China, the Democratic People's Republic of Korea (hereinafter: DPRK), Libya, South Sudan, Eritrea and Russia, involved in serious human rights violations and abuses.[53] According to the 2021 Annual Report on Human Rights and Democracy, the EU imposed sanctions in the case of Alexei Navalny's arbitrary arrest and detention, as well as sanctions against the Wagner group and its members. In December, the Council adopted a decision prolonging for one year the existing sanctions. Throughout the year, the EU took the lead in UN human rights fora on initiatives aimed at addressing human rights violations and abuses in Afghanistan, Belarus, Burundi, DPRK, Ethiopia, Eritrea and Myanmar. The first EU strategic dialogue with the Office of the UN High Commissioner for Human Rights in October 2021 was an opportunity to share updates on global human rights issues, to discuss priorities and to build a stronger partnership for more effective multilateralism and rules-based international cooperation. As a staunch advocate of multilateralism, the EU also remains vigilant in the defence and advancement of universal human rights and the integrity and functionality of the global human rights system.[54]

2.4. The importance of the European Union Global Human Rights Sanctions Regime

The European human rights community celebrated the adoption of a new, dedicated tool to publicise abuses and perpetrators, further raising the EU's profile as a global advocate of human rights.[55] The EUGHRSR covers serious human rights violations and abuses, including: genocide; crimes against humanity; torture and other cruel, inhuman or degrading treatment or punishment; slavery; extrajudicial, summary or arbitrary executions and killings; the enforced disappearance of persons and arbitrary arrests or

include the violation of restrictive measures adopted by the EU. See: PRESS RELEASE – Sanctions: Council requests European Parliament consent to add the violation of restrictive measures to the list of EU crimes. Council of the European Union, June 30, 2022. Available at: https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/sanctions-council-requests-european-parliament-consent-to-add-the-violation-of-sanctions-to-the-list-of-eu-crimes/ (3. 7. 2022).

[51] The EU sanctions map is available at: https://www.sanctionsmap.eu/#/main (10. 7. 2022).

[52] Overview of sanctions and related tools - An essential tool through which the EU can intervene where necessary to prevent conflict or respond to emerging or current crises, European Commission. Available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en (10. 7. 2022).

[53] See, available at: https://www.eeas.europa.eu/eeas/2021-annual-report-human-rights-and-democracy-world-report-eu-high-representative-foreign_en (10. 7. 2022).

[54] 2021 Annual Report on Human Rights and Democracy in the World - Report of the EU High Representative for Foreign Affairs and Security Policy, April 19, 2022, p. 10. Available at: https://www.eeas.europa.eu/eeas/2021-annual-report-human-rights-and-democracy-world-report-eu-high-representative-foreign_en (10. 7. 2022).

[55] Portela, C. 2021. *The EU's new human rights sanctions regime: one year on*. Available at: https://theloop.ecpr.eu/the-eus-new-human-rights-sanctions-regime-one-year-on/ (10. 7. 2022).

detentions.[56] The sanctions regime also covers acts which are widespread, systematic or of serious concern in relation to the goals of the EU's Common Foreign and Security Policy (CFSP), as set out in Article 21 of the TEU. These include: trafficking in human beings; abuses of human rights by migrant smugglers; sexual violence and gender-based violence; violations or abuses of the freedoms: of peaceful assembly and of association, of opinion and expression, of religion or belief.[57]

The new EUGHRSR allows the EU to target serious human rights violations and abuses worldwide, irrespective of where they occur, whereas existing sanctions regimes focus on specific countries. Sanctions, of course, are not an end in themselves. They are part of the EU's broader strategy on human rights. For example, the EUGHRSR is an important element in delivering on the EU Action Plan, which sets out the overall strategy in this field. The EU uses sanctions as a political tool aimed at policies or activities that the EU wants to influence, the means to conduct those policies or activities and those responsible for them.[58]

The targets of the EUGHRSR are also distinguished in three categories: first, natural or legal persons, entities or bodies, who are *responsible* for violations or abuses; second, those who provide financial, technical, or material support for or are otherwise involved in violations and abuses, including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts; and third, those who are *associated* with those in the first two categories (Eckes, 2022, p. 257).

It has been argued that the EUGHRSR could be seen as an EU response to a transnational security threat, or as pointed out by Eckes (2022, p. 266), "above all EUGHRSR is a transnational response to a changing landscape of security challenges, which are themselves transnational". Certain threats are themselves more flexible and require a more flexible

[56] According to Article 2 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, pp. 3-4, and Article 1 of the Council Decision 2020/1999, concerning restrictive measures against serious human rights violations and abuses (EU). O. J. (L 410 I) of December 7, 2020, pp. 13-14. See also: Summary of Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998. Restrictive measures against serious human rights violations and abuses. Document 32020R1998. Available at: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=uriserv:OJ.LI.2020.410.01.0001.01.ENG (10. 7. 2022).

[57] Summary of Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998. Restrictive measures against serious human rights violations and abuses. Document 32020R1998. See more at: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=uriserv:OJ.LI.2020.410.01.0001.01.ENG (10. 7. 2022).

[58] See: European Union External Action. The Diplomatic Service of the European Union. Questions and Answers: EU Global Human Rights Sanctions Regime. Brussels, 7 December 2020. Available at: https://www.eeas.europa.eu/eeas/questions-and-answers-eu-global-human-rights-sanctions-regime_en (10. 7. 2022). As for the first sanctions under this new regime, on March 2, 2021, the EU added four Russian officials to the Consolidated List for serious human rights violations linked to their roles in the treatment of Russian opposition leader, Alexei Navalny, marking the first listings under the EU human rights sanctions regime. In addition, on March 22, 2021, the Council decided to impose restrictive measures on eleven individuals and four entities responsible for serious human rights violations and abuses, among others, in relation to the Uyghurs in Xinjiang in China. These sanctions also concern the repression in the Democratic People's Republic of Korea, extrajudicial killings and enforced disappearances in Libya, torture and repression against LGBTI persons and political opponents in Chechnya in Russia, and torture, extrajudicial, summary or arbitrary executions and killings in South Sudan and Eritrea. See: The EU adopts its first sanctions under its new global human rights sanctions regime. Available at: Norton Rose Fulbright, March 2021. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/81a274ea/the-eu-adopts-its-first-global-human-rights-sanctions-regime (10. 7. 2022).

legal framework to deal with (Eckes, 2022, p. 266). According to Eckes (Eckes, 2022, p. 257), "the grave human rights violations targeted by the EUGHRSR are first of all a security threat in the places where they occur", and "they are also usually interrelated with other criminal activity, such as corruption and breaches of international law" (Eckes, 2022, p. 257). In addition, "the targeted violations are also of such a scope and gravity that they threaten international security more broadly" (Eckes, 2022, p. 257). In case such violations can be committed without fear of any response, a powerlessness of the international system is exposed, which in turn solicits others to also disregard human rights, including those that are considered to form part of *ius cogens* (Eckes, 2022, p. 257).

The adoption by the EU of such an extraterritorial human rights sanctions regime is a significant and critical development, as the EU will now be able to target human rights violations without being limited to existing geographical sanctions regimes. This new regulation follows the aforementioned EU Action Plan, wherein the EU committed to developing a new horizontal EUGHRSR to tackle serious human rights violations and abuses worldwide.[59]

3. THE EUROPEAN UNION ACTION PLAN ON HUMAN RIGHTS AND DEMOCRACY 2020–2024

The EU is founded on a strong commitment to promote and protect human rights, democracy and the rule of law. This is at the heart of its activities, both internally and in its relations with other countries and regions. As stated in the Joint Communication, "in line with the 2019-2024 strategic agenda adopted by the European Council and the 2019-2024 political guidelines for the European Commission, the EU has a strategic interest in advancing its global leadership on human rights and democracy with the aim of bringing tangible benefits to people around the world".[60]

In 2012, the EU adopted the Strategic Framework on Human Rights and Democracy aimed at setting out principles, objectives and priorities, all designed to improve the effectiveness and consistency of EU policy in these areas.[61] The adoption in 2012 of the Strategic Framework and Action Plan on Human Rights and Democracy, marked a new step in reinforcing EU and member states' support of the work of Human Rights Defenders through the establishment of explicit objectives and targeted actions.[62] The Declaration

[59] The EU adopts its first sanctions under its new global human rights sanctions regime. Norton Rose Fulbright, March 2021. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/81a274ea/the-eu-adopts-its-first-global-human-rights-sanctions-regime (9. 7. 2022).

[60] Joint Communication to the European Parliament and the Council. EU Action Plan on Human Rights and Democracy 2020-2024. (The High Representative of the Union for Foreign Affairs and Security Policy and the European Commission). No. doc: JOIN (2020) 5 final of March 25, 2020, p. 1.

[61] See: PRESS RELEASE - Human Rights and Democracy: striving for dignity and equality around the world. European Commission, 25 March 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_492 (9. 7. 2022).

[62] Intensifying the European Union's support to human rights defenders: Civil society proposals for the new EU Action Plan on Human Rights and Democracy, December 17, 2014. Available at: https://www.omct.org/en/resources/statements/intensifying-the-european-unions-support-to-human-rights-defenders-civil-society-proposals-for-the-new-eu-action-plan-on-human-rights-and-democracy (9. 7. 2022).

on human rights defenders identifies human rights defenders as individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.[63] The Declaration was adopted by consensus by the General Assembly of the United Nations in 1998, and therefore represents a very strong commitment by States to its implementation.[64] In accordance with Article 1 of the Declaration, everyone has the right, individually and in association with others to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.[65] According to the Strategic Framework, "the European Union is founded on a shared determination to promote peace and stability and to build a world founded on respect for human rights, democracy and the rule of law". It is further emphasized that ''these principlesunderpin all aspects of the internal and external policies of the European Union".[66] In order to implement the Strategic Framework on Human Rights and Democracy, the EU adopted two Action Plans, in 2012 and in 2015, respectively. When it comes to those Action Plans, it is important to emphasize that these documents „looked to increase the coherence and complementarity of all the tools that support human rights and democracy across the world".[67]

Since the adoption of the first two EU action plans on human rights and democracy (2012-2014 and 2015-2019), the appointment of the first EU Special Representative for Human Rights in 2012 and the 2019 Council Conclusions on Democracy, the EU has become more coordinated, active, visible and effective in its engagement in and with third countries and more prominently engaged at multilateral level.[68] As stated in the EU Action Plan on Human Rights and Democracy 2015-2019, "respect for human rights and democracy cannot be taken for granted" and that „the European Union is determined to strengthen its efforts to ensure that human rights are realised for all".[69]

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[63] Declaration on human rights defenders. Special Rapporteur on human rights defenders, Geneva: The Office of the United Nations High Commissioner for Human Rights (OHCHR). Available at: https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders (9. 7. 2022).

[64] It was adopted on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, after 14 years of negotiations. The Declaration is not, in itself, a legally binding instrument, but it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding. See: Declaration on human rights defenders. Special Rapporteur on human rights defenders, Geneva: The Office of the United Nations High Commissioner for Human Rights (OHCHR). Available at: https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders (11. 7. 2022).

[65] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly of United Nations (UN). No. A/RES/53/144 of March 8, 1999, p. 3.

[66] EU Strategic Framework and Action Plan on Human Rights and Democracy (EU). No. doc: 1185/12 of June 25, 2012, p. 1.

[67] Muguruza, C. C. & Isa, F. G. 2020. The EU human rights and democratisation policy. In: Wouters, J. *et al.*(ed.) *The European Union and Human Rights: Law and Policy*. Oxford: Oxford University Press, p. 478.

[68] See: PRESS RELEASE - Human Rights and Democracy: striving for dignity and equality around the world. European Commission of March 25, 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_492 (9. 7. 2022).

[69] EU Action Plan on Human Rights and Democracy. 2005. Luxembourg: Publications Office of the European Union, 2015, p. 9.

The Cancel Conclusions on Democracy from 2019 stated that "we are living in a world where democracy is being challenged and put into question", and "one of the aims of the EU's external action is to advance democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms".[70]

The EUGHRSR is also a key deliverable proposed by the High Representative and the Commission in the EU Action Plan as part of the Joint Communication adopted in March 2020.[71] On 25 March 2020, the European Commission and the High Representative set out the priorities and way ahead on Human Rights and Democracy, adopting a Joint Communication and the EU Action Plan. Further, they put forward a joint proposal to the Council to act by qualified majority voting on issues falling under the EU Action Plan, reflecting the strategic importance of the EU Action Plan. It aims at fostering faster and more efficient decision-making on human rights and democracy.[72]

According to the text of theJoint Communication and the EU Action Plan, "the purpose of the Communication is to put forward a new action plan for Human Rights and Democracy", and "to set out ambitions and priorities for the period of 5 years in this field of external relations", in order to "contribute to achieving a stronger Europe in the world".[73] It can be agreed with the statement that the EU Action Plan is "unique" because it is "the only instrument of its kind aimed at promoting a values-based agenda on the world stage".[74]

The Joint Communication proposes: a) enhancing EU leadership in promoting and protecting human rights and democracy worldwide; b) setting out EU ambitions, identifying priorities and focusing on implementation in view of changing geopolitics, the digital transition, environmental challenges and climate change; c) maximising the EU's role on the global stage by expanding the human rights toolbox, its key instruments and policies; and d) fostering a united and joined-up EU by promoting more efficient and coherent action.[75]

The EU Action Plan is the new compass for the EU's external action in this field.[76] Building on the achievements of the previous Action Plans, the latest EU Action Plan

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[70] Council Conclusions on Democracy (Council of the EU). No. doc: 12836/19 of October 14, 2019, p. 2.

[71] PRESS RELEASE - Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide of October 19, 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (9. 7. 2022).

[72] On that occasion, High Representative/Vice-President, Josep Borrell, said: *"Crisis situations, as the one we are living with the Coronavirus' pandemic, pose particular challenges to the effective exercise and protection of human rights, and put the functioning of our democracies to the test. This is an opportunity for Europe to stand up for its values and interests. We need the courage and ambition to tackle challenges together. Today, we propose an ambitious plan to defend human rights and democracy all over the world by using all our resources faster and more effectively"*. See: PRESS RELEASE - Human Rights and Democracy: striving for dignity and equality around the world. European Commission of March 25, 2020.
Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_492 (9. 7. 2022).

[73] Joint Communication to the European Parliament and the Council. EU Action Plan on Human Rights and Democracy 2020-2024. (The High Representative of the Union for Foreign Affairs and Security Policy and the European Commission). No. doc: JOIN (2020) 5 final of March 25, 2020, p. 1.

[74] *Ibid.*

[75] *Ibid*, p. 1-2.

[76] Thematic Programme on Human Rights and DemocracyMulti-Annual Indicative Programming 2021-2027. 2021, p. 1. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6695 (9. 7. 2022).

sets out EU ambitions and identifies the priorities for action around five interlinked and mutually reinforcing lines of action: a) Protecting and empowering individuals; b) Building resilient, inclusive and democratic societies; c) Promoting a global system for Human Rights and Democracy; d) Harnessing opportunities and addressing challenges posed by the use of new technologies; and e) Delivering by working together.[77]

4. CONCLUSION

The main goal of this paper was to point out the importance that the EU places when it comes to promoting and protecting human rights globally. The results of this research have shown that the EU has achieved impressive progress in the period of 2019-2022 with respect to the EU's activities in protecting and promoting human rights and democracy as fundamental values of the EU and a cornerstone of EU's external action. The most important EU's activities in that field were adoption of the Joint Communication and the EU Action Plan on 25 March 2020 and the establishment of the EUGHRSR as a key deliverable proposed in the EU Action Plan which reaffirms the EU's commitment to promoting and protecting these values worldwide.

It can be agreed that the EU Action Plan is uncommon because it is the only instrument of that kind aimed at promoting a values-based agenda globally. It appears from the previous analysis that the Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998 together constitute the EUGHRSR. Obviously, , the adoption of the EUGHRSR is a landmark achievement in the fieldof protecting and promoting human rights and democracy.

Next to the political dialogue and multilateral partnerships, EU sanctions are one of the EU tools that are available to address human rights violations and abuses and to help to achieve key EU objectives such as preserving peace, strengthening international security, as well as consolidating and supporting democracy, international law and human rights. Moreover, they are targeted at those whose actions endanger these values.

The EUGHRSR highlights the importance the EU places on promoting and protecting human rights globally by covering serious human rights violations and abuses and can be seen as an EU response to a transnational security threat. It can be concluded that the EUGHRSR shows a significant development in the field of the EU activities that are aimed on protecting human rights, because the EU is now able to target human rights violations without being limited to existing geographical sanctions regimes. In the end, it remains to be seen how the EU will continue to work on the protection and promotion of human rights and democracy in the coming period.

[77] Joint Communication to the European Parliament and the Council. EU Action Plan on Human Rights and Democracy 2020-2024. (The High Representative of the Union for Foreign Affairs and Security Policy and the European Commission). No. doc: JOIN (2020) 5 final of March 25, 2020, p. 4.

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THE FRAMEWORK ON DURABLE SOLUTIONS FOR INTERNALLY DISPLACED PERSONS IN THE SCHOLARLY LITERATURE: A PRELIMINARY ANALYSIS

The number of persons forcibly displaced from their homes, the long duration of their plight, and the manifold negative consequences of internal displacement have intensified the United Nations efforts to come to grips with, what is now called, "the global internal displacement crisis". At the heart of the new United Nations strategies is a quest for solutions to internal displacement, with the Framework on Durable Solutions for Internally Displaced Persons serving as their blueprint. Endorsed in 2009 by the major international stakeholders in the field, the Framework provided the conceptual foundations for the policies and programmes for internally displaced persons which would go beyond the provision of humanitarian assistance. To understand whether the Framework has had an important role in the development of the scholarship on forced displacement as it has had in practice, the study examines the references to the Framework in scholarly discussions evolving since its endorsement. To this aim, the authors undertake qualitative and quantitative analysis of a sample of scholarly articles in the field of social sciences. The study's findings confirm that the Framework on Durable Solutions for Internally Displaced Persons represents a standard reference for the concept of durable solutions in academic research on internal displacement. However, the study also shows that a more critical engagement with the text of the Framework is missing.

Keywords: internal displacement, Framework on Durable Solutions for Internally Displaced Persons, United Nations, internal displacement crisis, forced migrations scholarship.

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1. INTRODUCTION

An increased research and policy interest in the predicament of internally displaced persons (hereinafter: IDPs) observable in the last years is closely related to the phenomenon of protracted displacement. A rapid resolution of a forced displacement crisis has become an exception to the rule of an ever longer duration of internal displacement. The remoteness in time of the adverse effects of forced displacement from the events which triggered it is what eventually brought the change of perspective among the main stakeholders in the field. It became clear "that it is the long-term absence of solutions (rather than the mere duration of exile) that keeps people in protracted displacement" (Kraler, Etzold & Ferreira, 2021). At the heart of the intensified United Nations (hereinafter: UN) efforts to address this escalating crisis is a quest for new and innovative approaches to protracted displacement. Here, academia is seen as an important potential source of fresh insights and ideas on the matter. In the report released last year, the UN Secretary General's High-Level Panel on Internal Displacement calls for its greater involvement in a search for solutions. The Panel stresses the need for a greater engagement of researchers "to inform the public about internal displacement, provide expertise to Governments and set out a pathway for change"(UN SG High-Level Panel on Internal Displacement, 2021, p. 22).

The Framework on Durable Solutions for Internally Displaced Persons (2009)[1] serves as the blueprint for the UN attempts to find the solution to the displacement crisis. The document was a result of the concentrated efforts of the representatives of the major intergovernmental and non-governmental organization, state officials, scholars, and practitioners to develop the concept of durable solutions and the criteria for their achievement, which would respond to the complex nature of internal displacement in a more efficient way. More than two decades have passed since its endorsement, and now the time is ripe for an assessment of the extent to which its text became a reference point for academic research on internal displacement.[2] Such assessment could show whether the Framework grew into a shared conceptual background of the evolving scholarly literature and the international policy documents on internal displacement.

The goal of the present study is to investigate whether the Framework has been embraced by the scholars researching the solutions to displacement, as would be expected given the importance assigned to it in the UN documents. To this aim, in the study, the authors investigate the role of the Framework in scholarly discussions. The research question that the study seeks to answer is how the Framework appears in the academic papers on the subject of internal displacement. The purpose of the

[1] Further, "the Framework on Durable Solutions" or "the Framework".

[2] Two studies with a similar goal have been identified so far (see: Al-Mahaidi, Gross & Cantor, 2019, pp. 31-32 and Asfour, 2020, pp. 13-16). The main differences between these and the present study, are that their scope is much broader, they are focused on providing a "state of the art" review of the existing literature, and they do not include quantitative analysis. More importantly, the given studies review the papers on the subject of durable solutions, but they do not engage specifically with the role of the Framework on Durable Solutions in the scholarly literature on the subject.

present study is to provide a preliminary investigation of the Framework's role in shaping the scholarly reflections on the strategies to address the challenges of internal displacement.

The study is structured in the following way. The first chapter gives a short overview of the recently intensified UN activities aimed at addressing the internal displacement crisis. In the second chapter, the authors outline the Framework on Durable Solutions. The findings of the study are presented and interpreted in the third chapter. In the conclusion, the authors summarise the main findings.

1.1. A note on methodology

In the study, the authors departed from the assumption that the Framework on Durable Solutions has already earned its place in academic literature. That assumption was based on the number of research hits which appeared in the two academic search engines used for this initial search.[3] The study represents a qualitative and quantitative analysis of the sample of academic papers from the disciplines of law, sociology, political sciences, and other social sciences written on the subject of internal displacement. The sample was formed by searching academic papers containing the phrase "Framework on Durable Solutions" via the Google Scholar web search engine. The phrase "Framework on Durable Solutions" was used as a search keyword as the most common way the Framework is referred to in the policy documents and academic texts. The first 31 academic papers found among the search results were included in the sample. Since Google Scholar is not a curated academic search engine and its search results are known to include grey literature such as reports, policy literature, working papers, newsletters, and other non-peer reviewed material (Haddaway *et al*, 2015. López-Cózar, Orduña-Malea & Martín-Martín, 2019, p. 4), the sample was formed after selecting the relevant results which appeared on the first 11 results pages. The terms of the search were set to limit it to the papers published between 2010 and 2022 by using the available filtering options.[4] Not all scholarly papers identified by Google Scholar were included in the sample, but only those from the field of social sciences. To secure the diversity of the authors, only one paper per author was included in the sample. Where more papers of the same author were found among the search results, only the first paper which appeared on the list became part of the sample. The sample also did not include papers authored by scholars who are known to have been directly involved in the drafting of the Framework on Durable Solutions,[5] and

[3] The assumption was based on the number of results of the search for the academic texts which contain the keyword "Framework on Durable Solutions" via Google Scholar and the academic platform of the Consortium of Serbian Libraries "KoBSON". Google Scholar search resulted in a total of 371 results. The search on KoBSON which, as different from Google Scholar, provides the possibility of limiting search results to peer-review documents, showed a total of 231 results.

[4] The given range of years was the only logical choice, given that the Framework on Durable Solutions was first published in April 2010.

[5] Such as the experts from the Brookings Institution - University of Bern Project on Internal Displacement, who were intensively engaged in drafting the text of the Framework.

papers authored by the former Representatives of the UN Secretary-General on Internally Displaced Persons[6]. Despite its shortcomings as a source of data for scientific evaluation, the first one being that not all the parameters of its ranking algorithm are known,[7] the choice to use Google Scholar was based on two reasons. The first one is its wide coverage and fast indexing speed (López-Cózar, Orduña-Malea & Martín-Martín, 2019, p. 1). The second reason is that the citation count of an academic paper is known to be among the major factors influencing Google Scholar's results ranking (Beel & Gipp, 2009. Rovira *et al*, 2019, p. 1). While that can represent a serious limitation for many studies, here it was taken as an advantage given that one of the broader purposes of the study was to investigate the potential significance of the Framework for future strategies on internal displacement. Namely, the assumption was that the more cited the paper was, the higher the chances that it would have a direct or indirect influence on the policy-makers.

The sample has several limitations which need to be acknowledged. Its most obvious limitation is its small size and that it includes only papers written in English. A limitation of the sample identified once the sample was formed is that it is dominated by papers published in one journal.[8] The last identified shortcoming of the sample that was also not part of the research plan is that most papers have been published in the last five years.

2. IN SEARCH OF DURABLE SOLUTIONS

The number of internally displaced persons caught in protracted displacement, that is in the situation where they remain in precarious situations for long periods due to the unaddressed displacement-related vulnerabilities, is steadily growing.[9] Their share in the overall number of IDPs is what makes the look of today's global statistics so dramatic, as the number of newly displaced persons each year is to be added to more than 50 million

[6] Now "the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons".

[7] According to López-Cózar, Orduña-Malea & Martín-Martín, Google Scholar "considers a wide range of parameters for ranking documents [but] the detailed set of parameters and the weight each of them has in the ranking algorithm is not publicly available" (2019, p. 5).

[8] As many as 13 papers from the sample come from the "Refugee Survey Quarterly". The other international academic journals in which the papers from the sample were published are the "International Journal of Refugee Law", "Journal of Refugee Studies", "Journal of Peacebuilding & Development", "Journal of International Humanitarian Action", and others. The sample also contains papers published in regional and national legal journals such as, for instance, "African Journal of Legal Studies" and "Comparative and International Law Journal of Southern Africa".

[9] Protracted displacement is a distinct type of displacement characterised by a long duration and the lack of prospects for achieving the three traditional durable solutions. The conflict-induced protracted displacement is typically a consequence of stalemate in negotiations and implementation of peace agreements and/or of the situation in which the state, which bears primary responsibility for protecting and assisting those displaced within its borders, does not have effective control over the part of its territory from which IDPs have fled. More generally, for Kälin and Chapuisat "the term 'protracted displacement' refers to situations in which tangible progress towards durable solutions is slow or stalled for significant periods of time because IDPs are prevented from taking or are unable to take steps that allow them to progressively reduce the vulnerability, impoverishment and marginalisation they face as displaced people, in order to regain a self-sufficient and dignified life and ultimately find a durable solution" (Kälin & Chapuisat, 2017, p. 20).

of those who have already been displaced and whose predicament, by all chances, will not end up soon enough.[10] Rapid resolution of internal displacement situations rarely takes place and the duration of displacement is now coming close to being measured in decades. The estimates are that, on average, conflict-induced displacement lasts almost twenty years.[11] It has become apparent that internal displacement can no longer be considered a phenomenon of transitory character and primarily a humanitarian concern. Instead, now it is widely recognised that internal displacement is a complex phenomenon that can last for many decades as "a vicious circle of impoverishment and marginality" (Cantor & Apollo, 2020, p. 651) and that has multiple and profoundly negative effects on both individual IDPs and the society at large. This new perspective on the problem of protracted displacement, and internal displacement as such, in recent years, has prompted a series of UN initiatives aimed at finding new ways to tackle what is now being called a "global displacement crisis" (UN SG's High-Level Panel on Internal Displacement, 2021, p. 4). The UN has seen an increase in its activity directed towards achieving solutions for both new and protracted internal displacement. At the World Humanitarian Summit held in 2016, the UN Secretary-General set a target of a 50 per cent reduction in the number of new and protracted internal displacement by 2030 (UN General Assembly, 2016, para. 83). In the following year, the UN General Assembly adopted a Resolution on the Protection of and Assistance to IDPs (UN General Assembly, 2017), which was followed by the three-year multi-stakeholder GP20 Plan of Action to Advance Prevention, Protection and Solutions for IDPs (UN Human Rights Council, 2019),[12] kicked off on the 20th anniversary of the Guiding Principles on Internal Displacement (UN Commission on Human Rights, 1998). Acting on the call of 57 member states, the UN Secretary-General established a High-Level Panel on Internal Displacement in 2019 to develop "concrete recommendations for Member States, the United Nations system and other relevant stakeholders to improve the approach and response to the issue, with a particular focus on durable solutions" (UN Secretary-General, 2019).[13] As a follow-up to the High-Level Panel's 2021 report, in its Action Agenda on Internal Displacement, published in June this year, the UN Secretary-General has appointed the Special Adviser on Solutions to Internal Displacement "to mobilise relevant expertise from across the UN system and lead collective efforts on solutions" (UN Secretary-General, 2022). In the Action Agenda on Internal Displacement, the UN Secretary-General has also tasked a wide array of UN development, peacebuilding, humanitarian, human rights, disaster risk reduction, and climate change bodies and agencies to develop, by the end

[10] UNHCR reports that there were 51.3 million conflict-affected IDPs at the end of 2021 (UNHCR, 2022, p. 4). According to the IDMC, at the end of 2021 a total of 59.1 million persons were displaced as a consequence of conflict, violence and natural or man-made disasters (IDMC, 2022, p. 12).

[11] The exact estimates of the average duration of conflict-induced displacement are not available. According to the figure referred to in a report of the Special Rapporteur on the Human Rights of Internally Displaced Persons from 2015, an average conflict-induced displacement lasts 17 years (UN Human Rights Council, 2015, p. 1). N. Crawford *et al.* mention that "countries experiencing conflict-related displacement have reported figures for IDPs over periods of 23 years on average" (Crawford *et al*, 2015, p. 12).

[12] A GP20 Plan of Action had four priority issues: participation of IDPs, national laws and policies addressing internal displacement, data and analysis on internal displacement, and addressing protracted displacement and facilitating durable solutions.

[13] The High-Level Panel on Internal Displacement has completed its mandate in September 2021.

of 2022, their global institutional plans on how to reinforce own capacities to meet the challenges brought by internal displacement (p. 12). All of this was aimed at enhancing the UN's capacity to pursue more systematically "a critical imperative to scale up efforts to help IDPs to achieve durable solutions", which was, according to the High-Level Panel, a consequence of a "collective failure to prevent, address and resolve internal displacement" (UN SC High-Level Panel, 2021, pp. 8, 4).

3. AN OUTLINE OF THE FRAMEWORK ON DURABLE SOLUTIONS

In 1998, with the adoption of the Guiding Principles on Internal Displacement, the contours of the legal position of IDPs under international law were drawn. Although IDPs have had no special status guaranteed by international law, their specific needs were mapped and linked to the corresponding human rights norms derived from the international humanitarian and human rights instruments. Through an analogy with the international refugee law, return, integration in the place of displacement, and resettlement to a third place were identified as logical solutions to displacement (Principles 28-30). However, return, integration and resettlement are processes that do not end in one specific moment of time, and the question of how to determine when displacement is over remained unanswered. The international organisations involved in the protection of IDPs and the main international donors sought clearer guidance on the question of the end of internal displacement. This brought to the series of UN-led consultations of the main stakeholders, experts in the field, and practitioners, which were officially initiated in 2001 when the UN Office for the Coordination of Humanitarian Affairs (hereinafter: OCHA) asked the Representative of the UN Secretary-General on Internally Displaced Persons to provide guidance on when an individual should no more be considered an IDP (Mooney, 2002, p. 2). The consultations in 2007 led to a pilot version of the Framework on Durable Solutions to be field-tested in the subsequent two years (Brookings Institution – University of Bern, 2007). In 2009, the final version of the Framework on Durable Solutions was endorsed by the Inter-Agency Standing Committee (IASC, 2010, Foreword), the high-level humanitarian coordination forum where the executive heads of 18 UN and other organisations meet to formulate policy, set strategic priorities and mobilise resources in response to humanitarian crises.[14] In parallel to this, the Framework was presented before the UN Human Rights Council as an addendum to the Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (UN Human Rights Council, 2010).

The Framework departs from Section V of the Guiding Principles dedicated to return, resettlement, and reintegration. More precisely, the Framework further develops Principle 28, which establishes that:

> "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the

[14] The Inter-Agency Standing Committee was established in 1991 by a UN General Assembly Resolution (IASC web page).

country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."

Based on Principle 28, the drafters of the Framework shaped the concept of durable solutions and to it related, as they name it, "the right to a durable solution of IDPs" (para. 1, p. 5). Its text reiterates the primary obligation of states affected by displacement to provide solutions to their displaced population. However, as different from the Guiding Principles, the Framework underlines the necessity of greater involvement of international actors and, according to some researchers, its "primary audience is the diverse array of international actors involved in efforts to resolve displacement" (Bradley, 2018, p. 223). The Framework's purpose, as stated in its text, is "to provide clarity on the concept of a durable solution and provides general guidance on how to achieve it" (para. 3, p. 5). In order to do so, the Framework has a threefold aim: "(a) to foster a better understanding of the concept of durable solutions for the internally displaced; (b) provide general guidance on the process and conditions necessary for achieving a durable solution; and (c) assist in determining to what extent a durable solution has been achieved" (para. 5, p. 5). The same as the Guiding Principles, the Framework has a broad scope and applies to all major types of internal displacement, *i.e.* internal displacement in the context of armed conflict, situations of generalised violence, violations of human rights, and natural or human-made disasters.[15]

The text of the Framework is organised into five sections. In the introductory section, a link to the Guiding Principles is established, and the Framework's goals, its drafting process, its purpose, scope, and basic structure are outlined. The second section of the Framework defines the essential elements of the notion of a durable solution and principles that should guide the national authorities and other stakeholders in their efforts to secure the conditions necessary for achieving a durable solution. According to the Framework, the durable solution is a gradual and complex process which is to be achieved through return, integration in the place of displacement or settlement elsewhere in the country. The process is to be considered completed "when former IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement" (para. 8, p. 6). To that aim, the Framework identifies basic elements for determining whether the needs or human rights concerns of an IDP are to be considered as ensuing from displacement. According to the Framework, the displacement-related needs of IDPs, as the most typical human rights vulnerabilities caused by internal displacement, distinguish this group from other members of their political community and dictate the path to durable solutions. Given the nature of these needs, the Framework underlines that durable solutions cannot be equated with the absence of the immediate cause of displacement, which should only be seen as an opportunity to provide durable solutions. The text of the Framework emphasises that "[a] solution may become durable only years, or even decades, after the physical movement to the place of origin or place of settlement has taken place, or the decision to locally integrate has been made" (para. 15, p. 8). The process of arriving at durable solutions is described in

[15] Apart from the development-induced displacement for which the special guidelines on resettlement exist (UN Human Rights Council, 2010, footnote 3, p. 6).

the Framework as a process which involves humanitarian, human rights, peacebuilding, and development challenges and, hence, requires a coordinated engagement of a variety of international and local actors. Naturally, national authorities remain the primary duty holder, as pointed to in its third section dedicated to the principles which should inform the process of providing durable solutions. In this section, the Framework clearly parts away from the approach, which for a long while marked the efforts to resolve the internal displacement crises, whereby there is a clear hierarchy of solutions to displacement with the return to the place of origin at the top of it. The Framework elevates the voluntary nature of the decision to return, locally integrate or resettle to the level of a principle that should guide all the activities aimed at reaching a durable solution. The stakeholders are also warned against promoting durable solutions which can "endanger the life, safety, liberty or health of IDPs or if a minimum standard of agreeable living conditions bearing in mind local conditions cannot be ensured" (para. 21(f), pp. 10-11).

The Framework reflects a rights-based approach to the protection of IDPs.[16] The entire Section IV of the Framework is dedicated to the question of what it means to pursue a rights-based approach while working towards a durable solution. In the first place, it requires the conditions that would enable IDPs to make a free and informed choice on the durable solution they want to pursue. The rights-based approach further implies that IDPs are directly involved in the planning and management of durable solutions, that the firmly established channels of communication between IDPs and the humanitarian and developmental actors are in place, that there is an effective mechanism for monitoring the process, and that peacebuilding and peace processes are pursued with the participation of IDPs.

The rights-based approach is also embedded in the premises of the criteria for measuring the level of achievement of durable solutions laid down in the last, fifth section of the Framework. The eight criteria concern different displacement-specific needs and vulnerabilities of IDPs: (a) safety and security, (b) adequate standard of living, (c) access to livelihoods, (d) restoration of housing, land and property, (e) access to documentation, (f) family reunification, (g) participation in public affairs, and (h) access to effective remedies and justice. In that sense, they reflect the corresponding human rights of IDPs as guaranteed in the international humanitarian and human rights law and restated in the Guiding Principles. They are set in a manner that depicts an ideal-type situation which, according to the Framework's text, "may be difficult to achieve in the medium term" (para. 55, p. 18). In that sense, the criteria are to be used as benchmarks for measuring the progress towards the provision of durable solutions, and for that purpose, an exemplary set of indicators accompanies each criterium. Hence, the drafters of the Framework envisioned it as a conceptual tool that should be adjusted and further operationalised to respond to the specificities of the local context (para. 6, p. 6). As we will see from the further analysis, this is exactly the task the analysed scholarship has carried on in the last ten years.

[16] For a discussion on the limitations of the rights-based approach to durable solutions in the context of conflict-induced protracted displacement, see Matijević, Madžarević & Giantin (2022).

4. THE FRAMEWORK ON DURABLE SOLUTIONS IN ACADEMIC PAPERS

The study analysed the texts of 31 scholarly articles published in academic journals in the field of social sciences with the aim to determine the role of the Framework on Durable Solutions in the academic discussions evolving since its endorsement. The analysis shows that the Framework's relevance as the referential text for defining the concept of durable solutions is now beyond doubt. The concept of durable solutions, as developed and explicated in the Framework, is where this document has had the most significant impact on the scholarly literature. All but two of the analysed papers refer to the Framework in relation to the concept of durable solutions, [17] either through a direct quotation of its definition or by referring to its text as an authoritative statement on the question of what is to be understood by the notion of durable solutions.[18] The two papers in which the Framework was not referred to as a source of the definition or the elements of the notion of durable solution cite the Framework as a referential document for the principles of IDP protection[19] or for their internationally guaranteed rights, alongside the Guiding Principles on Internal Displacement.[20] The Framework was also used as a source of standards in the field of internal displacement as replicated in the regional and national legal and policy documents under investigation in three analysed papers.[21] In this context, the Framework was commonly cited together with the Guiding Principles on Internal Displacement.

Another principal reason for which the analysed papers invoked the Framework is as a source of benchmarks and indicators on the level of achievement of durable solutions. Namely, the analysis identified three papers in which the Framework is used as the basis for the methodology developed for the purpose of measuring some aspects of the position of IDPs in the national context.[22] In some of them, the Framework served as an indirect source of criteria, benchmarks and indicators, being mirrored in the provisions of the national legal and policy documents which were used as a basis for the research methodology. For instance, in one paper the questions for a profiling exercise undertaken in Burundi followed the criteria on the level of achievement of durable solutions as laid down in the national IDP strategy which adopted the Framework's set of criteria (Zeender & McCallin, 2013, p. 85). That shows that a considerable body of research explores and contextualises the Framework's criteria on durable solutions through in-depth context analyses, a development already envisioned by the Framework's drafters. As already noted, the very text of the Framework mandates the translation of the criteria on durable solutions into indicators sensitive to the local context in order to secure an objective and transparent basis for monitoring. It seems that the focus of many papers on the contextualisation of the standards laid down in the Framework follows a broader trend of the practitioners in the field trying to operationalise the Framework's eight criteria on the duration of internal

[17] See, for instance, Kuwali (2014, p. 275).

[18] See, for instance, Al-Mahaidi (2020, p. 482).

[19] See Draper (2021, p. 2).

[20] See, Onwe & Nwogbaga (2015, p. 54).

[21] See, for instance, Caterina & Lizcano Rodríguez (2020, footnotes 47, 49, p. 644).

[22] See, for instance, Ekezie (2022, p. 2).

displacement by developing indicators that should enable more accurate monitoring of their realisation in practice.[23]

Only two papers from the sample do not simply cite the Framework but engage in an analysis and discussion of its text.[24] That might be a consequence of the general focus of the forced migrations research on case studies and, as observed by Robert Muggah, a relatively small share of scholarly articles which engage with the normative standards in this emerging field (Muggah, 2008, p. 29). In effect, 15 of 31 analysed papers can be classified as case studies investigating the topic of forced displacement and durable solutions in the specific national context of countries affected by armed conflict or natural and man-made disasters.

There are another two specific observations that ensued from the analysis. Two-thirds of papers from the sample (21 papers) were published in the last five years, out of which 11 were published between 2020 and 2022. The publishing date of the ten remaining papers spans different years, the oldest being published in 2012.[25] The prevalence of the papers published in the last two years (one-third of the papers) in the sample which, as noted, is a product of the ranking algorithm used by Google Scholar, could be somewhat confusing at first glance. According to studies analysing the relevance ranking algorithms employed by academic platforms, the citation record of an article is a major factor in the Google Scholar results ranking.[26] This is usually beneficial not only for the papers from high Impact Factor sources but also for the older papers, which have had more time to be cited by other authors compared to the more recent papers. In that light, the prevalence of the papers dated in the last three years is a contradiction that might be assigned to some specific features of the Google Scholar relevance ranking algorithm. On the other hand, the explanation might also be sought among less technical reasons. We have noted in the second chapter that there was an increased activity of the UN and other organisations involved in the field of IDP protection in the last several years. The beginning of these intensified efforts could be roughly situated in 2016 when, at the World Humanitarian Summit, the UN Secretary-General set a target of at least a 50 percent reduction in the number of internal displacement situations by 2030. Since that time, as shown in the earlier chapter, a series of high-level, UN-led attempts to give more prominence to the problem of internal displacement have ensued. Moreover, it also became clear that the major problem with the number of IDPs globally is not the number of newly displaced persons but the magnitude of protracted displacement. Consequently, in practice, a greater focus has been placed on the solutions that go beyond responding to the humanitarian needs of IDPs. Of course, no direct causal link between the high share of papers published after 2016 and these developments could be established, but in the absence of a more plausible explanation, this one could figure as a potential factor that has led to an increased interest of academic researchers in the Framework and its concept of durable solutions.

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[23] More on this in Bradley (2018, p. 224).

[24] See Bradley (2018). Nguya & Siddiqui (2020).

[25] Schrepfer (2012).

[26] As shown in the first chapter.

Another notable feature of the references to the Framework found in the analysed papers is that they are not uniform. Most papers cite it under the name "IASC Framework on Durable Solutions for Internally Displaced Persons", but some also cite it only as "Framework on Durable Solutions for Internally Displaced Persons". Another difference lies in the data on the author and publisher. While the majority of papers cite it as a text authored by the Inter-Agency Standing Committee (hereinafter: IASC) and published by the Brookings Institution – the University of Bern Project on Internal Displacement (in full length or under abbreviations), there are also authors who cite it as authored by the Brookings Institution or as published by IASC, while in reality there is only one publication with the text of the Framework that was authored by IASC and published by the Brookings Institution – the University of Bern Project on Internal Displacement. Even though the Framework could be cited as a UN document, given that it was officially presented before the UN Human Rights Council as an Addendum to the Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons in 2009, only one author cites the Framework in that way.[27] This might look like a trivial observation, but in effect, it points to a rather important problem of the perplexing nature of the Framework on Durable Solutions. Namely, the Framework is often referred to in the literature, side by side with the Guiding Principles, as the source of standards on internal displacement. Both are soft-law documents[28] which were presented to the UN Commission on Human Rights (later UN Human Rights Council) and endorsed by the IASC. However, in the literature, the Guiding Principles are primarily cited as a UN document while, as seen in our analysis, the Framework is cited as an IASC-authored publication. The Guiding Principles are drafted as a legal document with paragraphs which resemble the articles of a hard law international human rights instrument. On the other hand, the Framework does not employ legal language and does not look like a legal text either in its form or in substance and it could be instead categorised as a conceptual document. This might be a reason why, as different from the Guiding Principles, the Framework is not cited as a UN document but as a publication authored by an entity that has no mandate to create legal standards. This aspect of the Framework deserves closer attention, given that the scholarly literature approaches its text in the first place as a source of standards, as shown in the study.[29] Further development of the protection of IDPs could, at some point, require consolidation of the hard law and soft law standards, which would in itself mandate a more careful observation of the procedures required for their codification. Today's internal displacement crisis has collective outcomes which are global in character and do not remain confined to the societies directly affected by displacement. These collective outcomes require collective action, the many aspects of which, sooner or later, might become a subject of international legal regulation.

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[27] See Al-Mahaidi (2020, p. 482).

[28] On the nature, sources and types of soft law documents, see Shelton (2008, pp. 2-7).

[29] Although the analysis conducted in the study did not cover the monographs, the cursory reading of the monographs which cite the Framework, shows that there it also plays a role fairly similar to the role it has in the analysed scholarly papers. See, for instance, Abebe (2017) and Adeola (2020).

The review of the texts of scholarly articles led to several other more substantive findings. Firstly, from the way the analysed papers employ the concept of durable solutions laid down in the Framework, it clearly ensues that the equal importance of all three durable solutions to internal displacement is now beyond question. Although the return-oriented policies and programmes still reign in practice,[30] in theory, the non-hierarchical relationship between the return, integration, and resettlement became a standard on its own even without invoking the human rights norms from which it was initially derived. While this standard was already included in the Guiding Principles, it seems that the endorsement of the Framework gave a decisive foundation for the shift away from the primacy of return among the solutions to internal displacement.[31]

Secondly, the review of the papers clearly points out that internal displacement, at least the conflict-induced displacement, is now approached as a situation that implies longer-term consequences and, hence, mandates a long-term perspective in searching for durable solutions, which is one of the basic premises of the Framework's concept of durable solutions. This means, in the first place, that physical return to the place of origin, for instance, is no more considered a durable solution on its own. Another segment of the long-term approach to durable solutions mirrored in the scholarship concerns the emphasis which the Framework places on the broader developmental implications of internal displacement. Asfour, Al-Thawr and Chastonay in that sense note that "[r]esearchers and policy-makers are just beginning to acknowledge the wider ways in which internal displacement may shape collective processes of development over the long-term" and that internal displacement, "at least in contexts of conflict, needs to be treated not only as an issue of short-term protection or assistance but also with long-term development implications" (Asfour, Al-Thawr, & Chastonay, 2020, p. 3).

The third finding, closely related to the previous one, is that the analysed scholarly literature now by default departs from the assumption that internal displacement is a phenomenon which has negative consequences for the entire society and not only for IDPs as the group directly affected by displacement. This is followed by the insight, also broadly reflected in the Framework, that multiple factors influence the achievement of durable solutions and that the available humanitarian and reconstruction assistance is only one of them.[32] As found in the study, such a perspective has influenced the evolution of academic discussions on durable solutions in the analysed papers.

5. CONCLUSION

The Framework on Durable Solutions was endorsed in 2009 by the major UN and other international stakeholders in the field in an attempt to create a conceptual background for the policies and programmes for IDPs that would go beyond the provision of humanitarian

[30] See on this Helletzgruber (2014, p. 224).

[31] See on this Amado (2016, p. 81).

[32] In that sense, Muguruza and Amado speak about "the great contribution of the IASC Framework to the characterisation of the multiple factors which contribute to the achievement of durable solutions" (2017, p. 323).

assistance. The Framework developed a comprehensive but fairly simple human rights conception of durable solutions and operationalised it through a set of criteria and indicators to be used in assessing the level of achievement of durable solutions. It reiterated the long-term character and magnitude of the negative consequences of forced displacement for IDPs and their societies. The text of the Framework also made clear that the challenges of internal displacement can be effectively met only through collective action and, next to the duty of the national authorities, it placed the responsibility for the realisation of durable solutions on a broad array of international actors. As such, the endorsement of the Framework represents an important milestone in the evolution of international practice on forced displacement.

More than a decade has passed since the text of the Framework was published, a period sufficiently long for an assessment of its role in the scholarship dealing with the challenges of internal displacement. In an attempt to investigate whether the Framework has had as an important role in the forced displacement theory as given to it in the UN practice, the study examines the references to the Framework in the scholarly discussions evolving since its endorsement. The qualitative and quantitative analysis of the sample of 31 scholarly articles published in academic journals in the field of social sciences over the past 12 years showed the relevance of the Framework as the referential text for the definition of the concept of durable solutions. In effect, all but two of the analysed papers refer to the Framework in the first place in relation to the concept of durable solutions, either through a direct quotation of its definition of durable solutions or by referring to its text as an authoritative statement on the question of what is to be understood under the notion of durable solutions. The study also showed that the Framework is often used as a source of benchmarks and indicators for measuring the level of achievement of durable solutions, this primarily being the case in the papers presenting the country-specific case studies. At the same time, very few papers included in the sample engage in an analysis and discussion of its text. That might be explained as a consequence of the general trend of the forced migration research to focus on case studies and the related absence of scholarly discussions on the normative and institutional foundations and other substantive aspects of the contemporary approaches to internal displacement. An interesting finding of the study is that the great majority of the papers from the sample were written in the last five years. In effect, one-third of the analysed papers was published between 2020 and 2022, which coincides with the intensified UN efforts to address the global internal displacement crisis. Another finding reached during the analysis is that the way different authors refer to the Framework is not uniform, which might be a consequence of a discrepancy between its role as a source of standards and the non-legal character of both the form and substance of its text.

The Framework on Durable Solutions is an important tool which, as the study confirms, serves as a conceptual foundation for academic research on the subject of internal displacement as much as it represents a blueprint for the practice of the international organisations active in the field. However, the study also shows that a more critical engagement with the text of the Framework is lacking, which might be the missing link between the expectations placed before academia and its capacity to deliver

truly innovative ways to come to grips with the internal displacement crisis of the scale we witness today.

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SELF-EXCULPATORY OR SELF-INCULPATORY APPROACHES TO THE MEMORY LAWS IN HUNGARY

After 1989/1990, with the downfall of the communist regime, the opportunity for the historical memory of the trauma of the 20th century had changed in Hungary as well. In 2004, with other Central and East European countries, Hungary became a member state of the European Union; there was another sweeping change in the Hungarian politics of the memory. Hungary's remembrance had to be fitted in the European „Holocaust-focused" memory-politics, with its two-folded, „Holocaust- and communism-focused" past. This situation resulted a rival victim-narrative, which effected a huge change in the structure of the Hungarian memory laws. After the downfall of the communist regime, the state approach was rather self-exculpatory, due to Hungary regarding itself just as a victim of the dictatorships of the 20th century. The Hungarian politics of memory does not want to confront the self-inculpatory narrative, despite the fact that no dictatorships could function without Hungarian „perpetrators". The paper seeks for the reason behind the change between the self-exculpatory and the self-inculpatory approaches of the Hungarian legal governance in the last three decades.

Keywords: memory law, self-exculpatory or self-inculpatory approach, historical memory.

1. INTRODUCTION

The term „*loi mémorielle*" was mentioned the very first time on the 16th December 2005 by *Francoise Chandernagor*. She used the phrase to refer to the laws which were enacted with the intention of „forcing on historians the lens through which to consider the past." But without giving an exact definition. In order to highlight this „bad practice", she referred to the following examples from the French legislation :1. *loi Gayssot* (adopted in 1990); 2. *loi Arménie* (adopted in 2001); 3. *loi Taubira* (also adopted in 2001); 4. *loi Rapatrié* (adopted in 2005.).[1] *Chandernagor* protested against the increasing number of such laws, as they

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[1] The adoption of *loi Rapatrié* was the final „straw" for some of historians, beacuse it required the schoolsystem of France to teach on the French colonization only in positive terms.

lead to a distorted and inauthentic interpretation of the past. The article in the *Le Monde* leads to a wide and interdisciplinary discussion about the independence of the historical research and the legislation regarding the remembrance.[2]

The phenomenon has not only national, but transnational character as well. Moreover, it has an EU-related interpretation. In the beginning of the 2000s it was widely discussed among historians, legal experts, linguists and psychologists. As a consequence, the organization *MELA*[3] was established in 2016. It is an EU-sponsored consortium dedicated to analysing the analogies and the differences among the memory laws in Europe.

Neither of the *Chandernagor*'s article, nor the MELA-project, even other researchers, organizations or publications researching the *loi mémorielles* provide an unambiguous definition about *memory law*;[4] instead, they rather explore the concept of the terminology. However, the term has been translated to many different languages. The most common term in English is *memory law*, even though *memorial law* would be more precise. The German term is *Erinnerungsgesetz,* the Spanish is *ley de la mémorica historia.* In Hungarian *emlékezettörvény* is regarded the most common term*;* however various other terms – in a somewhat broader sense – have been used to denote this type of laws as well.

2. SELF-EXCULPATORY AND SELF-INCULPATORY APPROACH OF LEGAL GOVERNANCE

Though the thesis does not try to give a precise definition of the memory law, it states that is not only a legal, but a cultural manifestation. According to this perspective, the paper analyses how states, in particular Hungary, try to find their own way to remember their history. This includes the question of how to reflect on own past and describe this reflection properly.

In 2019, the term self-inculpatory law was debated between *Eric Heinze*[5] and *Antoon de Baets*.[6] At the beginning of the debate, the Model Declaration[7] was explained by Eric Heinze.[8] In the debate, Heinze examines how states limit speech in order to control public awareness about past." As an example, he refers to Turkey and China. In order to punish or discipline those who accuse the state of having committed human rights abuses, both

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[2] As a result of the debates new organization, named the *Liberté pour l'histoire was formed*.

[3] Memory Laws in European and Comparative Perspectives.

[4] The most exhaustive overview of the definition can be found in *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia* by Nikolay Koposov. Cambridge: Cambridge University Press, 2017.

[5] Eric Heinze is a professor of law and humanities at Queen Mary University of London, and he is one of the writer of the Model Declaration on Law and Histrocial Memory of the MELA Project.

[6] Antoon de Baets is a professor of history, ethics, and human rights at the Univeristy of Groningen, in the Netherlands.

[7] The Model Declaration on Law and Historical Memory will be presented at the MELA Conference, which will be held at the Brussels School of International Studies, University of Kent (Belgium). This Declaration will be a summation of the best practices developed by the Project over the course from 2016, establishment of the MELA till 2019. Available at: http://melaproject.org/node/534 (8. 8. 2022).

[8] Heinze, E. 2019b. *Should governments butt out of history?* Available at: https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/ (8. 8. 2022).

states „routinely exert legal and social controls to self-exculpate, that is, to punish or to discipline those who accuse the state of having committed human rights abuses." In contrast to the interpretation, there are numerous states where the government does not "butt out" of their history, to borrow the rather colloquial term used in the title of Heinze's article.

It is a self-inculpatory approach of the legal governance to historical memory. This approach is based on bans: „For example, controversies have arisen in recent years around the laws prohibiting Holocaust denial." *Heinze* refers to the Model Declaration as a model to be followed. According to its para. 3 „The right to scrutinise and criticise past actions or policies of governing entities shall be guaranteed, irrespective of the citizenship, residence, or location of any individual or organization exercising that right."[9] Reflecting on this statement, *Antoon de Baets* points out the deficiency and inconsistency of the basic distinction between self-exculpatory and self-inculpatory approach, and emphasizes that the self-inculpatory laws do exist. His first argument is really simple: the temporalityi.e. that the state, that commits the atrocity crimes, is not the state that wants to decree self-inculpatory laws. *De Baets* refers to the historical narratives of Germany and Spain as examples. „The question arises to what extent, if any, a successor state can inherit the guilt of a perpetrator state and decree self-inculpatory laws."[10] After this statement, he does not agree with this division – using the word „posing" in his explanation, he focuses on the misunderstandable situation of the memory law-terms by *Heinze*. *De Baets* offers a different approach: „In my view, the decisive divide should not be between inculpation and exculpation but between opinion and hate speech: laws that prohibit historical opinions – including erroneous ones and even those that offend, shock, and disturb – are inappropriate. Only laws that prohibit historical opinions reaching the threshold of hate speech are appropriate. This distinction is prominent in articles 19 and 20 of the International Covenant on Civil and Political Rights."[11] The third „round" of the debate consists of a contribution by *Heinze*. He points out the considerable difference between talking and debating about „law", „code" and „statute". As he put it, „The entire legal system empowers officials to impose such penalties, in addition to the state's sweeping censorship of information about the past. … As I argued some time ago …, history certainly does suggest that the more abusive a regime, the less likely it is to self-inculpate. However, no serious study of law and historical memory could ever strictly limit itself to conduct incurring only formal international criminal liability."[12] *Heinze* refers to the West German Holocaust commemoration and then the unified German policy and challenges the *de Baets*' argument about the strictly formalist construction of law. The response of *de Baets* followed in six days. [13] He argued that *Heinze* broadened the discussion from the legal direction to „ethical" and „cultural"

[9] Available at: https://melaproject.org/node/534 (8. 8 2022.)

[10] de Baets, A. 2019b. *Self-inculpatory laws do not exist*. Available at: https://freespeechdebate.com/2019/12/self-inculpatory-laws-do-not-exist/ (8. 8. 2022).

[11] *Ibid.*

[12] Heinze, E. 2019a. *Self-inculpatory laws exist.* Available at: https://freespeechdebate.com/2019/12/self-inculpatory-laws-exist/ (8. 8. 2022).

[13] de Baets, A. 2019a. *Criminal regimes are never soft on history*. Available at: https://freespeechdebate.com/2019/12/criminal-regimes-are-never-soft-on-history/ (8. 8. 2022).

direction; in contradiction he focused explicitly on crimes and also provided a critical view of the Declaration. „It is well known that most dictatorships invest much energy in keeping up a semblance of legality in a contorted attempt to enhance their legitimacy. … I cannot think of a single regime in history that first kills, the secrets that it is guilty of it. For such a self-inculpatory regime to exist without any rupture explaining it, something unprecedented bordering the inexplicable must have taken place."[14] As summarized by *Eric Heinze*, the self-inculpatory approach on a – practically – official narrative should be created by the state itself. This approach could avoid the politicization of historical remembrance. Conversely, the self-exculpatory approach is completely politicized as it attempts to influence the historical narrative of the state.

Maria Mälksoo establishes a similar classification of memory laws. According to this classification, the approach of the states could be reflective or mnemonical security-oriented. „… Her interpretation of the self-exculpatory and the mnemonic security approaches, are associated with the rule of law deterioration in various states."[15] According to the reflective approach, the state has a huge ability of cooperation and self-reflexivity. In contrast, the mnemonic security-oriented approach relies on the state's behaviour being more confrontational and self-assertive. According to *Mälksoo*, the latter is similar to the *Heinze's* self-exculpatory approach, as both of them use punitive memory laws.[16]

3. THE CONCEPT OF MEMORY LAW IN HUNGARY

As mentioned before the academic discourse has still not delivered a proper the definition for memory law. This, naturally, also applies to the academiain Hungary as well. Hungarian academia uses two terms: *emlékezettörvény* and *emléktörvény*, after this dichitomy. „In the Hungarian language, two terms refer to memory laws: *emléktörvény* – indicating specifically declarative type of memory laws and *emlékezettörvény* – an umbrella term similar to the connotation of memory laws in English."[17] The term *emléktörvény* can also be attached to a individual person or a famous historical event.: „It can be literally translated as >>individual memory law or law of a single memory<<."[18]

The main argument of this paper is that, after the democratic transition in 1989-1990, *emlékezettörvény* is more frequent than, as *emléktörvény*. I argue that the reason for this difference lies in an excursion to the self-exculpatory approach. The first reference to the memory law in the Hungarian legislation can be dated to 1996.

Regarding the Act LVI of 1996, which sanctioned the memory of Prime Minister *Imre Nagy*, who died a martyr's death, and the memory of his mates in the martyrdom, *Miklós*

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[14] *Ibid.*

[15] Mälksoo, M. 2019. The Transitional Justice and Foreign Policy Nexus: The Inefficient Causation of State Ontological Security-Seeking. *International Studies Review,* 21(3), pp. 373-397.

[16] See the criminal aspects from the earlier debate.

[17] Bán, M. 2020. *The Legal Governance of Historical Memory and the Rule of Law*. PhD Thesis. University of Amsterdam, p. 48.

[18] Bán, M. 2020. *The Legal Governance of Historical Memory and the Rule of Law*. PhD Thesis. University of Amsterdam, p. 166.

Tamás Gáspár explains the connection between historical memory and law after the change of the regime; he used the term *emléktörvény*, but does not provide a detailed analysis of it.[19]

Iván Halász and *Gábor Schweitzer* used the term *emléktörvény* again in 2010, but they did not provide an explanation.[20] In that year they published another thesis, titled *'Law – remembarnce – cult'*. They give a definition of the term *emléktörvény* in the following way: „Who is put on a pedestal of the legal remembrance by the Hungarian legislator from the numerous „historical hall of fame?"[21]

A study written by *Judit Tóth* offers several definitons of *memory law*. She used a teleological approach, investigating the purpose of the bill?[22] She distinguishes between the so-called „merit-law", „project-law", „memorial-law" and laws about commemorative coins. Toth's approach is commendable, but not entirely acceptable, as there are a numerous memory laws (also in Hungary) which could be the part of some kind aforementioned type. It would be more important for the the Hungarian academia to first provide a definition, or decide between *emlékezettörvény* or *emléktörvény*.

4. THE DEMOCRATIC TRANSITION AS A CEASURA

4.1. Starting point

In Hungary, as well as in other Central and East-European countries, after the democratic transition in 1989-1990, the memories of both of the dictatorships of the 20th century could be expected to appear in legislation. However, I assert that this happened only a very limited extent, and that there is a clear difference between the self-exculpatory and the self-inculpatory approach of the legal governance.

4.2. Hungary as a bridge

Due to its position in Central and Eastern Europe, Hungary has a different specific narrative: the so-called national localization. It is based upon its the self-identity, resulting from its position between East and West. This position is not only geographical, but historical and political as well. Over the tumultuous centuries, most of the time, Hungary not independent. However, focusing on the last seven decades, Hungary lost its national sovereignty under the Soviet control, when, according to the pseudo state's perspective, the East triumphed over the West, or basically over Europe. After the fall of communism,

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[19] Tamás Gáspár, M. 1996. *A Nagy Imre-ügy*. Beszélő, 1. évf., 5. szám. Available at: http://beszelo.c3.hu/cikkek/a-nagy-imre-ugy (2. 8. 2021).

[20] Halász, I. & Schweitzer, G. 2010b. *Szimbolika és közjog: az állami és nemzeti jelképek helye a magyar alkotmányos rendszerben.* ('Symbolism and public law: the symbols of state and national in the Hungarian constitutional sytem'). Pozsony: Kalligram, p. 27.

[21] „Kit emel ki a magyar jogalkotó a népes történelmi arcképcsarnokból a jogi megemlékezés piedesztáljára?" Halász, I. & Schweitzer, G. 2010a. Jog – emlékezet – kultusz. (Law – remembrance – cult) In: Nótári, T. (ed.) *Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára*. Szeged: Leclum, p. 124.

[22] Tóth, J. 2002. A jelképes jogállam. *Mozgó Világ*, 2002(3). Available at: http://epa.oszk.hu/01300/01326/00027/marc1.htm (17. 11. 2021).

many Hungarian political and social leaders advocated for a "returning back to Europe"". However, in this narrative, the real East-West localisation is symbolic: Europe means the Christianity, the Roman or Habsburg Empire, while, on the other hand, the East means the Ottoman Empire or the USSR. Due to our memory construction, Hungary has to choose between, them as they are mutually exclusive alternatives. After 2004, Hungary became a part of Europe, the European Union, the West. Achieving this desired state consequently allowed it to become part of Western European memory narrative on the dictatorships of the 20th century. "The narrative characteristics of remembrance relate to the 'golden age' that arrived upon joining the EU (in the sense of EU=Europe); it means in other words that the works of King St. Stephen.[23] were fulfilled. In line with its accession, the centre-periphery axis has become relative. "[24]

4.3. Back to Europe?

Moreover, in 2004, as the EU expanded and most of the post-communist countries became member states, the EU had to face another historic trauma of the 20th century: communism. This dual or competitive remembrance politics became a real transnational need to understand the past. The reason for this duality or so-called competition is that Western European countries had their own strategy to confront their own past. It is important to bear in mind that, before the fall of the Iron Curtain, it was forbidden "in the East" to remember WWII, other than their "liberation" by the Soviet army, or the Holocaust or any traumatic historical events of this era. Since these countries perceived themselves as victims of the Stalinist dictatorship, their membership status in the EU was the result of reconstituting the postmodern founding myth.

4.4. Victim-narratives

In conclusion, I argued in my paper that Hungary has a dual victim-narrative, being a victim of the communism and being a victim of the Holocaust. It is in this this dual or competitive victim-narrative where it attempted to find the way between self-exculpatory and/or self-inculpatory approach.

5. HUNGARIAN EXAMPLES FOR THE SELF-EXCULPATORY AND SELF-INCULPATORY APPROACHES OF THE LEGAL GOVERNANCE[25]

This section provides an overview of two segments of the Hungarian memory laws after the aforementioned Hungarian definitions. By adopting *emlékezettörvény* 5.1. is

[23] The first king (1000-1038) of Hungary.

[24] Zombory, M. 2011. Visszatérés Európába. Állami emlékezetpolitika és magyar hovatartozás, In: Zombory M. (ed.), *Az emlékezés térképei*. Budapest: L'Harmattan, p. 115.

[25] See more: Könczöl, M. 2017. Dealing with the Past in and around the Fundamental Law of Hungary. In: Belavusau, U. & Gliszczyńska-Grabias, A. (eds.), *Law and Memory. Towards Legal Governance of History*. Cambridge: Cambridge University Press, pp. 246-262.

looking for the connection among the post-democratic transitional memory laws. In section 5.3. it will be explained that *emléktörvény* in Hungary could be wider titled than as self-inculpatory memory laws. The distinction between those is the aim: looking back into the past, using the shame as constitutional sentiment, or looking forward into the future, using pride as a constitutional sentiment. Section 5.2. could be read as a transitional area of the self-exculpatory and self-inculpatory approaches – these memory laws could be considered as a transition.

5.1. Examples for the self-exculpatory approach of the Hungarian legal government

The Fundamental Law of Hungary was promulgated on 18 April 2011 and entered into force on 1 January 2012. It attempts a coherent narrative to explain Hungarian history as a memory law.[26] In the Fundamental Law, there two parts relevant for this observation. The first part of the document is entitled „National Avowal" and it contains solemn declarations about the concept of the nation where the self-exculpatory aspect is visible in the following sentence: „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."[27] [28] Moreover, as is not titled as a constitution, the Fundamental Law carries a real elaborated historical overtone. Constitutional scholars have formulated a plethora of ideas to clarify the role of the historical allusions, and references included therein, and also the constitutional structure of Hungary. After several years another problem arose in relation to the aforementioned governmental self-exculpatory approach. Article 3 of the Fourth Amendment of the Fundamental Law enacted Article U, which entered into force on 1 April 2013. Article U has a lot of „constitutional" specialities. One of them most notable ones is that only the communist dictatorship was irreconcilable with the rule of law. As opposed to the statement from the aforementioned National Awoval's, Article U does not refer to the other 20th century dictatorship in Hungary.

„ (1) The form of government based on the rule of law for making public policy, established by the will of the nation upon the first free elections in 1990 and the previous communist dictatorship are irreconcilable. The Magyar *Szocialista Munkáspárt* (Hungarian Socialist Workers' Party) and its predecessors, and all other political organizations set up in their service under the communist ideology were criminally charged organizations …" Another specialty is the responsibility of the *Magyar Szocialista Munkáspárt*: „The political organizations legally recognized in the process of the democratic transition as the successors of *Magyar Szocialista Munkáspárt* share the responsibility of their

[26] There is a remembrance day in Hungary about the Fundamental Law: it is the 25 April – after the Closing and Miscellaneous Provisions, para 5.

[27] Fundamental Law of Hungary. Available at: https://njt.hu/translation/TheFundamentalLawofHungary_20220723_FIN.PDF (10. 8. 2022).

[28] About the debates of the historical memory in Hungary see more: Schweitzer, G. 2013. Fundamental Law – Cardinal Law – Historical Constitution: The Case of Hungary Since 2011. *Journal on European History of Law,* 2013(4:1), pp. 124-128.

predecessors, being the heirs of the wealth, they had amassed unlawfully."[29]

One more characteristic of the 4th amendment of the Fundamental Law is that Article U provided the legal basis for the foundation of the Committee of National Memory, tasked with investigating crimes committed during Hungary's totalitarian regimes. According to Article 1 of the Act CCLXVI of 2013 on the Committee of National Memory (hereinafter Committee) the Committee has the responsibility to preserve the political memory of the communist dictatorship and to reveal the power structure of the dictatorship. This a truly real „impressive" example of the self-exculpatory approach of Hungary: why there was not a general committee? There are many constitutional questions about the working process of the Committee however, since it is a committee that was established by the Fundamental Law, which made it very difficult to disregard; the result of the committee's work means the governmental historical narrative about the last five-six decades of Hungary.

5.2. Self-exculpatory and self-inculpatory approaches together

After four years of the democratic transition the Act IV of 1978 on the Criminal Code was amended in 1993, which introduced the so-called „Use of Symbols of Despotism" crime.[30] It determined which are those symbols from the 20th century's despotism: the swastika, the insignia of the SS, the arrow cross, the sickle and hammer, the five-pointed red star and envisaged grounds for prosecution for the use of these symbols. This list is exhaustive and includes a symbol that can only be connected with Hungary - the arrow cross. In the debate between *Heinze* and *de Baets* it could be read that the aforementioned bans implies a somewhat more self-inculpatory approach. From 2013, the „Open Denial of Nazi Crimes and Communist Crimes" also became penalized, renderning both despotic regimes dealt with in the criminal code.[31] On 1 July 2013 a new Criminal Code entered into force, the Act C of 2012, where both the mentioned crimes are still envisaged.

The ban of totalitarianism can be read in a very powerful non-punitive memory law of Hungary, in Article 3 (6) in Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings (hereinafter: Ctv.).

„ (6) The name of a company may not contain:

a) the name of any person who held a leading role in the foundation, development or continuance of an authoritarian political regime of the 20th century; or

b) an expression or the name of an organization that may be directly associated with an authoritarian political regime of the 20th century".

This regulation is definitely a memory law ban, which is more self-inculpatory, than a self-exculpatory approach. What does the totalitarian political system of the 20th century refer to? In Hungary, there were more than two totalitarian political systems, namely the

[29] This amendment is Janus-faced, because of the political overtones. In that year the governmental party, the FIDESZ had one of the significant opposition power, the MSZP. But after the enactment of Article U, the legitimacy of this party had been questioned.

[30] Enacted byArticle 1 of Act XLV of 1993, effective as of 21 May 1993.

[31] Article 269/C in Act IV of 1978: „Any person who publicly denies the crime of genocide and other crimes committed against humanity by Nazis and Communists, or expresses any doubt or implies that it is insignificant is guilty of felony…"

red and the white terror after WWI. In the historical narrative, it could be crucial that how on the chronological curve far is the researcher from the historical trauma? There is a fundamental question from the jurisprudential aspect: how can a a law be predictable, if it can be influenced by the context, by the Hungarian historical traditions or the knowledge from the historians? Furthermore, the amendment of the Ctvcame into force in 2013; as mentioned before, the Hungarian Criminal Code(s) incriminated the 'Use of Symbols of Despotism' years before that with the whole interpreting models of the totalitarian political systems.

5.3. Memory laws in the light of the Hungarian translations

As indicated *before,*s the definition of memory law can be translated into Hungarian as *emléktörvény* and *emlékezettörvény*:. In this section, showed some of the examples from the Hungarian memory laws which could be classified as *emléktörvény* will be presented as mentioned above, despite of the Marina Bán-definiton, it is my opinion that that the diachronic aspect could be decisive as well. Section 5.3elaborated on the *emléktörvény,* which are looking into the future. The examples presented show, the changing of the structure among the memory laws after the democratic transition. These are non-punitive memory laws, which commemorate famous figures and events.

The very first of Hungarian memory law after the democratic transition is the Act XXVIII of 1990, which prescribed the importance of the revolution and freedom fight in October 1956. It was enacted on 8 May 1990 – this date has immense relevance in the Hungarian historical memory and constitution, as the first free democratic elections were held on 2nd of May 1990. was. As indicated before, the National Awoval proclaims that the Hungarian self-identity had a break from 19 May 1944 till 2 May 1990. Therefore, the mentioned Act it is one of the very first acts of the first freely elected Parliament.

The Act LXXXI of 1994 is closely related to the Hungarian government's role in WWII. On December 21st 1944 the „Temporary State Assembly" was established, which wanted to establish a modern rule of law after the totalitarian system.

The very first mention of the Hungarian definiton *emléktörvény* is based on the Act LVI of 1996, which sanctioned the memory of Prime Minister *Imre Nagy*, who died a martyr's death and the memory of his mates in the martyrdom. The definition not could be read in the act, but rather in one of the academic mentions by Miklós Tamás Gáspár.[32] In 1996 many memory laws were adopted, as this year marked the 1100th anniversary of the conquest of the Carpathian Basin.

The Year 2000 marked the thousand-year-old-anniversary of the establishment of the Hungarian state – and consequently the Act I of 2000 was promulgated to commemorate King St. Stephan the first and the significance of the Holy Crown.[33]

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[32] Tamás Gáspár, M. 1996. A Nagy Imre-ügy. Beszélő, 1. évf, 5. szám. Available at: http://beszelo.c3.hu/cikkek/a-nagy-imre-ugy (2. 8. 2021).

[33] The Holy Crown has in Hungary not only a symbolic role, but it means the integrity, the independence and the continuity of the Hungarian state. It has an unique public law tradition.

With the Act LXIII of 2001 „the perpetuation of the Hungarian heroes' memory and the Commemoration of the Hungarian Heroes" was introduced. According to its Article 2, the last Sunday of May is a Remembrance Day of the Hungarian heroes, who gave their lives for the freedom, for the independence of the Hungarian state and the survival of the nation from the era of King St. Stephan the First until present day. with the Law is imbued with positive assertions which shows that this is a non-punitive memory law without the axis of self-exculpatory or self-inculpatory approach of the legal governance.

5.4. Constitutional sentiments

As mentioned in sections 5.1. and 5.2., there are a lot of self-exculpatory approaches of the legal governance in Hungary. These memory laws imply shame as constitutional sentiments. This shame does not necessarily relate to the Hungary itself – but rather to the feelings one should have with regards to the totalitarian political systems. In section 5.3. ome examples of memory laws which imply the proudness as constitutional sentiments are provided. There is a specific aspect of legal governance in the historical memory: the mnemonical constitutionalism.[34] It could be examined also with the aforementioned constitutional sentiments.

6. CONCLUSION

Remembrance can have both advantages and disadvantages– let us think to the basically thoughts of Tzvetan Todorov or Pierre Nora. In the postmodern era, the digital world has one of the most meaningful roles in remembrance, while humankind ostensibly wants to race for limited memories. These memories are basic components of not only the individual identity, but rather the collective self-identity. The legislators, who have the opportunity to influence the remembrance, have their own value system and their own interpretational horizon – leaving them always in the background. As Marina Bán puts it: „The self-inculpatory and self-exculpatory approaches both refer to symbolic, legal or practical measures taken by the state in order to demonstrate its contemporary attitude towards various historical questions. These two approaches encompass every memory law and ostensibly legal measure relating to mnemonic regulation. Indeed, the self-inculpatory and self-exculpatory approaches to the legal governance of historical memory are found in the background (among the motivations) of all historical memory-related provisions."[35]

[34] One of the best well-known legal researcher of the memory laws, Uladzislau Belavusau introduced the concept in 2018. See more: Belavusau, U. 2018. Final Thoughts on Mnemonic Constitutionalism. Verfassungsblog. Available at: https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/ (19. 8. 2022).

[35] Bán, M. 2020. *The Legal Governance of Historical Memory and the Rule of Law*. PhD Thesis. University of Amsterdam, p. 25.

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CONDOMINIUM PROPERTY IN NORTH MACEDONIAN PROPERTY LAW

The paper analyses the development and novelties in the regulation of condominium property in North Macedonian property law and comparatively. It dissects the concept of condominium property adopted in contemporary property law and examines the need for its redefining so that it could meet the requirements of modern living.

The paper focuses on the practical issues in implementing the novelties in regulating condominium property in North Macedonian law that have been, to some extent, adopted from other legal systems, primarily from the laws of neighbouring countries. As the paper will elaborate, research has shown inconsistencies in regulating condominium property between the basic property law – the Law on Ownership and Other Real Rights and special laws such as the Housing Law. The research has also shown inconsistencies or lack of precise and comprehensive provisions in the Housing law itself. Noting the shortcomings in the regulation relating to condominium property the paper directs attention to necessary amendments of the regulation that can be instrumental in overcoming practical issues in the management of condominiums, protection of rights and interests of homeowners and third parties, and the extent of administrative and judicial intervention in these relations.

Keywords: property, condominium, ownership, housing.

1. INTRODUCTION

Over the past two decades, condominium living has become the standard way of living in North Macedonian society, especially in the State's capital, the city of Skopje. The land parcels primarily intended for individual housing are often repurposed for collective housing with the new zoning plans, especially in the so-called "attractive" locations that include the centre of the city, and the surrounding municipalities (Karposh, Kisela Voda,

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Aerodrom, etc.). The construction of apartment buildings in these "attractive" locations has been so extensive that they start to resemble nothing more than giant housing and business building complexes. The available housing enabled a fast concentration of the population within the capital's city limits, which had an adverse effect on the quality of living within the city.

There are many reasons why the extensive construction of condominiums has lowered the quality of living, especially in the city of Skopje. However, in this paper we will focus on one of those reasons - the inadequate regulation of condominium property.

2.THE CONCEPT OF CONDOMINIUM PROPERTY IN NORTH MACEDONIAN LEGISLATION

The contemporary concept of condominium property was introduced in the North Macedonian legal system by the Law on Ownership and Other Real Rights of 2001[1] (Law on Ownership). The Law on Ownership regulates condominium property in Chapter III dedicated to the regulation of the so-called "sub-forms of ownership" which includes co-ownership, joint ownership and condominium ownership. The fact that condominium ownership is included in the chapter regulating sub-forms of ownership is indicative of the intention of the legislator to view it as a separate sub-form of ownership. However, a closer look at the actual provision regulating condominium ownership does not support the outlined concept of the condominium property. First of all, the Law on Ownership doesn't clearly define what condominium ownership is. In the provisions of article 95 (1) it is stated that:

Apartments, office spaces, basements, garages and other separate parts of apartment and office space buildings that have two or more apartments, offices or other separate parts may be owned by different natural and juridical persons (condominium ownership).

A simplistic interpretation of the cited provision would lead us to a conclusion that condominium ownership is ownership of a separate unit (apartment, office or another separate part) within a building that has two or more such units. However, in our opinion, that would not be entirely correct. A separate unit within a building could be in private, state or municipal ownership, and can also be co-owned or jointly owned by several persons. The point is that the separate unit will not be a condominium ownership *per se*. The condominium ownership will in fact emerge at the moment when different persons acquire ownership over the separate units in the building[2]. The emergence of condominium ownership at that moment is compulsory (by law) because the relations between the different owners of the building units in the building need to be put in a legal framework. From this analysis, it can be concluded that condominium ownership is not in fact a separate sub-form of ownership like co-ownership and joint ownership, but is rather a collection of provisions regulating the relations between the owners of the separate building units

[1] Закон за сопственост и други стварни права, *Службен. весник на РМ*, бр.. 18/01, 92/08, 139/09, 35/10.

[2] Regarding the emergence of condominium ownership see: Живковска, Р. 2005. Стварно право. Европа 92: Скопје, pp. 116-117.

in the same building[3]. The relations include: a) rights and duties of the owners relating to the use and maintenance of the building units within the building (apartments, offices or other separate parts), b) rights and duties related to the use and maintenance of the common parts of the building (roof, stairs, hallways, elevators and etc.), and c) right and duties related to the use of the land the building is erected on.

a) Looking into the regulation of rights and duties related to the use and maintenance of the building units within the building, we note that the Law on Ownership has adopted a rather liberal approach, stipulating that the owner of the building unit is free to use and dispose of his or her unit as he or she sees fit (Art. 96). There are some limitations in place with respect to the manner of use such as the duty for the owner to maintain the building unit, although the extent of the maintenance duty it is not specified. We consider that the maintenance duty should include the degree of maintenance that will keep the unit in a condition adequate for its purposed use, not including upgrades. The owner of a building unit is also prohibited from using the unit in a manner that is disruptive or causes damage to the other building units or common parts of the building. Making changes to the building unit that deface the architectural look of the building or endanger its stability is also prohibited. Any owner that causes damages by misuse of the building unit or the common parts of the building is by law liable for those damages. The owner of the building unit is also obligated to permit necessary intervention inside it for the benefit of other building units or common parts within the building and has the right to be compensated for any damages caused by such interventions. The free disposal of the building unit is also limited by a pre-emption right in favour of the other owners and leaseholders within the building. When a garage space is being sold, the other owners in the building have the right of pre-emption, and after them the leaseholders in the building (Art. 100). The leaseholders also have the right of pre-emption in case the owner decides to sell the office space they are leasing (Art. 97). To our opinion the regulation of the pre-emption right of the owners and leaseholders in the building is not very solid. Considering the problem of lacking parking space in the cities, the new regulation related to the norms and standards for the construction of buildings rendered planning sufficient parking space for each building unit within the building obligatory for investors. The idea behind the regulation is for each building unit to have at least one parking space attributed to it. If the garage or parking space is viewed as auxiliary to the building unit there isn't much logic for it to

[3] Scholars tend to define condominium ownership as statutory creation or a legal concept, that enables individual ownership of separate parts of a real estate and co-ownership of common parts in which individual owners hold an undivided share of the whole. See: Harris, D.C. & Gilewicz, N. 2015. Dissolving Condominium, Private Takings, and the Nature of Property. In: B. Hoops et al.(eds.), *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation*. The Hague, NL: Eleven, pp. 263-279. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548508 (18. 8. 2022). Królikowska, K. 2017. Transplants of Condominium Law in Central and Eastern Europe. In: Bieś-Srokosz, P. et al. (eds.), *Mutual Interaction Between Contemporary Systems and Branches of Law in European Countries*. S. Podobiński Publishing House: University in Czestochowa, pp. 115-138. Avaiable at: https://www.academia.edu/37156372/Transplants_of_condominium_law_in_Central_and_Eastern_Europe?email_work_card=reading-history (18. 8. 2022). Van der Merwe, C. G. 1994. *Apartment Ownership*, *International Encyclopedia of Comparative Law.* Vol. 6 Ch. 5.J.C.B. Mohr Publisher, pp. 731-742. Available at: https://www.cambridge.org/core/journals/israel-law-review/article/abs/apartment-ownership-by-c-g-van-der-merwe-international-encyclopedia-of-comparative-law-volume-vi-chapter-5-martinusnijhoff-publishers-1994/FD45E1C519442963BD190F6C09590295 (18. 8. 2022).

be sold separately, even if such sale is not explicitly prohibited by law. Since it is allowed for the owner of the building unit to separately sell the garage space attributed to his or her building unit, there is justification for the right of pre-emption in favour of the other owners in the building, because they are the ones that will benefit the most from the extra space. On the other hand, there is no justification for the right of pre-emption of the garage space to be granted to the leaseholders in the building, because once their lease contract expires, they will be left owning a garage space in a building they no longer reside in. As for the other pre-emption right in favour of the leaseholders that grants them priority to purchase the office space they are leasing in the building, we considered it appropriate for the interest of the leaseholders. For the sake of proportionality, we consider that the Law should make the rule apply to apartments as well.

Regarding the free disposition of the building units on part of the owners, it needs to be underlined that the Law on Ownership contains a rather debatable provision which allows the owners to repurpose the building unit from an apartment into an office space. There are several conditions tied to the permit for repurposing the unit. Some of them are of general nature, mandating that the repurpose shouldn't affect the security of the tenants, damage the building or interfere with the peaceful use of the other building units within the building (Art. 101). In addition to these general conditions, there is also one fundamental condition for the repurposing permit to be granted, and that is the consent of the majority of the other owners of building units in the building. In practice, when deciding whether to grant the repurposing permit the planning authority (the municipalities[4]) only looks to see whether consent was given by the majority of owners of the building units in the building, neglecting the conditions of general nature set forth by the Law on Ownership. As a result of this practice, the right to peaceful enjoyment of one's property is often being violated. More often than not, the owners of building units which are most affected by the repurposing – the immediate neighbours - are not even consulted about the repurposing. Usually, the interested party goes on collecting signatures of consent from everyone else in the building except his or her immediate neighbours. We consider that repurposing an apartment into office space will unavoidably change the quality and manner of living within the condominium for all tenants, and mostly for the immediate neighbours, meaning those that own apartments on the same floor where the repurposed building unit is located, and also those that own apartments above and below the repurposed building unit. For the sake of just consideration of the interests of all concerned parties, we propose that these provisions of the Law on Ownership be amended. In our opinion, repurposing of apartment units into office spaces or vice versa should be restricted and possible only if all the immediate neighbours have given their consent for the repurposing, and aggregated to that, that consent is given by the majority of owners of the building units in the building.

b) According to the Law on Ownership, the common parts of the building are to be used as joint and indivisible ownership of all owners of building units (Art. 107) The right to use,

[4] See: Art. 58, Law on Construction (Закон за градење, *Службен весник на РМ* .бр. 130/09, 124/10, 18/11, 36/11, 54/11, 13/12, 144/12, 25/13, 79/13, 137/13, 163/13, 27/14, 28/14, 42/14, 115/14, 149/14, 187/14, 44/15, 129/15, 217/15, 226/15, 30/16, 31/16, 39/16, 71/16, 132/16, 35/18, 64/18, 168/18, *Службен весник на РСМ*, бр.. 244/19, 18/20).

as well as the duty to maintain the common parts in the building, falls proportionally on all the owners of the building units in the building (Art. 102). The Law doesn't regulate in detail how the owners of building units will manage the use and maintenance of the common parts in the building. Instead, it leaves the matter to be settled by way of a management contract between the owners. What is clearly stated by the Law is that all the owners of building units in the building have the right to use its common parts, implying that no owner can be deprived of or restricted from exercising that right (Art. 107). The law also states that every owner of a building unit is obligated to participate in the maintenance costs for the common parts of the building, in proportion to the interest he or she holds in the building. The interest is determined by the inputted value of the building unit in the value of the building (Art. 109). We consider that the provision should be more precise stating that: the interest is determined by the inputted value of the building unit in the collective value of all building units in the building, or in the section of the building if it is a building complex. Costs for maintenance of the common parts of the building are comprised of costs for regular maintenance and costs for investments. The Law on Ownership prescribes that the maintenance costs should be determined by the management contract, or in absence of such contract by a separate agreement between the owners of the building units. In case the owners are unable to come to an agreement on maintenance of the common parts, whether it is a matter of repairs or upgrades, any owner can appeal for the matter to be resolved by the courts in a non-litigious proceeding (Art. 110).

From the few provisions found in the Law on Ownership relating to the maintenance of the common parts of the building, we can note that the law has a *laissez-faire* approach leaving the management issues to the free disposition of the owners of the building unit. The special Housing Law[5] on the other hand diverges from this concept giving a more restrictive legal framework regulating building management, which, among other things, includes management of the common parts of the building. These provisions of the Housing Law will be discussed further in the text.

c) With respect to the use of the land the building is erected on, the Law on Ownership states that all owners of building units have the right to use that land. No owner is allowed to use the common land in a manner that limits the right of use of the other owners of building units (Art. 108).

3. COMPARATIVE LOOK ON REGULATION OF CONDOMINIUM PROPERTY

For the comparative analysis of condominium property, we look into the legislations of the countries with which the North Macedonian legal system has a shared legal history: Serbia, Croatia, Montenegro and Slovenia.

Serbian Law on Property Relations does not use the term condominium ownership when defining the ownership of separate and common parts of a building. Instead, the Law only specifies that a separate part of a building such as an apartment, office, garage or

[5] Закон за домување, *Службен весник на РМ*, бр.. 57/10, 98/10, 127/10, 36/11, 54/11, 13/12, 55/13, 163/13, 42/14, 199/14, 146/15, 31/16, 64/18, *Службен весник на РСМ*, бр. 302/20, 150/22.

garage space can be an object of ownership (Art. 19 (1))[6]. In continuance, the Law states that common parts of the building and the appliances in the building are jointly owned by the owners of the separate parts of the building and cannot be subject to division (Art. 19 (2). The same concept is adopted in the Housing and Building Maintenance Law of Serbia[7]. The special Law also avoids using the term "condominium ownership", and states that separate building units may be privately owned, co-owned or jointly owned (Art. 5). As for the common parts and the land the building is erected on, the special Law states that by acquiring ownership over the building unit, a person also acquires joint ownership over the common parts and co-ownership of the land (Art. 5 and 8). The rights and duties of the owners of the building units are also regulated in the special Housing and Building Maintenance Law of Serbia. According to the special Law, owners of building units have the right to freely use their units in accordance with the law, and to make changes and adaptations to their building units without disrupting the use of the other building units or common parts (Art. 12). The owner of the building unit can repurpose his or her unit according to the laws regulating construction, and can also agree for his or her building unit to be transformed into a common part of the building (Art. 6 and 7). The owner of the building unit is entitled to use the common parts in accordance with their purpose to the extent that meets his or her needs and the needs of the members of his or her household. Law imposed duties for the owners of the building units are the following: the duty to maintain the building unit functional, the duty to allow entrance in his or her building unit for necessary repairs of other building units or common parts, the duty to maintain the common parts and to participate in the maintenance costs for the common parts and the duty to tolerate the use of the common parts by the other tenants in the building (Art. 14). The special Housing and Building Maintenance Law of Serbia regulates a right of pre-emption of common parts in favour of the owners of building units. If several owners are interested in exercising the right of pre-emption, priority is given to the owner of the building unit that is closest to the common part offered for sale (Art. 13).

The Croatian Law on Ownership and Other Real Rights defines condominium ownership as ownership of separate parts of a real estate that is unbreakably linked to the co-ownership share in the real estate where it is established (Art. 66)[8]. According to the concept adopted in the Croatian Law on Ownership, condominium ownership enables the co-owner of the real-estate to use the separate part of the real estate individually and exclusively, excluding all others from using it. According to the Croatian Law on Ownership separate part of the building can be privately owned if it represents an independent and functional separate part. The Law considers such parts to be apartments, offices, garages and clearly marked parking spaces. Other auxiliary parts of the real estate such as open balconies, basements, attics, and house yards can also be considered separate parts when they are clearly separated from the other parts of the real estate. The auxiliary separate parts are treated as accessories

[6] See: Zakon o osnovama svojinskopravnih odnosa, *Službeni list SFRJ*, br.. 6/80 i 36/90, "Sl. list SRJ", br. 29/96 i *Službeni glasnik RS*, br. 115/2005.

[7] Закон о становању и одржавању зграда, *Службени гласник РС*, бр. 104/2016, 9/2020.

[8] See: Zakon o vlasništvu i drugim stvarnim pravima, *Narodne novine,* br. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14.

of the independent separate part of the real estate (Art. 67). Regarding the connection between the ownership of the separate part and the co-ownership of the common parts, the Croatian Law on Ownership states that they are unbreakably linked, which means that they can be transferred, encumbered, inherited or subject to enforcement proceedings only as a whole (art. 69). Owners of the separate parts of the real estate have the right to use the separate part and all its accessories according to their disposition, they have the right to lease the separate part or to repursue it without the consent of the other owners (Art. 80, 81 and 82). Every owner of a separate part has a duty to maintain his or her separate part so that it won't cause damage to other owners and to allow access in his or her separate part for necessary repairs to other separate or common parts of the real estate (Art. 80). As for the use and management of the co-owned parts of the real estate, the Law states that the provision regulating the exercise of co-ownership rights apply accordingly, unless otherwise stipulated (Art. 85).

Similar to the Croatian Law, *the Law on Ownership of Montenegro* also defines condominium ownership as ownership of a separate part of an apartment or office building that is unbreakably linked to certain rights over the common parts of the building and the land the building is erected on (Art. 161)[9]. Further on, the Law specifies that the separate parts of the building can be privately owned, co-owned or jointly owned, while the common parts of the building are jointly owned by the owners of the separate parts (Art. 169 and 170). The land on which the building is erected is also jointly owned by the owners of the separate parts, and it can't be subject to division among the owners (art. 171). The Law on Ownership of Montenegro also states that the ownership of the separate part of the building, and the ownership of the common parts and the land are linked by law in a way that any change of ownership over the separate part of the building entails changes in ownership over the common parts and the land (Art. 173). There are no particular provisions regulating the exercise of the right of ownership over the separate parts of the building, which leads us to the conclusion that the general provisions for exercising the right of ownership apply. However, the Law does impose some duties on the owners of the separate parts such as the duty to maintain the separate part functional and to prevent any damages to the other parts of the building. While doing repairs or other construction work in his or her separate part the owner must refrain from any activity that may cause damage to other parts of the building, deface the architectural look of the building, or endanger its stability (Art. 175). The Law of Ownership of Montenegro allows for the existing building to be upgraded and the common parts to be transformed into separate parts according to laws regulating construction. According to the Law, the right to upgrade and transform the common parts into separate parts belongs to the owners of the building. If they are not interested in doing the upgrades, they are obligated to offer the public authority or the municipality pre-emption of the common part that can be upgraded and transformed into a separate part. Should the owners of the building fail to perform the upgrade, the common part that is planned for upgrade could be expropriated (Art. 177). Regarding the use of the common parts of the building, the Law on Ownership of Montenegro states that all owners are obligated to use the common parts according to their purpose, not disturbing

[9] See: Zakon o svojinsko-pravnim odnosima, *Službeni list CG*, br. 19/2009.

the right of use of others. Activities in the common parts that endanger the stability or security of the building, deface its architectural look or prevent the use of the common parts are prohibited (Art. 176).

Slovenian Property Code defines condominium ownership as ownership of a separate part of a building and co-ownership of the common parts (Art. 105). It appears that the Slovenian Property Code views condominium ownership to be a fusion of two ownership rights – ownership over the separate part of the building and co-ownership over common parts of the building[10]. Due to the concept of unity between the ownership of the separate part and the co-ownership of the common parts, the Property Code states that they are transferred as a whole (Art. 112). Similar to the Croatian Law on Ownership, the Slovenian Property Code defines the separate part of the building as a part that represents an independent and functional unit appropriate for individual use as an apartment, office, or other independent space (Art. 105-2). Common parts are considered to be all parts of the building intended to be used by all tenants. The land the building is erected on is also considered a common part of the real estate as a whole. Provisions regulating the use of the separate building unit in the Slovenian Property Code impose more or less the same duties as the other compared regulations: the duty to maintain the separate unit, to allow entry for repairs and to refrain from any repairs that may cause damages. If the owner of the building unit plans to undertake activities that may interfere with the use of other building units or common parts, he or she needs the consent of the owners who hold the majority of co-ownership shares (Art. 122). The Code affords the owners of the building units some dispositions connected to the building units and the common parts, such as the right to negotiate for a common part of the building to be attributed to a certain building unit, or to transform a common part into a separate part appropriate for individual use (Art. 113). The Property Code also allows for an owner to divide his or her building unit from one into several building units, which will call for changes in co-ownership shares in the common parts appropriately for each individual unit (Art. 114). When a building unit is offered for sale, the right of pre-emption is afforded to the other owners, but only if the building has more than two, and no more than five building units (Art. 124). Regarding the common parts, the Code states that all owners of building units have rights and duties concerning the common parts that are proportional to their co-ownership shares in the common parts. The Code also states that owners are entitled to regulate their relations concerning the use of common parts with an agreement (Art. 116). What draws particular attention in the Slovenian Property Code is the right of the owners to caution and consequently, sanction the owner of a building unit who has blatantly disregarded the rules of conduct set forth by the agreement for use of the common parts of the building. If, by disregarding the rules of conduct, an owner has made living in the condominium unsustainable for the other owners in the building, the owners that hold the majority in co-ownership shares can decide to issue a caution warning to the infringer. If the infringer ignores the warning, they may bring on legal action for his or her expulsion from the condominium and sale of his or her building unit (Art. 123).

[10] See: Stvarnopravni zakonik, *Uradni list RS*, št.. 87/02, 91/13, 23/20.

What the comparative analysis shows us is that there are similarities in the approach to defining condominium property. All regulations link condominium ownership with the ownership over buildings that have more than one building unit or other separate part owned by different persons. In all analysed laws, a difference is made between the ownership over the building unit or other separate parts and the common parts and the land of the building. While the building unit or other separate parts can be individually and exclusively owned, the common parts and the land are co-ownership or joint ownership of all individual owners in the building.

The comparative analysis has also shown similarities in regulating the rights and duties of the owners of building units regarding the use and maintenance of the building units and the common parts of the building. All regulations impose the standard duties: to maintain the building unit functional, to refrain from uses and activities that can be disruptive or cause damage to other building units and common parts, to refrain from defacing the architectural look of the building and to refrain from damages to the building as a whole. Regarding the common pars, all regulation calls for owners to practice appropriate use that is not disruptive or impedes the use by the other tenants in the building.

4. MANAGEMENT OF CONDOMINIUM PROPERTY

The management of condominium property in the North Macedonian legal system is closely regulated by the Housing Law. This Law only applies for housing condominiums comprised of apartment units only, or combined condominiums comprised of an apartment and office units, but it does not apply for condominium property in buildings comprised solely of office units.

According to the provision of the Housing law, management of condominiums consists of implementing the decisions of the owners of the building units concerning the management of the building, representation of the owners in legal traffic and representation of the owners before the public authorities relating to all matters connected to the management of the common parts of the building. Regarding the management of condominiums, the Housing law introduces two management models: management by an authorized administrator or by an owner's association (Art. 10)[11]. The introduced management models are in line with the United Nations Guidelines on the Management and Ownership of Condominium Housing aimed to aid in constructing effective and efficient management of housing condominiums in support of the Agenda for Sustainable Development, the New Urban Agenda and the

[11] The same two system of condominium management (authorized administrator or owner's association) are implemented by the Serbian Housing and Building Management Law (Art. 16).
The Croatian Law on Ownership prescribes that all owners manage the condominium abiding by the rules regulating co-ownership. Owners can also appoint a joint administrator (Art. 85).
According to the Law on Ownership of Montenegro the building itself represents a legal entity (Art. 163). Owners of building units are obligated to establish the organizational structure that consists of the owner's assembly and an administrator (Art. 181). If the owners fail to establish the required organizational structure, temporary administrator will be appointed (Art. 189).
The Slovenian Property Code prescribes that owners of building units manage the condominium according to the provision regulating co-ownership. However, if the building has more than two floors and more than eight building units appointing an administrator is mandatory (Art. 118).

Geneva UN Charter on Sustainable Housing and implementation of other United Nation agreements related to housing[12]. The Guidelines direct national legislations to strive for the management of condominiums with the participation of all owners of building units as an association where membership is compulsory. If for any reason the national legislation cannot provide a such form of management, the Guideline suggests alternative models of management, such as self-management or an authorized administrator[13]. Unlike the Guidelines, the North Macedonian Housing Law does not favour the owner's association as a model for condominium management. Instead, it puts it as an equally available model of management alongside the authorized administrator, affording liberty to the owners of the building units to decide which management model is best fitted to their needs. However, choosing one of the two available models of condominium management is compulsory for buildings that have more than 8 units within.

Although it is not explicitly mentioned in the text of the Housing Law, it can be concluded that in small buildings that have eight or fewer units within, owners are not obligated to choose one of the proposed management models. For them, self-management is an option. Self-management can be an option for the management of larger buildings, but only as a temporary solution, during the time that owners of building units decide which of the two models of condominium management they will implement (Art. 18(3), Housing Law).

Choosing the model of condominium management in North Macedonian law, as previously mentioned, is left up to the owners of the building units. According to the Housing Law, the owners of building units chose the model of condominium management through the owner's assembly which is a decision-making body. The decision of the owner's assembly is valid if passed by a majority vote (Art. 18 and 54, Housing Law). It is important to note that the majority, in this case, is determined by the number of owners who voted, which is debatable and can be attributed to the inconsistencies in the Housing Law. On the one hand, the Housing Law determines the degree of decision-making capacity of each owner on the basis of the interest he or she holds in the building (inputted value of the building unit in the value of the building) (Art. 17). The same proportion applies when calculating the participation in management costs. On the other hand, when making the decision about the condominium management model, each owner has equal voting rights. In practice, this can be interpreted very extensively to the point where co-owners of a single building unit may prevail in the voting process over a single owner who owns several building units in the building. It is our opinion that the Law should be consistent regarding the matter of the decision-making capacity of the owners of building units in the sense that the capacity for decision-making (the value of one's vote) should always be in correlation to the interest he or she holds as an owner in the building.

When deciding on the model of condominium management, one must be aware of the advantages and disadvantages of each model. In order to evaluate the efficiency of each management model, we look into its regulation by the Housing law.

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[12] United Nations, 2019. *Guidelines on the Management and Ownership of Condominium Housing*, United Nations Publication, ECE/HBP/198. Available at: https://unece.org/DAM/hlm/documents/Publications/Condo_Guidelines_ECE_HBP_198_en.pdf (18. 8. 2022).

[13] United Nations, 2019. *Guidelines on the Management and Ownership of Condominium Housing*, *op. cit.* pp 15-16.

Condominium management by an authorized administrator is regulated in Articles 18-41 of the Housing Law. The advantage of this model is that the authorized administrator is a person (natural or legal) specializing in the area of condominium management and holds a license for condominium management given by the Regulatory Housing Commission. In order to get the license, the administrator is obligated to register in the Central Registry of the Republic of North Macedonia and to have at least three employees - one with a university degree in law or economics and two with a high school degree (Art. 10, Housing Law). We note that the Housing Law puts a high standard for licensing administrators considering the educational requirements for the administrator's employees. Another advantage that we can point out concerning this model of condominium management is that the owners of the building units, even after appointing an administrator, still maintain a high level of control over the management of their condominium. The administrator acts as an agent of the owners who is obligated to follow the decisions of the owner's assembly. This means that the decision-making capacity is still in the hands of the owners of the building units.

The main rights and duties of the administrator are determined by law, which gives a certain level of security for owners that the condominium management will be appropriately conducted. According to the Housing Law, the administrator has the following duties: to obey the decisions of the owner's assembly, to maintain all common parts of the building functional, to represent the owners in matters of condominium management, to represent owners in acquiring permits and other necessary documents before public authorities in matters related to the condominium management and land property issues concerning the building and the land it is erected on, to prepare maintenance plans for the building, to calculate and distribute maintenance costs among the owners, to receive payments for maintenance costs, to submit work reports and render monthly and yearly accounts to the owners, to prepare a yearly report on condominium management, to administrate the reserves fund, to report information for registration in the Real Estate Cadastre and to be familiar with the standards and norms for access of persons with disabilities in the building (Art. 19). In addition to the listed duties, the administrator is also authorized to protect the condominium property against contractors and other third parties who have failed to fulfil their duties with respect to the condominium. None of the listed rights and duties of the administrator may be excluded or limited by way of contract, but it is possible for the owners to afford additional rights and impose additional duties on the administrator in the contract for conducting management services. In order to provide additional security for the owners, the Housing Law limits the duration of the contract for conducting management services to two years. The time limit imposed on the contract makes it rather easy for owners to end collaboration with an administrator that has not met their expectations without having to resort to additional legal actions. There is also a possibility for the contract between the administrator and the owners to be rescinded at any time. The owners can render a decision for dissolution of the contract with a majority vote, and the administrator can give written notice of intent for dissolution of the contract (Art. 29, Housing Law). Each party is obligated to give a two-month notice before dissolving the contract. The Housing Law also imposes personal responsibility on the administrator vis-à-vis the owners for all dealings with third parties related to

the condominium management. According to the Law, the administrator is personally responsible for the actions of third parties that acted under his authority in matters of condominium management (Art. 25 and 26). The Housing Law also makes it easy for owners to control the work of the administrator affording them the right to be informed in all matters related to condominium management. The right to be informed is not limited to receiving yearly work reports from the administrator. Each owner is authorized to demand access to documentation related to the condominium management, such as contracts with third parties, bills and expenses for services rendered, paid and unpaid management costs and etc. Owners may also appoint a Supervisory board to control the work of the administrator (Art. 40, Housing Law).

Taking all into account we can conclude that there are quite a few advantages to choosing an administrator for condominium management. By appointing an administrator, the owners are able to leave the day-to-day activities related to condominium management to the administrator while maintaining overall control over the management process. Along with the obvious advantages of this condominium management model, there are also some disadvantages. The main disadvantage is that it can be very costly, especially for buildings with a smaller number of units. The administrators tend to demand a fixed monthly fee for the management that doesn't include undertaking activities for regular building maintenance like changing lightbulbs, replacement of spare parts in the common areas and etc. These activities are considered by administrators as additional services and are charged separately. Some administrators went so far as to assign additional fees for each monthly calculation of management costs, and fees for each document they draft related to the condominium management, such as invites for the owner's assembly, fees for conducting and keeping records at the owner's assembly, gathering information from contractors and other third parties for matters concerning condominium management etc. Upon receiving various complaints from owners of building units, the Regulatory Housing Commission has cautioned administrators against such practices, since that type of regular activities should be covered by the monthly fee that administrators charge. Although steps were taken to eliminate bad practices, the initial surge of opportunism on the part of the administrators, combined with the delayed reaction on the part of the Regulatory Housing Commission, has irreparably damaged the reputation of the authorized administrators. The overall public opinion is that administrators take advantage of condominium management without really putting in the work that the Housing Law requires them to do. There were also isolated cases where administrators have directly breached the law, embezzled or misused funds and failed to pay electricity, water and other costs for the buildings under their management. The owners of building units affected by mismanagement on the part of the administrators found themselves tied up in long civil disputes and criminal proceedings, uncertain they will be able to recover their funds or claim damages. All these occurrences made owners of building units rather weary and reluctant to choose this model of condominium management.

There are some measures that the Housing Law can take in order to prevent similar abuses on part of administrators in the future, such as defining more precisely what are the duties of administrators with respect to day-to-day condominium management and

what falls out of that scope and therefore can be subject to additional fees. The Housing Law can also impose a duty on administrators to provide guarantees for fulfilment of their contractual obligations, since registering for condominium management services does not require investing large capital. The involvement of the Regulatory Housing Commission in supervising the work of the administrator, and, more importantly, its efficiency in dealing with filed complaints should also be increased.

Condominium management by an owner's association is regulated by Articles 54-64 of the Housing Law. The owner's association as a model for condominium management requires a more hands-on approach in management matters than the management by an authorized administrator. This can be a considerable advantage for owners of building units who want to have complete control over the way the condominium is being managed, and not just make major management decisions. In order for the owner's association to legally function, it must be registered as a legal entity (Art. 54, Housing Law). The decision for forming the owner's association is made by the majority of the owners. Once the decision is made, membership in the association is obligatory for all owners of building units in the building, regardless of whether they voted for the decision or against it. The owner's association is registered in the Central Registry of the Republic of North Macedonia. As a legal entity, it must have a founding document (Statute), and organizational structure as prescribed by the Housing Law and estate. The Statute of the association regulates the name of the association[14], contains data about the owners of building units, regulates the decision-making process, the obligations of a member of the association and the procedure for appointing and dismissal of the association's president. According to the Housing Law, the organizational structure of the owner's association must consist of the owner's assembly, which is a decision-making body, and the president of the association who is authorized to act as a representative of the association in legal relations with third parties. As a legal entity, the owner's association is able to enter into legal relations, but its active legal capacity is limited to undertakings linked to condominium management. The owner's association is explicitly prohibited to have any other business dealings that are not directly linked to the condominium management (Art. 58, Housing Law). By nature, the owner's association is a non-profit organization[15]. Due to its non-profit nature, the owner's association has limited resources in its estate, consisting of monthly payments made by the association members in the fund for management and the reserves fund. Since the association itself has limited resources at its disposal, the members of the association (the owners of building units) are jointly and severally liable for all obligations of the association in relation to third parties linked to the condominium management.

Another advantage of the owner's association, besides the fact that it enables direct participation of owners in condominium management, is the economical aspect. The owner's association is the less costly model for condominium management for buildings that have a smaller number of building units close to the legal limit set by the Housing Law, above which self-management is not an option (more than 8 units).

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[14] The name of the owner's association is the address of the building. The address of the building is also considered to be the seat of the association according to the Housing Law (Art. 55 and 56).

[15] More on the types and legal nature of juridical persons see: Живковска, Р. & Пржеска, Т. 2021. Граѓанско право, Општ дел. Скопје: Европа 92, pp. 157-165.

The disadvantage of the owner's association as a model for condominium management is the formality it is required for it to legally function. Formalities such as registration, drafting of constitutive documents, managing the legal entity and the condominium at the same time, learning and abiding by the regulation that governs legal entities as separate legal personalities, learning and abiding by accounting and tax laws and the like. The burden of all formalities linked to the functioning of the owner's association falls mainly on the association president. The president not only has to ensure that the association as a legal entity is functioning in accordance with laws and by-laws, but also has the same duties and responsibilities as the administrator with respect to the condominium management. This renders the position of the association president a time-consuming job with little or no reward for the inputted effort. Taking this into account, it is obvious why the owner's association's main problem is finding a person among the members who is willing to be elected president. It is redundant to point out that, if the owners fail to elect a president, the owner's association can't be constituted.

The Housing Law envisaging the two presented models for condominium management came into force in 2009; even after 13 years of its implementation, the issues in condominium management have not still been completely resolved. There is a large percentage of condominiums that haven't opted for either of the condominium management models, even though they are bound by law to do so. Some of those condominiums are old buildings, where owners continued to practice self-management as an informal way of managing, simply because they have been accustomed to it and had been practising it years before the Housing Law of 2009 came into force. Other condominiums began with self-management as an intermediate solution until they reach an agreement on the model of condominium management they want to implement, but stuck with the self-management for years.

Although *self-management* is not the preferred, nor legally available way for condominium management for most condominiums, the reality is that is still very widely practised. The reason why it is still practised is its informal nature. It doesn't require any formalities, no special organization or registration of any sort. That makes self-management easy to implement especially when there is a disposition on part of the owners to voluntary comply and fulfil their obligations concerning the use and maintenance of the condominium.

The informal nature of self-management of condominiums can be both an advantage and a disadvantage. Viewed as an advantage the informal nature of self-management allows for easy implementation. As a disadvantage, the informal nature of self-management makes it hard to force owners of building units to fulfil their obligations regarding the use and maintenance of the condominium.

On the issue of forcing irresponsible owners to fulfil their obligations to the condominium both of the formal models for condominium management (by an authorized administrator or by owner's association) are more effective than self-management. This is due to the fact that the formal models for condominium management enable the issuing of invoices for management costs that are directly enforceable (unless they have been disputed by the indebted party).

The Housing Law has made some obvious progress in regulating condominiums by giving a legal framework for the implementation of formal models of condominium management. However, as underlined in the paper, it would be beneficial for the regulation to be amended and made more consistent, precise, and comprehensive. Enhancement of the authority of the Regulatory Housing Commission could also be beneficial if it is directed to the effective protection of individual rights of the owners of building units against abuses from authorized administrators. If the owners feel that their rights are accordingly represented and protected, they will be more inclined to choose an authorized administrator for condominium management.

There is also a need for harmonization between the special Housing Law and the basic Law on Ownership on the matter of condominium property that will require amendment of the basic law as well. One issue that needs to be addressed in depth in the regulation of condominium property is the conduct of owners with respect to the use of the common parts of the building and the land the building is erected on. This issue hasn't been sufficiently addressed in the basic Law on Ownership. The Housing law is more focused on regulating the management of the common parts of the building, rather than the conduct of owners concerning the use of the common parts and the land the building is erected on.

5. ISSUES AND DISPUTES REGARDING THE USE AND MANAGEMENT OF CONDOMINIUMS

Regarding the use of the common parts of the building the basic Law on Ownership states that they are jointly owned and jointly used, and regarding the land, it is stated that it is jointly used without specifying the form of ownership over the land. The provisions of the Law on Construction Land[16] specify that the land where condominiums are built is jointly owned (Art. 11 (4)). Even though common parts of the building and the land the condominium is built on nowadays are being registered in the Real Estate Cadastre[17] as joint ownership of all owners in the building, they are still subject to usurpation or misuse by individual owners of building units. The common parts are repurposed to be used as separate building units and appropriated by some of the owners. The same happens with the land the condominium is built on - some owners put up fences and use it as their personal garden or yard. The damages some owners cause with misuse of the common parts and the land usually remain uncompensated, or, in some cases, they are passed off as maintenance costs.

Regarding the repurposing of the common parts of the building, we note that it is possible under the same conditions as repurposing a separate building unit. The main condition is for the majority of the owners to give consent for it. The Law on Ownership does not state what will happen once the common part is repurposed to serve as a separate building unit. In practice, when a common part of the building gets repurposed as a building unit,

[16] Закон за градежно земјиште, *Службен весник на РМ*, бр.. 15/15, 98/15, 193/15, 226/15, 31/16, 142/16, 190/16, *Службен весник на РСМ*, бр. 275/19.

[17] Закон за катастар на недвижности, *Службен весник на РМ*, бр. 55/13, 41/14, 115/14, 116/15, 153/15, 192/15, 61/16, 172/16, 64/18, *Службен весник на РСМ*, бр. 124/19.

the person who effected the repurposing expects to become its owner on the basis of the consent of the majority of owners in the building. In our opinion, this is unacceptable. The fact that the majority of the owners in the building have consented to the repurposing does not mean that they can also transfer ownership over the repurposed common part of the building. Even after a common part of the building has been repurposed to serve as a separate building unit, ownership over it does not change, meaning it will continue to be jointly owned by all of the owners in the building. Since, by repurposing, the common part becomes a separate building unit, it is possible to transfer the ownership over that part to an individual person, but only if all joint owners so agree. This is not a matter that can be decided with a majority vote, as the majority of owners in the building do not have the authority to deprive the minority of their stake in the joint ownership of the common parts, repurposed or not. Any other interpretation would be contrary to the Constitution where it is clearly stated that "No one can be deprived of ownership and the rights deriving from it, unless it is in public interest determined by law" (Art. 30 (3)).

Usurpation of the land the condominium is built on for individual use by some owners in the building has no legal basis. Both the Law on Ownership and the Law of Construction Land are clear on the matter that the land is intended to be used jointly by all owners in the building, and it can't be subject to divisions for individual use. Therefore, it is our opinion that the clauses in sales contracts where the buyer relinquishes the right to use the land where the condominium is built, or parts of that land, for the benefit of others are null and void because they are contrary to the imperative legal norms of the Law on Ownership and the Law on Construction Land.

Claiming damages incurred by misuse of the common part of the building on the part of some owners is littered with difficulties. The Law on Ownership proclaims that all owners are liable for the damages they may cause by misuse of the common part, but it fails to specify who is authorized to bring legal action against the person liable. The Housing Law authorizes the administrator or the president of the owner's association to take legal actions against third parties for all matters related to the condominium management, and against the owners in the building when they fail to pay their part of the management costs. Nothing is said about the possibility of taking legal action against the owners for damages incurred. So, the question is: What is the right way of taking legal action?

Having in mind that the liability for damages caused by misuse of the common parts is imposed by law, we consider that any owner in the building as an affected party is authorized to take legal action against the person liable. The common parts are jointly owned, so any of the joint owners can protect that ownership before the courts. The capacity to sue is not in question: however, what is problematic is resolving the relations between the owners regarding the lawsuit. If the lawsuit is successful, it will benefit all, so whoever brings up the legal action against the liable person should have the right to demand reimbursement of litigation costs from the other owners in the building. What if some of them are opposed to filing a lawsuit for damages against the liable person - do they have the right to forfeit the claim for damages? In a general sense claiming damages according to the Law of Obligations[18] is left to the free will of the affected party, meaning that they

[18] Закон за облигационите односи, *Службен весник на РМ*, бр. 18/01, 4/02, 5/03, 84/08, 81/09, 161/09, 123/13.

can freely decide whether to make the claim or not. However, considering the nature of joint ownership, where the relations between the joint owners are closely interlaced and the actions of one affect all, forfeiting rights guaranteed by law should not be a unilateral decision. Further on, if any of the joint owners are willing to exercise a right guaranteed by law that will be beneficial for the joint ownership as a whole, then the others should not be able to impede the exercise of that right and should bare their share of the costs linked to the exercise of that right. In our opinion, this should especially apply for joint ownership of the common parts in the condominium, because often in practice irresponsible owners damage or destroy installations and appliances in the common areas of the building, and no one holds them liable for that. We propose that additional provisions regarding the liability of owners of building units be added in the Law on Ownership, and also provisions in the Housing Law obligating the administrator or the president of the owner's association to take legal action against the liable owner in the building.

6. CONCLUSION

The paper demonstrates that according to the concept adopted by North Macedonian legislation, condominium ownership is not in fact a separate sub-form of ownership like co-ownership and joint ownership, but rather is a collection of provisions regulating the relations between the owners of the building units within the same building.

Using comparative analysis, the paper points out that similarities exist in the approach to defining condominium property. All analysed legislations, as shown in the paper, link condominium ownership with the ownership over buildings that have more than one building unit or other separate part owned by different persons.

Going into the issue of condominium property management, the paper demonstrates that the issue is regulated by the Housing Law, but only applies to housing condominiums or combined condominiums. Two models of management are available: management by an authorized administrator or by an owner's association. Condominium management by an authorized administrator is a type of management conducted by a natural or legal person that specializes in the area of condominium management and holds a license for condominium management. Condominium management by an owner's association calls for the creation of a legal entity by the owners of building units in the building.

The paper points out that self-management as a non-formal type of condominium management, can be an option for buildings with no more than 8 units, or as a temporary solution until a formal management model is implemented.

Regarding the shortcomings of the regulation and the need for amendments, the paper concludes that the Housing Law has made some obvious progress in regulating condominiums by providing a legal framework for the implementation of formal models of condominium management, although it would be beneficial for the regulation to be amended and made more consistent, precise and comprehensive. The paper also underlines the need for harmonization between the special Housing Law and the basic Law on Ownership, outlining the need for more precise regulation on the conduct of owners with respect to the use of the common parts of the building and the land on which the building is erected.

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RANGE AND SCOPE OF THE DEFINITION OF STALKING FROM THE ISTANBUL CONVENTION IN NATIONAL LEGISLATION IN BiH

With the adoption of the new Criminal Code in 2017, the Republic of Srpska introduced a new criminal offence, with the aim of harmonizing criminal protection from gender-based violence with the standards contained in the Istanbul Convention. One of them is the crime of stalking. In this paper, we analyse whether formal legal protection against gender-based violence has improved in the Republic of Srpska with the introduction of this criminal offence and compare this crime with the same or similar crimes in the criminal laws of states in the Balkan region and other political-territorial units in BiH. We pay particular attention to the crimes of endangering security, and sexual harassment. We are especially interested in the Federation of BiH, given that this entity does not prescribe an adequate criminal offence in its criminal law in the light of the requirements of the Istanbul Convention (ratified by BiH), but also taking into account the fact that the Convention does not detail the essential features of the nature of the crime of stalking. Based on best comparative practices, and taking into account the jurisdiction of international forums, we will give some proposals de lege ferenda. The paper also includes a specific insight into the criminal offences of stalking and endangering security, which exist in the relevant criminal laws in Bosnia and Herzegovina, and which will serve to prove our hypothesis

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more reliably. The paper will have a strong gender-based approach, but, to the extent necessary, systemic shortcomings in the prosecution of the crime of endangering security will also be shown in auxiliary categories, e.g. vis-a-vis journalists, as the safety of female journalists is often under attack.

Keywords: Bosnia and Herzegovina, stalking, legislation, gender-based violence, Istanbul Convention.

1. INTRODUCTION

Although the occurrence itself pre-dates the period, attention has been given to „stalking" since the 1920s (Kerović, 2021, p. 99). It is believed that the main reason for that was the murder of actress Rebecca Schafer, which was committed by her admirer Robert Bardo, after which the state of California in the United States criminalized stalking (Penal Code of California, 646.9 PC). Stalking often appears as an accompanying form of other illegal behaviours, such as domestic violence, sexual harassment and other types of violence (Miladinović-Stefanović, 2016, 143). This paper observes how the criminal law in Bosnia and Herzegovina looks at stalking.

It primarily focuses on the criminal offence of „stalking", which already exists in one of the criminal laws (Republic of Srpska), and analyses the connection with other criminal offences. In a lot of European Union Member States,[1] the crime of stalking was commonly introduced in response to an identified legal gap, in situations where a person was not threatened nor physically attacked but was followed, put under surveillance, contacted or to whom offensive content was sent.

The development of technology has caused the definitions to include behaviours of the suspect/accused that were committed in the virtual world/online. The consequences for victims were also determined in national legislative, in terms of self-harm, psychological consequences and suicidal thoughts. Psychological violence is rarely proven and taken into account during the court proceedings for offenses of gender-based violence: however, in terms of the criminal offence of stalking, it is one of the key features of the criminal offence itself.[2] Speaking in general, the definition now also includes situations where the victim was not injured or felt fear, but where the perpetrator wanted to cause harm or cause fear and situations where the perpetrator knew that this would most likely be the result of his or her behaviour. The pioneer of the criminalization of „stalking" are the United States of America (the first law was passed in 1990 in California), while in Europe those efforts were led by Denmark and the United Kingdom of Great Britain and Northern Ireland (USA and UK also have a measure of prohibition of approaching the victim as an epilogue of the

[1] Denmark is a pioneer, having criminalized stalking in 1933. The United Kingdom was the next European Member State. Until 2009 the only other European Member States that have passed laws against stalking are Belgium, the Netherlands, Germany, Malta, Ireland, Austria, and Italy.

[2] Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harass-ment, Banja Luka, United Women of Banja Luka. Available at: http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u -RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf (30. 8. 2022).

procedure[3]). The European Court for Human rights did not develop standards for stalking within its caselaw, but the issue itself was analysed under other forms of gender-based violence (domestic violence, femicide...). A typical recent example of this approach is the judgment in the case of Tkhelidze vs. Georgia (application number 33056/17), dated 8. 6. 2021, where it was established that the victim was stalked and threatened for a certain period of time, day after day, by her extra-marital partner.

Further, we will show the degree of abstraction in the definitions of this criminal offence in the legislations of the countries of the region, and also evaluate whether these definitions are in accordance with the one given in the Istanbul Convention. The aim of the paper is to show the differences and similarities between the countries of the region when it comes to the definition of the criminal offence of stalking and to try to draw some general conclusions. In the following chapters, we will describe the definition of stalking in the Istanbul Convention, analyse the definition in the countries of the region, and make a special review of the regulation of the criminal act of persecution in the criminal laws of the countries of the region.

2. THE DEFINITION OF „STALKING" IN THE ISTANBUL CONVENTION

The Council of Europe Convention on preventing and combating violence against woman and domestic violence (hereinafter: the Istanbul Convention) was signed in Istanbul on May 11th 2011. On November 7th 2013, Bosnia and Herzegovina became the sixth member state of the Council of Europe to ratify the Convention,[4] thereby making a commitment to undertake a series of measures, which, among others, include the creation of a legal framework for prevention and punishment of violence against women and the protection of violence victims. The Agency for Gender Equality of Bosnia and Herzegovina adopted the Framework Strategy for implementation of the Istanbul Convention in Bosnia and Herzegovina, where one of the main goals is to ensure a consistent and high quality implementation of the Convention, especially through the adjustment of relevant legal and institutional frameworks.

The Convention contains certain substantive-law provisions. This is an improvement compared to the period before its entry into force, when a lot of social relations covered by the Convention were either regulated by non-binding norms or were „soft" law.[5] The

[3] In 2020, Government of UK gave police new powers to protect victims of stalking. New Stalking Protection Orders (SPOs) came into force of 20 January 2020. They allow courts in England and Wales to move quicker to ban stalkers from contacting victims or visiting their home, place of work or study. The Orders will usually last for a minimum of 2 years, with a breach counting as a criminal offence that can result in up to 5 years in prison.

[4] Konvencija Vijeća Evrope o prevenciji i borbi protiv nasilja nad ženama i nasilja u porodici, *Službeni list BiH*, br. 15/13.

[5] In 2002, the Council of Europe Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence was adopted. A Europe-wide campaign, from 2006 to 2008, to combat violence against women, including domestic violence was organized. The Parliamentary Assembly of the Council of Europe has also adopted a number of resolutions and recommendations calling for legally-binding standards on preventing, protecting against and prosecuting the most severe and widespread forms of gender-based violence.

Convention obliges the member states to take measures to implement its provisions aimed at preventing and combating violence against women. Within these substantive legal provisions, there is also a provision that contains an imperative legal norm: "Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at an other person, causing her or him to fear for her or his safety, is criminalised" (Art. 34 of the Convention). It is evident from this that the Convention does not precisely specify the characteristics of the criminal offence of stalking (Paunović, 2019, p. 21). The Istanbul Convention in particular apostrophizes that there must be a consequence i.e. that it is not enough only that acts of threatening behaviour were undertaken, but also that the victim was infused with a sense of fear (actions of stalking must have been undertaken intentionally and with the special purpose of causing a feeling of fear in the victim).[6] It follows that the consequence should be appreciated from the subjective feeling of the victim (proved with expertise/expertise report) and not from the average citizen (e.g. as in the United Kingdom).[7]

3. STALKING IN THE LEGISLATION OF THE COUNTRIES IN THE REGION

In the Criminal Code of Republic of Serbia[8] stalking is defined as a criminal offence in Article 138a.Unlike the criminal offence of sexual harassment, the criminal offence of stalking does not need to have an emotional or sexual connotation. This criminal offence is committed by a person who, during a certain period of time, persistently and unauthorized follows or undertakes other actions with an aim to get closer to another person against her or his will. This criminal offence can also be committed when a person establishes direct contact (e.g. waiting in front of a building), through a third person (by contacting a friend or a neighbour to speak about the victim), or through social networks (Viber, WhatsApp, Facebook, etc.). However, following through social networks (e.g., sending a friend request on Facebook) does not constitute this criminal offence. For a conviction, it is necessary for a conviction to prove that the goal is to get physically closer to that person (e.g. finding the work address or a friend's home address). Additionally, it is also necessary for the perpetrator to have undertaken several actions (not just one) over an extended period of time (it is necessary that there is a continuity between two actions), in an aggressive manner or in such a way that it can affect the life of a stalked person. The main reason to demand continuity in the criminal offence of stalking is that only when stalking actions are observed collectively, they can constitute this criminal offence based on the feelings of psychological insecurity and anxiety of the victim (Roberts, 2018, p. 274). This is because one-time and short episodes of stalking can hardly cause fear and anxiety in the victim (Pittaro, 2017, p. 191). Nevertheless, case law shows that stalking

[6] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence – 2011. Available at https://rlr.iup.rs/wp-content/uploads/2020/10/RLR-instructions-to-authors.pdf (30. 8. 2022).

[7] Protection of Freedoms Act, 2012, Section III, paragraph 2A.

[8] Krivični zakonik, *Službeni glasnik RS*, br. 85/2005, 88/2005 - ispravka, 107/2005 – ispravka, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

can take place within one day – in this case, the accused followed a woman for a period of time and followed her into two cafes; afterwards, the person drove away with friends and then, during the same day she saw the accused by, her house standing in the street.[9] It is explicitly prescribed that stalking is committed by unauthorized following, given that criminal prosecution authorities can follow a person with authorisation, i.e. when taking certain measures in accordance with the law. If the contact between persons was voluntary and had ended, then the other person should make clear that further contact is unwanted in order for this criminal offence to exist. The following three paragraphs can be contested. Namely, paragraph 3 of Article 138 prescribes that this criminal offence can be committed by misusing the personal data of another person or a person close to him/her for the purpose of ordering goods or services. Paragraph 4 prescribes that stalking is a threat of attack on life, body or freedom of another person or a person close to her/him. As for paragraph 3, this formulation is very similar to the criminal offences of fraud, false representation or unauthorized collection of personal data (the most controversial part is "for the purpose of ordering goods or services"). Paragraph 4 is similar to the criminal offence of "Endangering safety" and differs from it in the consequence and extended protective object (in accordance with the formulations for two criminal offences in the Criminal Code of the Republic of Serbia, one threat of death would be endangering safety, while several of them would be stalking). In accordance with paragraph 5 of Article 138, the criminal offence of stalking will also exist when any other actions are taken in a manner that can significantly endanger the private life of a person against whom the actions are taken. This formulation is too general and unusual for criminal legislation. The theory proposes here the formulation of "undertaking another action of persistent stalking" or "other action of persistent harassment" (Škulić, 2016, p. 20). In a relation to the consequence, two more qualified forms of the criminal offence, with a stricter punishment are prescribed. The consequence consists in causing danger to the health, body or life of the victim as well as in causing the death of the victim due to an illness resulting from stalking or suicide (which is the most serious form of this criminal offence). In Serbia, there is some progress when it comes to prosecution, but even though there a number of court decisions were passed, and even though the sanctions are strict, the penal policy is mild. Research of court practice for the period from 2017 - 2020 in Serbia[10] shows that cases of stalking are reported and prosecuted, but the data also show that in almost 70 per cent of the judgments (a total of 193 cases) a suspended sentence was imposed. Prison sentences and house arrest were recorded in 17 per cent of cases, while fines were imposed in almost 13 per cent of judgments for persecution. Individual cases of court reprimands, work in the public interest, and educational measures were also recorded.

Even before the ratification of the Istanbul Convention, the Republic of Croatia had a crim-inal offence of Intrusive behaviour in its criminal legislation, but also a number of other criminal offences which can overlap with the definition given in the Convention, such as threat or coercion (Gudelj, 2019, p. 66). In the Republic of Croatia, the criminal

[9] Supreme Court of Cassation of Serbia, no. Kzz 70/2019 of February 6, 2019.

[10] Zbog proganjanja donete 282 presude – Serbia 2022. Available at: https://www.politika.rs/sr/clanak/496662/Zbog-proganjanja-donete-282-presude (30. 8. 2022).

offence "Intrusive behaviour" was introduced in the Criminal Code in 2013[11] in Chapter XIII "Criminal offences against personal freedom". Paragraph 1 of Article 140 of the Criminal Code defines it as persistently and over a long time following or stalking another person or trying to contact or establishing an unwanted contact or intimidating in some other way intimidates thereby causing anxiety or fear for such person's safety or safety of persons close to him/her, which is punishable by imprisonment of up to one year. In case the offence was committed in a relation to a close person, a person with whom the perpetrator was in an intimate relationship or to a child, the perpetrator can be sentenced to imprisonment of up to three years. It is obvious that it is very important to determine whether the perpetrator and the victim were in a relationship because that information makes a difference between the basic and the qualified form of a criminal offence. The criminal offence is prosecuted by proposal[12] except when it is committed against a child or a close person. As well as the Criminal Code of Serbia, the Criminal Code of Croatia requires a long period of stalking and following ("persistently and over a long time"). In Croatian case law, there was a case where the accused was acquitted because the intrusive behaviour lasted only three days, during which the accused called the victim 37 times on the mobile phone and 31 to the landline phone.[13] The Supreme Court of Croatia established that perseverance and time duration are elements that are valued in every specific case.[14] In this case, the court took the position that, for the evaluation of the length of time that the acts of unwanted behaviour were committed, an important question was whether the victim was brought in a state of anxiety or fear for his/her personal safety at a certain time, not the number of days during which the criminal offence was committed. Of course, other elements should always be considered in order to conclude that a criminal offense exists – persistence, as well as the effects left on the victim. The actions of the accused can be disturbing, constitute stalking or unwanted contact, but still not amount to a criminal offence. An example of actions that represent intrusive behaviour can be found in the judgment of the Supreme Court of Croatia, where the accused was convicted because he sent messages to the victim that he would like for her „to be his wife and that she was more beautiful than the moon".[15] The quantity of fear and anxiety is determined in each individual case, where a specific person is taken as an example, and not an average, reasonable person under the same conditions. The flaw of the Croatian solution is that it does not contain the norming of stalking in the virtual space, which means that if a person undertakes actions through information and communication technologies, that will not constitute stalking. It is good that cases of stalking committed by a person close to the victim and the one committed against a child are marked as more difficult. Croatia has also recorded one case where a

[11] Krivični zakon Republike Hrvatske, *Narodne novine* br. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

[12] A certain number of criminal acts can be prosecuted by proposal, which means the attitude of the injured party towards the criminal prosecution of their perpetrators must also be taken into account, since they affect the personal sphere of his/her life in a special way.

[13] County Court in Bjelovar, no. Kž-131/2017-4 of September 14, 2017.

[14] Supreme Court of the Republic of Croatia, no. III Kr 132/14-6 of February 12, 2015.

[15] Supreme Court of the Republic of Croatia, no. I Kž 161/2016-4 of August 31, 2017.

public person was the victim of stalking. The case concerned a singer who was stalked by a retiree for two years; the stalker was sentenced to eight months imprisonment with a three-year probation.[16] Also, the Municipal Court in Zagreb sentenced him to a measure of mandatory psychiatric treatment and a three-year prohibition on approaching and disturbing the singer, because, among other things, he stalked the singer from Zagreb to Hvar and sent her letters and songs.

Montenegro also introduced the criminal offence of stalking into the Criminal Code.[17] Articles 9, 12 and 15 of the Law marked the completion of harmonization with the Istanbul Convention, which Montenegro ratified and signed. The harmonization was affected by introducing criminal offences such as: Female Genital Mutilation, Forced sterilization, Stalking. Also, responsibility for an attempt of the criminal offence of Abuse and the new incrimination i.e. a new form of the criminal offence of rape was prescribed. The criminal offence of stalking was introduced by Article 168a of the Code within Chapter XIV Criminal offences against life and body. According to Article 12 whoever persistently stalks another in a way that significantly endangers his/her life, health, body or way of life will be punished with a fine or imprisonment of up to three years. The special value of this solution is emphasizing the word „persistent", which underlines the special relation of the perpetrator with the actions taken i.e. that he/she is constantly causing significant changes in the performance of the victim's daily activities through continuous actions. Another important characteristic is the reference to „sensibly/noticeable", which means that the actions taken produced significant changes in the victim's life. If this criminal offence is committed against a former spouse or an extramarital partner, the perpetrator will be punished with imprisonment from three months up to five years. The same sentence is prescribed for the perpetrator who commits this criminal offence against a minor, a pregnant woman or a person with a disability. According to the Law, it is considered that someone is persistently stalking another person when, during a certain period of time, he/she is: following or undertaking other actions with the aim of physically approaching that person without authorization, tries to establish contact with that person directly, through a third party or means of communication; abuses the personal data of that person to order goods or services; threatens by an attack on the life, body or freedom of that person or a person close to him/her; takes other similar actions towards that person. The comments made with regards to paragraphs 3, 4 and 5 of Article 138a of the Criminal Code of Serbia are also valid vis-a-vis the same solutions in the Criminal Code of Montenegro (Article 168a, paragraph 6, point 3), 4) and 5)). The last current case from Montenegro was the one where the accused was sentenced by the Basic Court in Nikšić to imprisonment of three months for stalking an RTV Montenegro journalist (sending her threatening messages via his Instagram profile).[18]

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[16] Zbog uhođenja Nine Badrić, penzioner dobio osam mjeseci zatvora – Croatia 2021. Available at: https://radiosarajevo.ba/vijesti/regija/zbog-uhodenja-nine-badricpenzioner-dobio-osam-mjeseci-zatvora/436520 (30. 8. 2022 of August).

[17] Krivični zakonik Crne Gore, Službeni list CG, br. 70/2003, 13/2004 – ispr. 47/2006 i Službeni list CG, br. 40/2008, 25/2010, 32/2011, 64/2011 – dr. zakon, 40/2013, 56/2013 – ispr., 14/2015, 42/2015, 58/2015 – dr. zakon, 44/2017, 49/2018, 3/2020.

[18] Osuđen na tri meseca zatvora zbog proganjanja novinarke iz Crne Gore – Montenegro 2022. Available at: https://www.021.rs/story/Info/Region-i-svet/304103/Osudjen-na-tri-meseca-zatvora-zbog-proganjanja-novinarke-iz-Crne-Gore.html (30. 8. 2022).

4. SPECIFICITY OF REGULATING THE CRIMINAL OFFENCE OF STALKING IN THE CRIMINAL LAWS OF BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina efforts were made to harmonize the provisions of the law with the requirements of the Istanbul Convention, but that was done partially, in certain political-territorial units and time distanced from each other. The legislator in the Republic of Srpska was the first and only one[19] to effect this harmonization. This is not surprising, given the amount of political will, speed of legislative process (mechanism of decision making is not complex in the legislative body of the Republic of Srpska) and the territorial organization of the authorities in it. In this regard, the introduction of criminal offences which are followed by appropriate sanctions that will have a deterrent effect was initiated. The Criminal Code of the Republic of Srpska entered into force in 2017[20] (the legislator decided to codify the entire criminal law matter). One of the goals of the new criminal legislation was to harmonize it with the Istanbul and Lanzarote Conventions. Pursuant to the Istanbul Convention, new criminal offences which were introduced into the Criminal Code of the Republic of Srpska are within the framework of Chapter XII – Criminal offences against life e and body, criminal offences of Female Genital Mutilation (Article 133) and forced sterilization (Article 134), within the Chapter XIII Criminal offences against the freedom and rights of the citizens, criminal offence of persecution/stalking, (Article 144), within the Chapter XIV Criminal offences against sexual integrity, criminal offence of sexual blackmail (Article 166), and sexual harassment (Article 170) and within the Chapter XVI Criminal offences against marriage and family the criminal offence of forced marriage (Article 183). By introducing these criminal offences into the legal system, the Republic of Srpska created the conditions for improving the formal legal protection of women from various forms of gender-based violence through court proceedings against the perpetrators of violence, as well as for stricter application of mechanisms that already exist within the framework of criminal proceedings with the aim to protect basic human rights, safety and access to justice for women who survived violence.[21]

As stated earlier in this paper, currently the criminal offence of stalking exists only in the Criminal Code of the Republic of Srpska, where paragraph 1 of Article 144 prescribes that "whoever persistently and for a long time follows or stalks another person or tries to establish or is establishing unwanted contact with him/her directly or through a third person or otherwise causes that person to change his/her lifestyle, anxiety or fear for his/her personal safety or the safety of his/her close persons shall be punished by a fine or imprisonment up to two years." Paragraph 2 of the same Article contains the imperative norm that the perpetrator will be punished with imprison-ment from six months to three years if the offence from paragraph 1 of this Article was committed in a relation

[19] At the level of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and District of Brčko of Bosnia and Herzegovina did not.

[20] Krivični zakonik Republike Srpske, *Službeni glasnik RS*, br. 64/2017, 104/2018 – odluka US, 15/2021, 89/2021.

[21] Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harass-ment, Banja Luka, United Women of Banja Luka. Available at: http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u -RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf (30. 8. 2022).

to a current spouse or extramarital partner, a person with whom the perpetrator was in an intimate relationship or towards a child (a qualified form of the offence). What this criminal offence includes and in what way it can be committed is prescribed by the law itself (Kerović, 2021, p. 106) and it is up to the case law to specify the details. The reference to unwanted contact can be disputed in practice, because it is not stated that the offence can be committed in the virtual world – through the means of communication (phone, social networks, etc.). It is commendable that this provision includes an element of persistence in undertaking enforcement actions. The time interval for stalking is specified because it is limited to taking actions over a longer period of time. In case law, we already have judgments in which it was established that stalking was committed over a longer period (February 2018-September 2018[22], July 2017-February 2019[23] ...), but also in a somewhat shorter period (April 5, 2018 - April 18, 2018[24]). It is encouraging that the subjective conception is respected. In one of the finalised cases, the court took the position that the consequence does not have to be determined by expertise/expert's report, but must be assessed according to the circumstances of the specific case (as found by the first instance court).[25] The object of protection is the personal safety of a person or a person close to him/her, and the perpetrator can be any person, and he/her must act with direct intent.

In the case law of the Republic of Srpska, different acts of committing the criminal offences of stalking have already been determined. On May 27th 2019, the basic court passed a judgment in the first instance proceedings against the accused who committed the criminal offence of stalking from Article 144, paragraph 2, in connection with paragraph 1 of the Criminal Code of the Republic of Srpska. The accused was found guilty and sentenced to six months in prison, with a one-year probation. In the same judgment, the accused was sentenced to a security measure of prohibition of approaching and communicating with the victim (Article 79, paragraph 1, Criminal Code of the Republic of Srpska) for a period of one year. In the second instance judgment upon appeal, the district court confirmed the first-instance judgment, and it became final on July 25th, 2019. The judgment indicates that in the period from April 5 to 18, 2018, the accused persistently stalked a woman with whom he had previously been in an intimate relationship, trying to make unwanted contact with her directly. The accused committed the more severe form of the criminal offence of stalking, since he had previously been in an intimate relationship with the victim. The detailed statement of the victim[26] is not common or often visible in court judgments for

[22] Basic Court of Bijeljina, no. 80 0 K 101358 18 K, of December 12, 2018.

[23] Basic Court Prijedor no. 77 0 K 095424 19 K of April 18, 2019.

[24] Basic Court of Bijeljina, no. 80 0 K 097525 18 K of May 27, 2019.

[25] District Court of Bijeljina, no. 80 0 K 097525 19 Kž of July 23, 2019.

[26] In the explanation of the judgment, the court focused considerable attention on the testimony of the victim, which allowed her to present all the details not only regarding the actions of the accused focused on stalking, but also the nature of the intimate relationship that the victim had with the accused, her attempts to end the relationship even before his going to serve the sentence of imprisonment for another criminal offence, as well to justify her feelings of anxiety, fear for her life and her own safety and changes in life habits that were caused by the actions of the perpetrator after his release from prison, when his continuous phone calls started, followings on the street and at work, ringing and banging on the door and windows of the apartment, calling and insulting. Due to these circumstances, the victim was not able to live a normal life or move on the street and go to work normally, she felt devalued as a person and constantly feared for her life and safety.

acts of gender-based violence, although it represents a key segment of the argumentation of the existence of characteristics of acts of violence, not only in cases of this criminal offence but also with regards to other offences similar offences.[27] On March 19th, 2019 the basic court in the proceedings against the accused for the criminal offence of stalking, from Article 144, paragraph 1 of the Criminal Code of the Republic of Srpska, based on a plea agreement, passed a convicted judgment in which the accused was found guilty and sentenced to a fine of 600 Bosnia and Herzegovina convertible marks. However, there was also a case[28] where it was evident that both the prosecutor and the court had failed to recognize the qualified, more serious form of this criminal offence, which also entails a stricter sentence.[29]

In the Criminal Code of the Federation of Bosnia and Herzegovina,[30] the criminal offence closest to stalking is Endangering Safety.[31] It is prescribed in Article 183, paragraph 3 of, reading: "Whoever, by sneaking in, frequently following or harassing in any other way, endangers the safety of a spouse, a person with whom he/she lives in an extramarital union, the parents of his/her child or another person with whom he/she maintains or has maintained close relations, shall be punished by a fine or imprisonment of up to one year". Currently, the process of harmonizing the Criminal Code with the Istanbul and Lanzarote Conventions in the Federation of Bosnia and Herzegovina is underway, and it is expected that the criminal offence of stalking will be expressly prescribed. The draft law was adopted in one of the chambers of the Parliament of the Federation of Bosnia and Herzegovina, but it has not yet been promulgated. What the draft provision does not contain, compared to solutions from Serbia, Croatia and Montenegro, is primarily the circle of persons who may be harmed (especially since the victim must be a person with whom the potential perpetrator maintained close relations), and the prescribed sentence (imprisonment can be replaced by a fine). This is enough to conclude that out of all criminal legislation, victims

[27] Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harass-ment, Banja Luka, United Women of Banja Luka. Available at: http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u -RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf (30. 8. 2022).

[28] It is obvious from the judgment that, during the period from May 2018 to February 2019, the accused tried to establish unwanted contact with the victim, with whom he was in an emotional relationship, and stalked her by approaching her on the street and trying to talk with her in various ways, threatened that she was his or God's. The accused created several fake profiles on social networks, from which he sent insulting messages to the victim, and published photos of the injured party with offensive text captions on those profiles, which caused the victim to leave the city on several occasions and go to another place where she stayed with a friend. During two days in February 2019, the accused harassed the victim and her friends with phone calls and messages with offensive content related to the victim and told the victim's father, whom he had encountered on the street, that he would publish photos that compromised her if she reported him to the police. These actions caused changes in the victim's lifestyle, grievance, anxiety and fear for her own safety, which is why she reported him to the police. From the description of the actions of the criminal offence in the judgment, it undoubtedly follows that the accused committed the actions of the criminal offence of stalking.

[29] Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harass-ment, Banja Luka, United Women of Banja Luka. Available at: http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u -RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf (30. 8. 2022).

[30] Krivični zakon Federacije Bosne i Hercegovine, *Službene novine FBiH*, br. 36/2003, 21/2004 – ispr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017.

[31] This is the reason why this criminal offence will be analysed here, although it exists in other legislations as well.

of stalking have the weakest protection under the Criminal Code of the Federation of Bosnia and Herzegovina.[32]

Also, the suspects in these cases are most often interrogated by the police, not the prosecutor. Moreover, in practice (as indicated in the previous two paragraphs where the practice concerning the criminal offence of endangering safety was outlined), the prosecutor's office files an accusation only if the suspect does something (hits the victim, walks around the building frequently, waits for her/him, comes to the workplace...), carries out a threat (this can also happen according to this paragraph ("jeopardizes safety in another way"), given the fact that case-law has already constructed the position in interpreting all three paragraphs of Article 183 that the threat must be real and serious, not conditional. This is a particular problem for journalists, where endangering safety is the most frequently reported criminal offence, which would be more efficiently prosecuted if the criminal law of the Federation of Bosnia and Herzegovina included the criminal offence of threats or the criminal offence of stalking (as confirmed in the Montenegro example elaborated above).

5. CONCLUSION

It is positive that stalking has finally found its place in most former Yugoslavia criminal leg-islations and that it is being considered in the spirit of the Istanbul Convention. In Serbia, paragraphs 3, 4 and 5 of Article 138 and in Montenegro points 3, 4 and 5 of paragraph 6 of Article 168a of the Criminal Code should either be worded differently or transferred to other criminal offences or such incrimination should be abandoned altogether, for the reasons we elaborated in section 3 of this paper. Our position is supported by the fact that similar criminal offences are already prescribed, which leads to problems with the qualification of the criminal offence in practice. We consider that both the basic form of this criminal offence and the more severe form are adequately regulated by criminal law in the Serbian and Montenegrin criminal codes. It is important that, formally and legally, in most countries, adjustments have been made to the definition from the Istanbul Convention, which is narrow and does not provide precise answers to the numerous questions which were left to the national legislators. The Istanbul Convention, for example, did not solve the issue of how to evaluate the condition of repetition of the action whereby the act is committed.

As a result, the state determines that time frame within their laws and jurisprudence, and it happens that the same set of actions is punishable in one state and not in another. This is problematic, especially considering how small the area of the former Yugoslavia is, and even more so in the case of Bosnia and Herzegovina, which has four criminal laws. The Federation of Bosnia and Herzegovina and the District of Brčko need to harmonize their criminal codes with the Istanbul Convention as soon as possible to ensure the relevant protection of victims in these cases. Countries do not have to regulate every possible act that could fall within the scope of the definition of stalking in the Istanbul Convention (e.g., no country has taken over acts of vandalism towards pets). The time period in which the

[32] This is also the case in the Criminal Code of Brčko District of Bosnia and Herzegovina, where almost everything that is written for the Criminal Code of the Federation of Bosnia and Herzegovina is valid; this offence by its nature cannot be in the Criminal Code of Bosnia and Herzegovina.

stalking should be carried out is not determined by laws, but is left to practice to create on a "case by case" basis. It would certainly be difficult to accept, where it is not prescribed that stalking is committed for a "longer period" that the period in question could be just a few hours, regardless of how heightened the sensibility of people in modern society is today.

When it comes to case law, where criminal offences are similarly or identically prescribed, we believe those general conclusions cannot yet be drawn. In connection with the punishment of the perpetrators of criminal offences of stalking and other forms of gender-based violence, the courts should make efforts to pronounce stricter sentences instead of a lenient approach to sentencing noted so far In addition to directly punishing and preventing the perpetrators of violence from committing the same or similar crimes in the future, sanctions have an important impact on the social perception of these forms of violence to which women are predominantly exposed, while conversely, milder sentencing contributes to their additional marginalization and invisibility, and influences the victims to believe they will not be able to achieve protection and safety by reporting. In the countries of the region, there is progress when it comes to prosecution, but even though a number of court decisions have been pronounced, despite the envisaged rather strict sentences, in practice, the penal policy is mild, as demonstrated by research and the case law presented in the paper.

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HUMAN TRAFFICKING IN BOSNIA AND HERZEGOVINA - CRIMINAL LAW, JUDICIAL PRACTICE AND IMPLICATIONS FOR HUMAN SECURITY

Human trafficking represents one of the most serious forms of human rights violations in Bosnia and Herzegovina. The Criminal Code of Bosnia and Herzegovina criminalises human trafficking as an offence in the category of crimes against humanity and values protected by international law. The drafters of the international conventions, which served as a model to the domestic legislators, did not approach human trafficking solely as an organised crime or transnational crime, for the reason of which the criminal codes in Bosnia and Herzegovina also criminalise domestic human trafficking. The starting point of this paper is the interrelatedness between plea bargaining in procedural law and lenient penal policies, which represents an obvious problem with profound security implications for Bosnia and Herzegovina. In this context, we begin with the analysis of the notion of human security, the essential element of which is the protection of human rights and, thus, the rights of victims/aggrieved parties in criminal proceedings. Human trafficking is a result of structural inequalities at the global level and within a country's boundaries.

Keywords: human trafficking, plea bargaining, victims/aggrieved parties, human security.

1. INTRODUCTION

Human trafficking is a global phenomenon which has been present in Bosnia and Herzegovina over the last three decades. Since the end of the war (1992-1995), Bosnia and Herzegovina succeeded in reconstructing its law enforcement institutions at both the state and entity levels. Bosnia and Herzegovina signed and ratified international conventions prohibiting human trafficking and, consequently, criminalised human trafficking in national

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legislation. From this perspective, Bosnia and Herzegovina has fulfilled its international obligations regarding this severe form of human rights violation. However, certain problems have been identified in judicial practice. Judicial practice shows that lenient sentences have been imposed on human traffickers. The acquisition of legal qualifications for the same offence and the principle of *in dubio pro reo* led prosecutors' offices and courts to opt for the application of a lighter legal qualification favouring the perpetrator of the offence and the imposition of more lenient sentences. Additionally, plea agreements have become a standard practice in prosecuting human trafficking cases in Bosnia and Herzegovina.

The imposition of extremely lenient sentences for human trafficking is not only a criminal law issue but also an issue of protecting the human rights of the victims. The paper examines the widespread judicial practice of pronouncing judgments for human trafficking below the statutory minimum through the theoretical prism of the notion of human security. Human security places a human being at the centre of its analysis, where human rights and human development are the positive values that security policy should protect (Ejdus, 2012, p. 216). States have an obligation to respect the guaranteed human rights of individuals and to respond adequately to threats to these rights. The state bears responsibility for a lenient penal policy with regards to the offence of human trafficking because such policy points to a lack of appropriate mechanisms for the protection of victims/aggrieved parties' rights, as guaranteed by the international conventions applicable in Bosnia and Herzegovina.

This paper develops around two research questions: which aspects of procedural law lead to the lenient penal policy, and what are the implications of such practices for the human security of human trafficking victims in Bosnia and Herzegovina.

The paper consists of four sections. The first section presents the background of the problem and the scope of human trafficking in Bosnia and Herzegovina. The second section discusses the phenomenon of human trafficking from the perspective of human security. The third section gives an overview of international conventions prohibiting human trafficking, which have been ratified and signed by Bosnia and Herzegovina. The fourth section gives a brief overview of the substantive criminal legislation in Bosnia and Herzegovina and its judicial practice on the fight against human trafficking.

2. BACKGROUND AND THE LEVEL OF THE HUMAN TRAFFICKING PROBLEM IN BOSNIA AND HERZEGOVINA

Human trafficking has been a long-term problem in Bosnia and Herzegovina. Since the end of the war (1992-1995), this type of criminal activity has varied in scope and modalities. Human trafficking for sexual exploitation is the dominant form in Bosnia and Herzegovina. In addition to sexual exploitation, forced begging, which mainly concerns Roma children, is also present (Vranješ, Lalić & Šikman, 2021, 60). In the first years after the end of the war, Bosnia and Herzegovina was primarily a transit and destination country for victims of human trafficking for sexual exploitation purposes. The victims came from Eastern European countries, mostly from Ukraine, Moldova, Romania, Bulgaria and the states which emerged after the breakup of the Socialist Federal Republic of Yugoslavia (SFRJ). In the meantime, these patterns have changed significantly, and the number of victims from Eastern European

countries has significantly decreased. Meanwhile, Bosnia and Herzegovina has become a country of transit and origin for victims of human trafficking (US Embassy in Bosnia and Herzegovina, 2017. US Department of State, 2018. US Department of State, 2021).

The end of the Cold War, the migration of the population from the East to the West, and the wars fought in the former SFRY in the 1990s are the main processes which influenced human trafficking in Bosnia and Herzegovina. In the last decade of the 20th century, the territory of the former SFRY was marked by conflicts that shaped the region's geopolitical map. The disintegration of the SFRY led to the creation of new states, and the region was militarily, politically and economically divided (Lalić, 2007, p. 112). The countries that emerged following the collapse of the SFRY have been seriously affected by organized crime and corruption. In the 1990s, organized criminal groups in Bosnia and Herzegovina and the region successfully exploited institutional weaknesses to carry out various types of criminal activities, including human trafficking. In this period, there was no political will in Bosnia and Herzegovina to solve the problem, which was manifested in the lack of an appropriate legal framework, the inadequate training of law enforcement personnel, widespread corruption in the public sector and porous state borders. This situation contributed, to a large extent, to the expansion of human trafficking in post-conflict Bosnia and Herzegovina (Rathgeber, 2002). During the war in Bosnia and Herzegovina (1992-1995), the economy was almost destroyed, illicit trade was widespread, and organised criminal groups emerged as the main suppliers of consumer goods in the market (Andreas, 2004). Similar patterns are evident in the post-war period. Human trafficking was carried out through well-established smuggling channels, and human beings were traded like other goods (Haynes, 2010). Government institutions, which were in the phase of formation and consolidation, were unable to provide an appropriate response in the years that followed.

The presence of peacekeeping forces was also one of the factors contributing to the expansion of human trafficking in the post-war period. Specifically, human trafficking is closely related to conflict, not only because of poverty and forced migration but also because of the presence of peacekeepers. In accordance with Annex 1 of the Dayton Peace Agreement signed in 1995, 76.000 peacekeepers were deployed in Bosnia and Herzegovina. The presence of international peacekeeping forces consequently led to the growth of the sex industry. In this period, a large number of nightclubs were opened, where women and children were sexually exploited, while the users of sexual services were, among others, the peacekeepers. Such a situation existed until 2000, when a female member of the American IPTF contingent in Bosnia and Herzegovina, Kathryn Bolkovac, publicly pointed out the involvement of members of the peacekeeping forces in human trafficking, which was a turning point in the institutional response to human trafficking (Human Rights Watch, 2002). From that moment on, this long-ignored problem has become one of the priorities of the international community in Bosnia and Herzegovina and domestic institutions.

Although the number of identified victims of human trafficking has significantly decreased in the meantime, the conflict in Bosnia and Herzegovina has had a long-term impact on its political culture, social cohesion and trust in government institutions. In the long term, the conflict has divided society along ethnic lines, which inevitably decreased the level of mutual trust and trust in common state institutions (Šalaj, 2009).

Today, there is no institutional vacuum anymore. On the contrary, there are many intuitions in Bosnia and Herzegovina which are responsible for tackling human trafficking: the Ministry of Security of Bosnia and Herzegovina, law enforcement agencies at the state or entity levels, judiciary at the state and entity levels, strike force for combating trafficking in human beings and organised illegal immigration.[1] Bosnia and Herzegovina has adopted the National Strategy for Combating Trafficking in Human Beings for 2020-2023 (Strategy for Combating Trafficking in Human Beings in Bosnia and Herzegovina for the period 2020-2023), including the Action Plan for the Implementation of the Strategy. In addition, Bosnia and Herzegovina has established a legal framework for prosecuting human trafficking at the state and entity levels. However, there are specific obstacles to an adequate response to the problem of human trafficking, such as mild punishment for traffickers below the statutory minimum, lack of financial support for anti-trafficking activities and coordination with NGOs to identify victims, insufficient financial support for day-care centres for street children and lack of socio-economic programs for the inclusion of victims, including financial compensation to the victim charged from the offender in the course of criminal proceedings (GRETA, 2022). A particular problem relates to the prevention of and combating human trafficking for labour exploitation, primarily in terms of strengthening institutional capacities and cooperation (GRETA, 2022, p. 44).

Current trends indicate that human trafficking in Bosnia and Herzegovina is still an ongoing problem. Between 2017 and 2021, a total of 306 potential victims of human trafficking were identified. The largest number of potential victims, 282 out of 306, were citizens of Bosnia and Herzegovina. The remaining victims originated from Serbia, Montenegro, North Macedonia, Libya, Afghanistan, Syria, Iran, Sri Lanka and the Netherlands. Regarding the age structure, 62% were minors. According to the gender structure, 212 potential victims were female, 89 were male, and five were of unknown gender (GRETA, 2022, p. 9).

Bosnia and Herzegovina is located on the so-called "Balkan migrant route". It is, to the greatest extent, a country of transit for migrants heading towards the European Union countries. It is estimated that between January 2018 and December 2020, about 70,000 migrants, including a great number of unaccompanied children, passed through BiH. Only three victims of human trafficking were identified among them in the mentioned period (GRETA, 2022, p. 9). However, it can be assumed that the number of actual victims of human trafficking in Bosnia and Herzegovina is actually higher, especially the number of victims of sexual exploitation, which takes place in private apartments and other secret locations (US Department of State, 2021).

Human trafficking in Bosnia and Herzegovina is a nexus of criminal activities, conflict, poverty, social inequalities and institutional weaknesses.

[1] Decision on the formation of the Strike Force for combating trafficking in human beings and organized illegal immigration was adopted by the Council of Ministers (*Official Gazette of Bosnia and Herzegovina*, no. 3/04). The Strike Force consists of representatives of prosecutors' offices, law enforcement agencies, the tax agency, the Financial Police, and the Border Police. The Strike Force cooperates closely with the National Coordinator for combating trafficking in human beings and illegal migration in Bosnia and Herzegovina. Additionally, it cooperates with international law enforcement agencies and non-governmental organizations in Bosnia and Herzegovina.

3. HUMAN TRAFFICKING – HUMAN SECURITY PERSPECTIVE

Human trafficking represents one of the most serious forms of human rights violations, which has serious physical and psychological consequences for the victims (Milković, 2020). The victims are mainly recruited from poor, politically unstable, and conflict-prone countries (Akee, Basu, Chau, & Khamis, 2010. Nelson, Guthrie, & Coffey, 2004). Human traffickers exploit these weaknesses and focus on the most vulnerable categories of the population as potential victims (Gjermeni *et al.* 2008; Jones, Engstrom, Hilliard, & Sungakawan, 2011. Shelley, 2010).

The roots of the idea of human security lie in the geopolitical changes which occurred in the late 1980s and early 1990s. The end of the Cold War and of the bipolar world brought new perspectives on security in the post-Cold War era. Instead of military threats that dominated during the Cold War, human security focuses on human rights and sustainable development. The notion of human security entered the political and academic discourse with the publication of the Human Development Report by the United Nations Development Program (hereinafter: UNDP) in 1994 (UNDP, 1994). Although much criticised in terms of its practical applicability, theoretical generality and vagueness (Lipovac & Glušac, 2011), the notion of human security triggered a series of theoretical debates, scientific research and practical policy activities. Human security refers to the protection of an individual's personal safety and freedom from direct and indirect threats of violence (Bajpai, 2000). The notion of human security, in the broadest sense, includes freedom from fear and want (UNDP, 1994). The essence of the notion of human security is a human being as the referent object of security, in other words, what is being protected.

The 1994 UNDP report gives a long list of threats to human security, which has seven dimensions: economic, food, health, environmental, personal, community, and political security.[2] Regarding its causes and consequences, the phenomenon of human trafficking, directly or indirectly, includes all seven dimensions of the notion of human security. Paragraph 3a of the United Nations General Assembly Resolution on human security of September 10, 2012, states that human security, among other things, includes:

> "The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential" (United Nations, 2012).

Human trafficking is the antithesis of the notion of human security. It deprives the victims of their freedom and dignity, and they often live in poverty and in difficult conditions that threaten their personal safety. Victims do not have an equal opportunity to enjoy all their rights on par with the other citizens. The possibilities for the development of their human potential are often missing. The scale of the phenomenon of human trafficking at the global level, which represents violations of human rights in the countries of origin, transit, and destination of victims of human trafficking, is worrying. The size of the population at risk

[2] For more details, see: *Human Development Report 1994: New Dimensions of Human Security* (UNDP, 1994, pp. 22-33).

of becoming potential victims of human trafficking is also a reason for deep concern (Clark, 2003). Human trafficking cannot be viewed outside the context of the state, whose institutions are obligated to provide protection to vulnerable categories of its population. As stated in the Resolution of the General Assembly of the United Nations, it is the responsibility of every state to "ensure the survival, livelihood and dignity of [its] citizens" (United Nations, 2012). The notion of human security should serve as conceptual foundations for an institutional framework that would protect vulnerable categories and provide full support to victims of human trafficking. The role of the international community is to provide the necessary support to governments upon their request so as to strengthen their capacities to respond to current and emerging threats (Clark, 2003),[3] including human trafficking.

4. INTERNATIONAL CONVENTIONS ON COMBATING HUMAN TRAFFICKING RATIFIED BY BOSNIA AND HERZEGOVINA

International documents identify human trafficking as a crime against humanity and values protected by international law. Human trafficking violates the right to life and the right to freedom. Human trafficking is contrary to the prohibition of forced labour and slavery. International conventions prescribing the prohibition of human trafficking are important instruments with a strong impact on the countries that have signed and ratified them. Bosnia and Herzegovina has ratified the following international instruments on the prohibition of human trafficking: the United Nations Convention against Transnational Organized Crime (2000), the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989),[4] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000),[5] the Forced Labour Convention No. 29 (1930),[6] the Rome Statute.[7]

[3] The idea that the state protects its citizens is not new and dates back to ancient times. What is new is that the issue of human rights and human development is now viewed in the context of international security. Human rights, human development and security are viewed from a supranational perspective. They are not a matter of national security, but the security of an individual.

[4] The 1989 Convention on the Rights of the Child is an integral part of the Constitution of Bosnia and Herzegovina and is contained in its Annex I.

[5] Bosnia and Herzegovina became a member of this protocol on the basis of the Decision on Ratification of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2002, *Official Gazette of Bosnia and Herzegovina*, no. 5/02.

[6] The Forced Labor Convention, No. 29, *Official Gazette of Bosnia and Herzegovina*, International Agreement, no. 25/1993, and other international conventions on the right of workers have been ratified by BiH, such as the Convention on the Employment of Women Before and After Childbirth, the Night Work (Women and Minors) Convention, the Employment Injury Benefits Convention, including other international conventions available at: https://lnss-bosnia-herzegovina.libguides.com/c.php?g=667337 (6. 10. 2022).

[7] The Rome Statute was ratified by the Decision of the Presidency of Bosnia and Herzegovina with the previously obtained consent of the Parliamentary Assembly of Bosnia and Herzegovina and published in the Official Gazette of Bosnia and Herzegovina, International Agreement, No. 2/02. On the basis of Article IV 4, paragraph 4(a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court at the session held on October 19.

The regional instruments ratified by Bosnia and Herzegovina which prescribe the prohibition of forced labour and slavery are the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights)[8] and the Council of Europe Convention on Action against Trafficking in Human Beings.[9] In addition, important regional documents focused on the suppression of child sex tourism are the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (also known as the Lanzarote Convention), the Council of Europe Convention on Contact Concerning Children, and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[10] The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,[11] signed and ratified by Bosnia and Herzegovina in 2020[12], was adopted with the aim of confiscating proceeds acquired by the perpetrator from human trafficking through the prevention and fight against human trafficking.

5. CRIMINAL LEGISLATION ON COMBATING HUMAN TRAFFICKING AND JUDICIAL PRACTICE IN BOSNIA AND HERZEGOVINA

The criminal legislation of Bosnia and Herzegovina is aligned with international conventions concerning the prohibition of human trafficking. Confirmed international agreements are regarded as part of the legal order of a country, while the instruments for the implementation of international agreements are the norms of national legislation prescribing sanctions for a specific criminal offence. Due to the implementation of international norms concerning the prohibition of human trafficking, Bosnia and Herzegovina criminalised human trafficking for the first time in 2003. The first definition of human trafficking contained in national legislation was harmonised with the definition of human trafficking laid down in the Palermo Protocol, but subsequent amendments to the criminal codes of Bosnia and Herzegovina ensured compliance with the definition contained in the Council of Europe Convention.

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[8] Paragraph II, item 2 of the Constitution of Bosnia and Herzegovina stipulates that international standards, rights and freedoms prescribed in the European Convention on the Protection of Human Rights and Freedoms and its additional protocols are directly implemented in Bosnia and Herzegovina. These acts take priority over all other laws. The European Convention on Human Rights is part of the Constitution of Bosnia and Herzegovina.

[9] Council of Europe Convention on Action against Trafficking in Human Beings, *Official Gazette of Bosnia and Herzegovina,* International Agreement, no. 14/07.

[10] The Bosnia and Herzegovina Presidency adopted the Decision on the Ratification of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) and Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007, *Official Gazette of Bosnia and Herzegovina*, International treaty, no. 11/12.

[11] The The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, *Official Gazette of Bosnia and Herzegovina*, International Agreement, no. 4/20.

[12] The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, *Official Gazette of Bosnia and Herzegovina*, no. 4/02.

Human trafficking is defined in Chapter XVII of the Criminal Code of Bosnia and Herzegovina and falls into the group of crimes against humanity and values protected by international law, while the codes of the two entities define human trafficking as a crime against the rights and freedoms of citizens. The offence of human trafficking with an element of foreignness is prescribed in the Criminal Code of Bosnia and Herzegovina, while the offences related to trafficking of citizens of Bosnia and Herzegovina and within the borders of Bosnia and Herzegovina, are found in the criminal codes of the two entities and the Brčko District of Bosnia and Herzegovina. Human trafficking is a complex criminal offence which consists of three elements with alternative forms of execution: a) the act, b) the means, and c) the purpose. All three elements of the offence of human trafficking (the act, the means, and the purpose) must be cumulatively fulfilled for the offence to exist.

However, all three cumulative conditions do not have to be met when the victim of human trafficking is a person under the age of 18. Regarding minors, the existence of the act and the purpose is sufficient for the existence of the offence of human trafficking. The Court of Bosnia and Herzegovina found that the offence of human trafficking is considered to be completed when some acts of crime with the aim of exploiting the person who is the object of the act have been undertaken, while for the existence of a completed criminal offence, it is not necessary that this goal be achieved.[13] An essential element of the crime of international human trafficking is that the victim/aggrieved person does not have citizenship or residence in the country of exploitation. Given that status of the victim was set alternatively in the law, *i.e.* it relates to his/her residence or citizenship as alternative conditions, the act of international human trafficking will be established if the victim has the citizenship of Bosnia and Herzegovina but does not have residence.

The consent of the victim of human trafficking to exploitation does not affect the existence of the offence of human trafficking. This position was taken by the Court of Bosnia and Herzegovina prior to the amendments to the 2001 Criminal Code of Bosnia and Herzegovina.[14] Human trafficking is motivated by the financial gain of the perpetrator of the offence, yet the intention to obtain the proceeds from the crime is not an element of the offence of human trafficking. The offence of international human trafficking, per its nature, belongs to the group of permanent offences, which last as long as the state of subordination and various forms of exploitation for the purpose of exploitation last.

An efficient fight against human trafficking is also undermined by the fact that some forms of exploitation typical for human trafficking at the same time represent elements of another punishable crime. For instance, prostitution[15] is one of the acts of execution, *i.e.* one of the forms of exploitation of the criminal offence of human trafficking,[16] and at the same time, prostitution is criminalized within the group of offences against sexual integ-

[13] Judgment of the Court of Bosnia and Herzegovina, no. Kž-125/05 of December 16, 2005.

[14] Judgment of the Court of Bosnia and Herzegovina, no. KžK-1/07 of February 15, 2007.

[15] Judgment of the Cantonal Court in Novi Travnik, no. 06 0 K 006325 14 K of March 4, 2015.

[16] Article 145 of the Criminal Code of Republika Srpska, *Official Gazette of Republika Srpska*, no. 64/17. Article 210(a) of the Criminal Code of the Federation of Bosnia and Herzegovina, O*fficial Gazette of the Federation of Bosnia and Herzegovina,* no. 36/03. Article 207(a) of the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of Bosnia and Herzegovina*, no. 19/20.

rity or the group of offences against the rights and freedoms of citizens.[17] Also, in judicial practice in Bosnia and Herzegovina, the demarcation between the offence of neglecting and abusing a child and the offence of human trafficking is rather vague.[18] All criminal codes of Bosnia and Herzegovina[19] apply the principle of impunity to the victims of human trafficking who were forced to commit criminal offences.

The criminal proceedings against the accused for human trafficking were most often pursued as the regular criminal proceedings via some form of agreement. More precisely, a plea bargain was concluded in 41 (39.4%) cases out of a total of 104 analysed cases, which were brought before the courts in Bosnia and Herzegovina from 2003 to 2021 (Mujanović, Datzer, Vučinić, & Buha, 2022, p. 112). For example, in the criminal proceedings in the Ahmetović case,[20] which was conducted before the Court of Bosnia and Herzegovina, the accused, who physically abused and exploited a disabled victim for the purpose of forced begging and forced labour was, based on a plea bargaining, sentenced to 11 months of imprisonment suspended and placed on probation for three years. The imposition of a more lenient criminal sanction is also evident in the Hajrlahović case,[21] which involved a girl forced into prostitution who was under the custody of the first defendant. There, the court accepted the prosecution's proposal to impose sanctions contained in the plea bargain, which were below the statutory minimum.

The courts' decision to accept plea bargaining agreements in human trafficking cases is not in accordance with the objectives of the penal policy of general and special prevention. Plea bargaining is present in numerous continental European criminal procedures, yet the tendency of widespread recourse to the practice of plea bargaining is sometimes described as an "infection" with plea bargaining. There is no one model of plea bargaining

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[17] Prostitution is criminalised within the group of offenses against sexual integrity, Article 169 of the Criminal Code of Republika Srpska, *Official Gazette of Republika Srpska*, no. 64/17. In the Criminal Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 36/03, as well as in the Criminal Code of the Brčko District of Bosnia and Herzegovina the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of BiH*, no. 19/20, prostitution is criminalised as a punishable offense within the group of offenses against sexual freedom and morality. The analysed cases contained in the Report on the prosecution of human trafficking cases in Bosnia and Herzegovina from 2003 to 2021 indicate that in 60 cases (57.7%), the criminal offense was qualified as the solicitation of prostitution regarding the manifest forms of human trafficking or related offenses (Mujanović, Datzer, Vučinić & Buha, 2022).

[18] In the court case No. 71 0 K 156546 15 K of January 22, 2015, the Basic Court in Banja Luka found the accused guilty because she used a minor child for begging and grossly neglected her duty to care for and educate a minor child. The more serious form of the offense of neglecting children by forcing them into work is different from the offense of human trafficking, firstly because the perpetrator of the offence of child neglect and abuse can only be a person who has the duty of raising and caring for the child. Given that more severe forms of the offence of neglecting children are reminiscent of human trafficking, it is worrying that the law prescribes a more lenient punishment for this offense compared to the offense of human trafficking, which leaves to the competent authorities the choice to opt for a more favourable statutory criminalisation.

[19] Article 145, paragraph 9 of the Criminal Code of Republika Srpska, *Official Gazette of Republika Srpska*, no. 64/17. Article 210 (a), paragraph 10 of the Criminal Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 36/03. Article 186, paragraph 10 of the Criminal Code of Bosnia and Herzegovina. Article 207 (a), paragraph 9 of the Criminal Code of the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of BiH*, no. 19/20.

[20] Judgment of the Court of Bosnia and Herzegovina, Almir Ahmetović of September 28, 2011.

[21] Judgment of the Cantonal Court in Bihać, Ema Hajrlahović *et al*, of January 20, 2011.

that is applied in all countries. Various criminal legislations have adapted plea bargaining to the social needs and justice needs of their countries. Therefore, there are different legal solutions, ranging from the most restrictive, allowing plea bargaining only for less serious crimes, to those providing for an agreement for all offences (Škulić, 2009, p. 290). The court is not obligated to accept a plea bargain and should make sure that a plea bargain is not to the detriment of the aggrieved party or the victim of the crime.

The law in Bosnia and Herzegovina stipulates that, when considering the plea bargain, the judge in the preliminary proceedings is obligated to verify, among other things, whether the accused understands that he/she is waiving the right to the criminal sanction to be imposed on him, which is understandable because it is the result of the arrangement between the accused and the prosecutor. Also, the court should determine whether the aggrieved party has been given the opportunity to plea before the prosecutor regarding the property claim. The aggrieved party also has the right to appeal the decision on the property claim. However, the question arises as to the meaning of the legal provision that stipulates the court's obligation to inform the aggrieved party of the results of plea bargaining if the aggrieved party has no right to appeal the decision on the proposed criminal sanction contained in the plea bargain that has been accepted.

In accordance with Article 1 of the European Convention on Human Rights, the victim could invoke the right to have the perpetrator convicted if found guilty, but the problem is that the victim does not have a procedural status; hence, it is deprived of any procedural rights. The question arises as to whether Article 13 of the European Convention on Human Rights could apply to the victim, which guarantees everyone whose rights and freedoms have been violated the right to an effective legal remedy before domestic state authorities even when the violation was committed by persons acting in an official capacity. Thus, the victim would be able to invoke the violations of Articles 2 to 8 of the European Convention on Human Rights in a situation where law enforcement officials, prosecutor's office, or court officials did not effectively carry out official actions regarding the criminal offence. However, there is a formal obstacle for the victim to lodge a petition to the European Court of Human Rights because the victim must first use all available procedural means in national legislation to defend his/her rights (Mrvić, 2018, p. 12). In criminal proceedings, the victim has the right to appeal the decision on the property claim and the decision on the cost of the criminal proceedings.

6. CONCLUSION

Human trafficking in Bosnia and Herzegovina has a long history, from the post-war period onward. In the meantime, Bosnia and Herzegovina has made significant efforts to build institutional capacities to combat human trafficking at both the state and entity levels. However, problems have been observed in judicial practice, which calls into question the state's ability to provide an adequate level of protection for human trafficking victims.

In the criminal legislation of Bosnia and Herzegovina, the prescribed penalties for human trafficking are not mild. Still, the criminal codes favour certain aspects of substantive law, such as extenuating circumstances, special prevention, the need for resocialisation, and

the application of plea agreements. There is also the problem of the victim's marginalised procedural position in the criminal proceedings, which has also brought to the lenient sentencing of the perpetrators. The problems pertaining to an effective fight against human trafficking lie primarily in the flawed procedural position of the aggrieved party, who has not been given many important procedural rights in criminal proceedings, such as the right to present evidence or lodge an appeal against the judgment. In order to successfully combat human trafficking, the practice of qualifying human trafficking as a less serious offence should be prevented by law.

In plea bargaining, the prosecutor may propose a sentence below the minimum punishment prescribed by law. The law does not prescribe an obligation for the court to accept the proposed sentence or agreement. We are of the opinion that the application of plea-bargaining agreements in human trafficking cases should be limited, at least in such a way that the court does not accept a sentence which is below the statutory minimum prescribed for the offence of human trafficking.

The concept of human security arose as a response to the inability of the state to fulfil its part of the social contract with the individual. In this context, the question may be asked as to what extent the existing institutional framework in Bosnia and Herzegovina successfully protects victims' rights, especially freedom from fear, as one of the two fundamental principles of the concept of human security. For this reason, it is necessary to review the existing judicial practice and focus on the human rights of the victim. The existing practices call into question the effectiveness of the institutional response to human trafficking and the ability of Bosnia and Herzegovina to protect the rights of human trafficking victims. The mild penal policy towards human trafficking perpetrators and the violation of the rights of the victim guaranteed by the international conventions is a matter of human security. The state does not provide victims with adequate legal protection, and the extremely lenient sentences for human traffickers are not in line with the goals of special and general prevention.

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SUSTAINABILITY IN FINANCE

Sustainability has received more and more attention over the past years and its environmental, social and governance (hereinafter ESG) factors even more so. The theme has long passed the stage of being just about the environment or the climate. The term ESG has a very wide scope. It encompasses an extensive range of considerations, including tax. Major international organizations have recognized the role that taxation could play in achieving the United Nations Sustainable Development Goals. Contributing their fair share to public revenue has become a reputational risk, especially to multinational businesses. Through the lens of ESG factors, aggressive tax optimization and harmful tax strategies are against the sustainable future. In order to give a more realistic view of how the interaction of ESG and taxation can promote economic sustainability, this paper explores the following issues. The fundamentals of ESG in finance underline the emerging role of transparency in taxation by analysing the adopted measures in the reporting frameworks around the globe. The article examines the Balkan region by highlighting and comparing the completed ESG specialised tax measures in Serbia, Croatia and Hungary.

Keywords: Sustainability, ESG, Taxation, Tax compliance, Tax evasion.

1. INTRODUCTION

The concept of sustainable development was described for the first time in 1987 when a group of experts from the World Commission on Environment and Development (hereinafter: Brundtland Commission) adopted a recommendation on environmental sustainability, entitled "Our Common Future." The document issued by the United Nations described sustainable development „as a development which meets the needs of the present without compromising the ability of future generations to meet their own needs".[1] In Rio de Janeiro, in 2012, Member States adopted the outcome document "The Future We Want" in which they decided, inter alia, to launch a process of developing a set of Sustainable

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[1] Report of the World Commission on Environment and Development 1987. *Our Common Future.* Available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (07. 8. 2022.).

Development Goals (hereinafter SDGs) to build upon the Millennium Development Goals and to establish the United Nations High-level Political Forum on Sustainable Development. In 2015, the 193 Member States of the United Nations at the General Assembly began the negotiation procedure on the post-2015 development agenda. The process culminated in the subsequent adoption of the 2030 Agenda for Sustainable Development, with 17 SDGs at its core. The Agenda 2030 seeks to achieve sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner.[2]

The promotion of ESG factors is a fundamental part of the mentioned concept. ESG issues were first mentioned in the 2006 United Nations' Principles for Responsible Investment (hereinafter PRI) report consisting of the Freshfield Report[3] and a joint initiative called "Who Cares Wins"[4] of financial institutions at the invitation of the United Nations.[5] That was the first time that ESG criteria were required to be incorporated in the financial evaluations of companies. Since then, the emphasis and the scope on ESG is increasingly growing and broadening (Bujtár, 2022, p. 6). Major institutional investors playing a key role in promoting the environmental, governmental and social criteria have been raising higher compliance expectations towards companies for years (Bujtár, 2021, p. 145). Taking the process further, international organisations and countries are establishing strategies, programmes, initiatives, soft law recommendations and promulgating binding rules in order to ensure environmental compliance – inter alia – in the financial sector. With the increased focus on business practices globally, the importance of complying with tax laws in a sustainable manner has never been more important than today. The article observes a relatively new, but fundamental element of this environmental compliance by describing the sustainability aspect in taxation.

2. THE CONVERGENCE OF ESG AND TAXATION

In years gone by, businesses looked primarily to increasing shareholder returns, paying less attention to how their practices affected the environment and society. However, things have changed since the financial crisis in 2008. Public expectations about corporate tax behaviour became a mainstream topic, where there was a growing belief that undertakings were not paying their „fair share" of tax. Furthermore, the abuses exposed in the Panama papers[6], the Paradise papers[7] and the Luxembourg

[2] United Nations 2022. *Sustainable Development Goals.* Available at: https://sdgs.un.org/goals (10. 8. 2022).

[3] UNEP 2005. *Finance Initiative.* Available at: https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf (20. 07. 2022)

[4] Demystifying ESG: Its History & Current Status 2020. Available at: https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--current-status/?sh=50dcc7712cdd (03. 7. 2022).

[5] UN Environment Programme 2004. *Who Cares Wins –The Global Compact Connecting Financial Markets to a Changing World.* Available at: https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf (10. 7. 2022).

[6] In 2016, a German newspaper the *Süddeutsche Zeitung* released documents of a giant leak of more than 11.5 million financial and legal records, exposing a system that enables crime, corruption and wrongdoing, hidden by secretive offshore companies.

[7] The Paradise Papers are a set of over 13.4 million confidential electronic documents relating to offshore investments that were leaked to German reporters from the newspaper *Süddeutsche Zeitung.*

leaks[8] have sharpened this perception. Since early 2020, the COVID-19 pandemic has placed additional pressure on the growing importance of responsible corporate behaviour, because governments worldwide are facing shortfalls in tax revenues along with increasing social challenges (Corwin *et al*, 2021, p. 2). In recent years, several international organisations have developed programmes that are specifically designed to combat aggressive tax actions or strategies (Menez Montenegro, 2021, p. 1). The Organisation for Economic Cooperation and Development (hereinafter OECD) is at the forefront of the fight against tax evasion and shadow economy for decades. In 2013, the OECD launched the Base Erosion and Profit Shifting project (hereinafter BEPS) with the aim to revise the global international tax framework. As a continuation of this work, over 135 countries and jurisdictions created a new two-pillar plan to reform international taxation rules and ensure that multinational enterprises pay a fair share of tax wherever they operate. This project's name is BEPS 2.0. The plan addresses many issues of aggressive tax planning, including transparency, because the OECD is a catalyst for – among others – increasing tax transparency, which is a key ESG aspect.

Tax can be seen to intersect with ESG – among others - is in intensified scrutiny of corporate tax practices (Corwin *et al*, 2021, p. 2). The amount of tax paid can be seen as a measure of Corporate Social Responsibility (hereinafter CSR), which „is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large" (R.Holme & P.Watts, 2000, p. 8). CSR is different from corporate governance, because the rules of corporate governance are more concerned with the inner workings of a corporation, whereas CSR is more about „being a good corporate citizen" (Barnabás, 2020, p. 30). CSR connects to the social dimension of ESG, and thus can serve as a measure of sustainability. Taxation has another link to ESG in the governance dimension, with an expectation that companies will conduct themselves in an appropriate manner with regard to corporate policies such as corporate governance rules, code of conduct or principles governing tax choices. Regarding this, businesses are increasingly adopting and articulating clear tax principles, aligned to their broader ESG agenda. This has become a critical element in providing them with their „social licence" to operate, which is ever more important to shareholders, investors and wider communities. To sum up, we can state that tax is a key ESG metric. In the following paragraph, the article shows some promising initiatives, which are aiming to enhance transparency in relation to companies' tax practices.

3. TAX TRANSPARENCY AS A KEY FACTOR

In 2014, the OECD approved the Common Reporting Standard (hereinafter CRS) in response to the G20 request. It is an automatic exchange system, calling on jurisdictions

[8] Sometimes shortened to Lux Leaks or LuxLeaks is the name of a financial scandal revealed in 2014 by a journalistic investigation conducted by the International Consortium of Investigative Journalists. The LuxLeaks' disclosures attracted international attention and comments about tax avoidance schemes in Luxembourg and elsewhere.

to obtain information from their financial institutions on an annual basis.[9] The standard underlined that cooperation between tax administrations is critical in the fight against tax evasion and in protecting the integrity of tax systems. A key aspect of that cooperation is the exchange of information. The OECD designed another reporting rule under the BEPS project. Pursuant to it, all large multinational enterprises are required to prepare a country-by-country (hereinafter CbC) report with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates. The CbC report is shared with tax administrations in these jurisdictions, for use in high-level transfer pricing and BEPS risk assessments.[10] The European Union and unilateral attempts by several countries tried to change the course of the CbC reports by pressuring the parties to let information become public. In 2021, the institutions of the European Union reached an agreement on the public country-by-country reporting directive (hereinafter public CbCR directive). Furthermore, the accepted modification will require multinational groups with a total consolidated revenue of EUR 750 million to report either whether they are EU- parented or otherwise have EU subsidiaries or branches of a certain size. The report will require information on all members of the group, including in non-EU states, about description of their tax practices and activities. The public CbCR directive entered into force on 21 December 2021, and Member States will have to transpose the Directive into national legislation by 22 June 2023.[11]

In addition to the binding and non-binding regulations, the demand for more tax transparency from non-governmental organizations, investors, and the public has led to promising achievements too.[12] The Global Reporting Initiative (hereinafter GRI) founded in 1997 is an independent international organization that helps businesses take responsibility for their impacts, by providing them guidelines on the public reporting of tax and financial data.[13] The GRI207 introduced in 2019 by the organization is a voluntary standard that builds on OECD's country-by-country reporting rules. It is designed to help a company understand and communicate its management approach in relation to tax, and to report its revenue tax and business activities on a country-by-country basis. It gives insight into the organization's tax practices in different jurisdictions. The report can include the organization's tax principles, its attitude to tax planning, can provide a view of its use of tax havens: it can also include the

[9] OECD 2017. *Standard for Automatic Exchange of Financial Account Information in Tax Matters Second Edition.* Available at: https://www.oecd-ilibrary.org/docserver/9789264267992-en.pdf?expires=1660726067&id=id&accname=guest&checksum=1E189E434ABB7FE522E674BB72DA115E (20. 7. 2022).

[10] Action 13 Country-by-Country Reporting 2022. Available at: https://www.oecd.org/tax/beps/beps-actions/action13/ (10. 8. 2022).

[11] EU Directive 2021. EU, Decision of the European Parliament and of the Council of 24 November 2021 on amending EU Directive 2013/34 as regards disclosure of income tax information by certain undertakings and branches. L 429/13. 1. 12. 2021.

[12] EY 2021. *Tax transparency in your sustainability report (GRI 207).* Available at: https://assets.ey.com/content/dam/ey-sites/ey-com/nl_nl/topics/assurance/assurance-updates/ey-tax-transparency-in-your-sustainability-report-gri-207.pdf (15. 8. 2022).

[13] GRI 2022. *Our mission and history.* available at: https://www.globalreporting.org/about-gri/mission-history/ (12. 7. 2022).

degree of risk the organization is willing to accept, and the organization's approach to engaging with tax authorities.[14]

4. IMPLEMENTING ESG IN TAXATION IN SERBIA, CROATIA AND HUNGARY

In recent years, the Serbian Government transformed the nation's tax system to be highly conducive to foreign investment. The tax rates are among the lowest in Europe; investors can also benefit from the available tax incentives which create excellent start-up conditions. One of the key problems and challenges of the Serbian economy is the shadow economy, which primarily refers to tax evasion.[15] According to reports by international organizations and surveys of citizen opinion, the effectiveness, transparency and accountability regarding taxation need to be strengthened.[16] In order to face the mentioned issues, Serbia is undertaking an extensive legislative amendment process aimed at harmonizing its laws with those of the European Union's *acquis communautaire* and with international norms. To prevent multinational group tax avoidance and improve the resolution of cross-border tax disputes, Serbia joined the Inclusive Framework on BEPS and has pledged to adopt minimum standards on international taxation agreed to by nations in 2015 in response to the BEPS plan. These standards include adopting tougher rules, such as agreeing to collect and exchange country-by-country reports of multinationals. Serbia must agree to improve its cross-border tax dispute resolution system.[17] CbC reporting has been applied since 1 January 2020. The introduction of the reporting system means that ultimate parent entities of a multinational group resident in Serbia are required to submit a CbC report if the total consolidated revenue of the group expressed in consolidated financial statements for the preceding period is at least the RSD equivalent of EUR 750 million.[18]

ESG compliance in Croatia is still in its early phase. However, there is undoubtedly an increase in ESG investments in the country, coupled with increased requirements in corporate and investor strategies. In addition, ESG is broadening its scope of influence to cover all economic and policy sectors; tax transparency is among the impacted areas.[19] Croatia has taken its first steps in harmonising the legislation with Action 13 of the BEPS plan by introducing CbC reporting requirements. The members of multinational enterprises whose global consolidated turnover exceeded EUR 750 million in 2016 are required, for tax periods beginning 1 January 2016 or after that date, to submit to the tax authorities

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[14] GRI 207 2019. *TAX 2019.* Available at: https://www.globalreporting.org/standards/media/2482/gri-207-tax-2019.pdf (20. 7. 2022).

[15] Highlights of Serbia's Tax System 2020. Available at: https://ceelegalmatters.com/serbia/15227-highlights-of-serbia-s-tax-system (20. 7. 2022).

[16] Transparency and Accountability Initiative in Serbia 2020. Available at: https://www.worldbank.org/en/country/serbia/brief/transparency-and-accountability-initiative-in-serbia (14. 6. 2022).

[17] Serbia joins "Inclusive Framework on BEPS" to fight tax avoidance 2018. Available at: https://mnetax.com/serbia-joins-inclusive-framework-beps-fight-tax-avoidance-26149 (20. 7. 2022).

[18] Orbitax 2020. *Serbia Publishes 2020 Budget Laws Including CbC Reporting Requirements.* Available at: https://www.orbitax.com/news/archive.php/Serbia-Publishes-2020-Budget-L-40390 (14. 8. 2022).

[19] ESG Investments Croatia 2022. Available at: https://venturexchange.hr/esg-investments-croatia/ (13. 8. 2022).

their reports together with the annual corporate income tax return.[20] The country also seeks opportunities to implement the European Union's latest achievements – including e.g. the public CbCR directive – regarding the fight against tax evasion. This is very important, because the shadow economy accounts for a significant part of the GDP of Croatia.[21] Significant amounts of cash are used in the tax crime schemes.[22] The Croatian Tax Authority have stepped up their digitalisation effort since 2013, in order to create a more efficient tax administration, to reduce the use of cash, and to make communication with taxpayers more effective and transparent.[23] The digitisation of tax services and tax administration seems to be an optimal tool for reducing the size of shadow economy.

The situation is the same in Hungary, where the Government made some fundamental changes in the tax system since 2010, with the aim to face tax evasion but also international tax competition (Szilovics, 2020, p. 2). As a consequence, the Hungarian tax system is among the most favourable in Europe, due to the friendly corporate tax environment and tailor-made incentive offers, mainly for foreign investors (Szilovics, 2019, p. 2). The country is also promoting sustainable development and ESG movement in finance. However, in order to preserve its competitive status Hungary was against the latest public CbCR directive. The main reason behind the „resistance" was, that the extended reporting obligation may deter foreign companies from investing in the country and this could lead to substantial tax revenue losses for the central budget.[24] Finally, the country agreed with the Union and will implement the applicable rules in the near future.

5. FINAL THOUGHTS

The intersection between taxation, sustainability and ESG dimensions has different outlooks. In the article, the author examined the financial side by concentrating on the tax transparency matters of the topic. Public and investor demand for greater tax transparency is likely to continue to accelerate, and build upon the presented initiatives and achievements. This phenomenon clearly leads to the whitening of the shadow economy and the restriction of tax aggressive corporate behaviours. However, we must note that there are loopholes in the current system under development. The agreement on public CbCR report is restricted to the members of the European Union, which means that companies can easily shift their taxes outside the EU by methods they already use. The current tax transparency initiatives will not affect many of the tax havens. A global consensus is the only solution. Another important issue could be the growing tax compliance demands and administration costs

[20] PWC 2022. *Croatia Corporate - Group taxation.* Available at: https://taxsummaries.pwc.com/croatia/corporate/group-taxation (10. 8. 2022).

[21] More than 30% in 2016 according to the IMF and 6,97% in the same year according to the EUROSTAT.

[22] Anti-money laundering and counter-terrorist financing measures Croatia 2021. Available at: https://rm.coe.int/moneyval-2021-24-mer-hr-en/1680a56562 (18 .8. 2022).

[23] WTS Global 2019. *Croatia: Digital taxation and digital transformation.* Available at: https://wts.com/global/publishing-article/croatia-20191024~publishing-article?language=en (17. 7. 2022).

[24] Portfolio. 2021. *Összejött a fontos brüsszeli alku: a Magyarországon működő nagy multiknak is szint kell vallania.* Available at: https://www.portfolio.hu/gazdasag/20210602/osszejott-a-fontos-brusszeli-alku-a-magyarorszagon-mukodo-nagy-multiknak-is-szint-kell-vallania-486074 (10. 6. 2022)

regarding the additional reporting obligations. Who will bear these costs? The businesses or the consumers?

The three examined countries recognized the importance of ESG factors, and have already started to implement the international standards in order to face the challenges. In the author's opinion, in addition to the modification of the legal framework towards sustainability, Hungary, Croatia and Serbia need to make some changes or upgrades in their financial literacy too, with the aim of fostering increased compliance on the part of the taxpayers.

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THE IMPACT OF EUROPEAN INTEGRATION ON THE DEVELOPMENT OF SERBIAN MONETARY LEGISLATION[1]

The subject of the paper is the impact of European monetary integration on the formation and development of domestic monetary law, and as its subject of legal regulation. European monetary law is a hybrid branch of law understood as a set of legal norms defining the monetary unit for the denomination of public debt. As such, it represents a good example of flexibility, dynamism, complexity, and the vital importance of the contemporary monetary legislation, the significance and relevance of which, in both academic and practical terms, are reflected in the preservation of monetary stability, as an essential public good, and monetary rights of the monetary citizen, i.e. citizens who live under domestic monetary jurisdiction, to have a stable and sound domestic currency. The impact of European monetary integration is particularly noticeable in the harmonisation of regulations within the competence of the central bank with supranational lex monetae. The same is true for the central bank's competence to adopt monetary legal rules from acts of secondary monetary legislation defined within the new models of macroeconomic governance in EMU during the debt crisis, which enables the harmonisation of national banking policies at the EU level. Also, the new competencies of the supreme monetary national institution with regards to the aim of maintaining financial stability, its function as the bank of last resort for preventing the financing of terrorism, and competencies related to the fight against financial crimes, confirm the thesis about the evolution of central bank competencies towards common European values and axiology of European monetary legislation. By applying the dogmatic, comparative, and axiological methods, the paper seeks to identify existing differences between domestic and European monetary legal solutions and the achieved de lege results. The paper also offers certain de lege ferenda guidelines for shaping future monetary nomotechnique aimed at providing

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the optimal and sustainable monetary legal answers to the issues arising in the realm of the law of value.
Keywords: monetary law, EU, lex monetae, monetary stability, central bank.

1. INTRODUCTION

Among the existing monetary unions, the European Economic and Monetary Union (EMU) appears as the most developed monetary union ever despite the periods of institutional and economic crises during its existence. This Union is founded on a special corpus of legal rules, which is confirmed in the fact that a very intense process of disintegration of EU monetary law is underway, from which the *Law of the European Economic and Monetary Union (EMU)* and the *Law of the European Central Bank (ECB)* stand out as independent legal disciplines. The EMU law represents the entirety of legal norms that have enabled the creation of EMU, through its comprehensive and detailed regulation during the main stages of the evolution of EMU, institutional arrangements within the centralized monetary policy, as well as the norms on the responsibility of monetary subjects for tasks assigned to them. This corpus of legal norms reflects a critical evaluation of existing rules and a cohesive synthesis of past problems, current solutions and attempts to face future challenges in the functioning of the banking union and the formation of the fiscal union to round off the EMU concept uniquely and comprehensively (Amtenbrink, Herrmann, & Repasi, 2020, p. 5). ECB law refers to the entirety of legal norms that define the organizational structure, mandate, and tort liability of the highest monetary institution of the EU, which initiates the overall legislative process and uses monetary prerogatives derived from contemporary monetary sovereignty as so-called cooperative monetary sovereignty in the realm of money (Zimmerman, 2013, pp. 24-31). It is interesting to note that the influence of the ECB law as a specialized monetary legal discipline in the years after the outbreak of the financial and pandemic crisis became very dominant in domestic monetary law, which is shown by a large number of sources of secondary monetary legislation adopted by the National Bank of Serbia in this regard, *i.e.* a large number of amended units of monetary legislation that are aligned with new trends in the field of public law monetary management.

The monetary law of the EU, as well as the law of the EMU, has strong external effects on the monetary legislation not only of the member states but also on the legislation of the states that are in the process of European integrations, as well as on their foreign trade partners, yet with much lower intensity (Feibelman, 2012, p. 137). More precisely, this influence on foreign trade partners appears to be *modest* and *indirect* and concerns the knowledge of the basic principles of the functioning of the national monetary system due to the stipulation of monetary clauses in international economic agreements (especially payment agreements and investment agreements). At the same time, the intensity and scope of the influence with the countries acceding to the EU are greater and more direct, as is observed in the harmonization of domestic regulations on the work of the central bank and the structure of its mandate, which is largely adapted to European standards. On its European integration path, the Republic of Serbia harmonised the valid sources of both substantive and procedural monetary law, as well as the central bank law, which,

through the process of disintegration, developed into an independent branch of law in the domestic legal theory and practice. The harmonisation took place to a truly astonishing extent in accordance with the current trends in European monetary legislation. That is clearly reflected in the concept of the new competencies of the National Bank of Serbia, which no longer appears to be a guardian of only monetary stability but has also become a guardian of the national financial stability, and is also in charge of cooperation with the European Banking Authority (EBA), and has concluded agreements with the Single Resolution Board and the Single Supervisory Board as the main bodies of the European Banking Union. Also, its competencies include other activities, such as those in the field of the suppression of terrorist financing, as well as the new responsibilities regarding the issue of digital assets, which were established by the Law on a Digital Property (2019), where the monetary legislator and the public state management showed readiness to regulate by law the area of digital monetary competition promptly.

2. BRIEF REVIEW OF THE SIGNIFICANCE AND AXIOLOGY OF MONETARY LAW IN THE EU AND THE DOMESTIC LEGAL SCHOLARSHIP

When considering the subject of EU monetary law, we must consider that it developed from national monetary law, which in our region was studied almost exclusively in the domain of private law because monetary obligations represent an element of various types of cargo contracts. We believe that this approach to defining national monetary law is rather narrow and inadequate because it leaves room for numerous legal gaps, which partially explain the unsatisfactory legal argumentation of domestic courts in monetary disputes (Golubović & Dimitrijević, 2020, p. 14). Namely, we think that the monetary norm must be understood as a special form of the legal norm that regulates social relations with the monetary element in the broadest sense of the word. In terms of its nature, this norm is very similar to the tax norm, which means that it regulates concrete legal-economic factual (here monetary) situation, the realisation of which is the *initio* of the monetary legal relationship. At the moment of the factum of the event determined by the monetary norm, the abstract monetary relationship becomes a concrete one and, as such, produces effects in the monetary circulation. This kind of hybrid factual situation, we note, is not determined exclusively by legal facts but also by those of economic nature, which is why it is quite clear that the legal definition of the concept of money must also include the functions of money as an economic category defined in the broadest sense.

In domestic legal science, a small number of works deal with the issue of monetary law. *Meichsner,* in his monography, defines monetary law as "a set of legal norms that, while regulating relations within the boundaries of one legal area, conceptually imply money and monetary relationships" (Meichsner, 1981, p. 40). In our opinion, this view of national monetary law today does not follow the current trends and economic conditions in the EU. This conclusion is primarily based on the fact that the "problem of intermittency" characterising the EU as a co-federation *sui generis* was not taken into account, which at the time seemed justified "because of the non-existence of international money, neither in the economic nor in the legal sense and the international monetary authority that would

introduce such a unit and sovereignly issue monetary-right regulations" (Ibid). In this context, monetary law has traditionally been treated in the international framework as an area of international private law, and the conflicts between monetary and other laws were resolved by applying conflict of law norms. It is clear that the mentioned argument no longer finds its justification in the objective social reality, given that in the past thirty years, there has been an intensive development of the European and international monetary order thanks to the work of international institutions that created "new" international monetary law, whose institutes, standards and principles must be taken into consideration by the domestic legislator when regulating the internal monetary rules.[2]

The prominent theorist of monetary law, *Arthur Nussbaum*, was the first to talk about this tendency in his capital work "*Money in the Law*", which represents the first comprehensive study of the science of monetary law, although it was not regarded as belonging to the obligation law scholarship.[3] Considering the *modus operandi* of monetary sovereignty, the author states that international monetary law cannot be clearly "subsumed under the domain of private international law, nor the domain of public international law" because it is a hybrid branch of law. Similarly, this work was written in 1939, before the extensive globalization of international financial flows took place. Today it is unequivocally clear that international monetary law is much closer to the branch of public law because the main subjects in international monetary legal relations are specialized international economic organizations, such as the International Monetary Fund, the World Bank, the Bank for International Settlements and the European Central Bank (Dimitrijević, 2018, p. 42).

The relevance of EU monetary law stems from the fact that solving monetary problems directly affects the rights and obligations of subjects in monetary relations. This issue is particularly clear to practising lawyers, especially lawyers who cannot give a precise answer to the question of what is the attitude of the legal profession towards changes in the law of value. Hence, their answer is usually superficial and incomplete. Interestingly, many monetary problems throughout history could not be solved at a given moment, so their resolution was deferred to the extent that they became a burden to future generations. That is visible in the fact that some of the problems that escalated during earlier monetary crises are still relevant today, such as the consequences of hyperinflation, oil crises, and bad monetary reputation due to the collapse of the domestic monetary system (Hirschberg, 1979, pp. 92-93).

In reality, a distinction can be made between the *two legal corpuses* (Hirschberg, 1981, p. 271). The *first corpus* is traditional and, as such, included in textbooks, statutes, judgments, and precedents. The main characteristic of the *second corpus* is that it is a direct consequence

[2] Even though the international monetary order of the 70s and 80s of the last century was not developed in today's sense of the word, we think that regardless of that fact, the concept of monetary sovereignty had to be seen within the framework of the international order. One can better understand the norms of classical international monetary law, which will be the subject of the later analysis, in the manner of its manifestation, conditions, and obstacles for the realization of state monetary prerogatives outside the territory of the domestic monetary jurisdiction.

[3] Although the aforementioned work was written in the first half of the 20th century, the author's argumentation, in our opinion, was far ahead its time. Although it was a pioneering study in a certain sense (since it is the first comprehensive monetary legal thought), its quality has become the standard to which modern theorists of monetary law still strive today.

of modern legislative activity aimed at solving contemporary social and economic problems (here, we can also classify monetary law). However, with its modern methodology and principles, legal jurisprudence has not yet managed to unify these two branches of law. In addition to various traditional and classical legal rules, the concept of *emergent law* also finds its place in practice. It represents a different manifestation of the public policy program, which also means that it is interpreted and applied differently in crisis periods than in normal circumstances (Dimitrijević, 2019, p. 301). We find the full meaning of monetary law in preventing the harmful effects of recessions and the spreading of those effects, primarily in the social and economic realm. For a long time, public policy creators paid attention only to the prevention of crises during wars or political revolutions. Still, over time it became clear that special legal rules must be established to prevent and resolve economic crises in all their forms (financial, monetary, public debt crises and others). In essence, monetary law is the response of legal science to the changes that follow the law of value when the scope of legal rules in the monetary sphere is tangible.

3. EUROPEAN CENTRAL BANK AS A KEEPER OF MONETARY LEGISLATION

Monetary legal thought in the EU area is highly valued in theory and practice, which is proven by the comprehensive study of the discipline of substantive and procedural EU monetary law, the discipline of EMU law, and the law of the European Central Bank. In terms of the nature of contemporary banking powers, subject matter and territorial range of their decisions, this law more and more concerns some other segments of the economic policy of the Union, such as fiscal policy, environmental policy, a policy of technical and technological development, as well as non-economic areas, such as social policy, living standards and protection of human rights. In our opinion, these disciplines should justifiably find their place in the domestic syllabi of studying legal sciences as an independent branch of the legal system.

The legal subjectivity of the ECB is very developed and specific, which is not surprising considering its role in the international monetary order. Since the initial years of its establishment, the ECB's institutional structure has always developed and adapted to current events on the monetary scene. That was true both in terms of formal and essential elements, which greatly influenced the evolution of its competencies, that was in the first years of the Union based on classical monetary principles on the tasks of the central bank and how its operations should be organized. Later on, it reflected the modernisation of the basic postulates with new tasks from the domain of fiscal and other segments of general economic policy, to the point of arriving at completely new views, seen by some scholars as somewhat radical and peculiar, on the conception of the ECB as the legislator the mandate of which surpasses its character of the EU communitarian body and exists independently of it.

The jurisdiction of the ECB in the creation of the so-called *soft legislation* is of inestimable importance for the science of contemporary monetary law because its effect on legal transactions is far from its attribute of "soft" law. The guidelines, instructions, measures, announcements, interpretations and measures applied by the European Central Bank are

indispensable sources for filling legal gaps in EMU regulations that cannot be replaced by any other type of legal and other materials. The primary monetary legislation could not play its role during the crisis due to its rigidity and excessive formalism, and the need to harmonise the activities of various subjects participating in its adoption. Through its crisis management actions, the ECB has shown the ability to include the problem of the social market in its programs and implement its mandate in a "more humane way", and provide the much-needed "human component" to the overall scheme of the EU's monetary policy.

Speaking about the judicial assessment of the legality of the ECB decisions, as well as of central banks in general, we must note that, in practice, the key legal concept that stands in the assessment of the legality and review of each act is the so-called *standard of review* (Ziloli, 2019, p. 23). Its content somewhat resembles a legal standard, the specific content and meaning of which depend on the situational framework and tenuous circumstances otherwise characteristic of monetary disputes, especially in critical moments). However, in most cases, it comes down to the readiness of the courts to consider the very substance of the acts of public administration bodies, including of the central banks.

It is important to note that with the establishment of the European System of Central Banks (ESCB), the member states agreed to restrictions in certain segments of their monetary sovereignty regarding the free creation and conduct of monetary policy. With the creation of the European Central Bank, national banks did not cease to exist because of the national monetary sovereignty erosion (Zimmermann, 2013, pp. 7-20), but their competencies in the field of monetary and credit policy were undoubtedly narrowed. By centralizing monetary policy in the Eurosystem, the ECB has become a supranational monetary institution that determines the direction and instruments of coordination of a centralized monetary policy. The ECB has the status of a legal entity, *i.e.* can be the holder of rights and obligations and can conclude various types of contracts and undertake other activities with legal effect, dispose of movable and immovable property, and has the status of a participant in court proceedings (Prokopijević, 2012, p. 116). In terms of the contemporary monetary and financial flows, it is pointed out that the ECB conducts monetary policy with elements of opportunistic policy because decisions and measures are taken based on observing the movement of monetary aggregates. That is why the so-called "monetary rule" does not work in the Eurozone, given that there is no monetary aggregate whose path is close to the sum of inflation and the rate of economic growth in the previous year (Prokopijević, 2012, p. 117).

When we talk about the sources of EU monetary law, in practice, we can distinguish between *primary* and *secondary* sources. Primary sources are embodied in the provisions of the so-called founding acts of the EU and in the provisions of the national monetary legislation that regulates the work and establishment of central banks and the area of public debt management. Secondary sources are embodied in the so-called "soft law" provisions, which are elaborated by the norms of secondary legislation, such as the statute on the work of central banks, the strategy of public debt administrations, and the protocols attached to the ECB Statute. The sui *generis* interstate and intergovernmental agreements on the new models of macroeconomic management in the Eurozone - the Agreement on the European Stabilization Mechanism (further "ESM") and the Agreement on Coordination,

Management and Stabilization in the Economic and Monetary Union (the so-called "Fiscal Contract") - have a special place among these secondary sources. The legal nature of this new model, especially ESM, was the subject of considerations of the constitutional courts of the member states and later of the European Court of Justice precisely because of its non-compliance with the provisions of the primary legislation in the sphere of centralized monetary policy (examples are: BVefG Case No. 2 BvR 1390/12, partly separated as 2 BvR 2728/13 and judgment on September 12, 2012, *Thomas Pringle vs Government of Ireland*, Ireland, Judgment in Case C-3370-12, where ECJ finally confirmed the legality of ESM). The mentioned secondary sources of European monetary law were created as an institutional response of the EU to the global financial crisis. Their *ratio* was the protection of economic stability rather than of legal certainty, which is an atypical situation, but the social and economic developments asked for such a response in order not to avoid the fiscal moratorium.

We must not forget that the importance of secondary sources in European and international monetary law is exceptionally high because they fill legal gaps in the existing provisions of primary law and regulate more concisely the conditions for the implementation of the monetary norm. The rigidity of hard law cannot follow the dynamics of monetary relations because the process of amending laws (especially international agreements) is complicated and burdened with technocratic requirements. Hence, the flexibility of soft law is its advantage in newly emerging economic circumstances that the legislator could not foresee when shaping the primary legislation. Precisely for the mentioned reason, we can see the practical importance of the economic education of lawyers, who must know the basic principles of macroeconomic models that economists use and determine the economic effects of applying specific legal norms. A good law is a law that, in addition to its normative efficiency, also exhibits economic efficiency, which is essential for the optimal regulation of the economic system of every country.

4. THE ROLE OF THE EUROPEAN CENTRAL BANK IN SHAPING MODERN MONETARY LEGISLATION: THE EXPERIENCE OF SERBIA

On Serbia's path toward European Union membership, the harmonization of domestic legal regulations with the *acquis communitaire* takes on special importance, where the formation of an optimal economic policy program is possible only with the determination of essential elements of the coordination mechanisms of the common economic policy. At the same time, these are a prerequisite for constructing optimal monetary legal instruments (Dimitrijević, 2020, p. 994). The impact of European integration is in the domestic monetary legal discourse mainly observed through the way the European Central Bank law shapes domestic monetary regulations. That applies not only to the primary sources, such as the law on the work of the NBS, but also to the secondary sources (intergovernmental monetary agreements, protocols and *sui generis* legal documents issued by the NBS). Nonetheless, one could observe that this represents a kind of "legal phenomenon" in the monetary law, given that Serbia is not a member of the EU and, therefore, not a member of the Eurozone.

We believe that this is a consequence of the fact that the EU monetary law, with its modern nomotechnics in the regulation of challenging and complex social relations, does not insist on a conventional distinction between "hard" and "soft" law, procedural and material sources, but sublimates them and uses them to create a constructive synergy. That is how a legal instrument for the regulation of dynamic and intellectually "winding legal landscapes", which cannot be brought under the precious heritage of Roman private law established in the European continental legal space and modernised according to the proclaimed social goals, is to be created. Monetary policy is the most important and the oldest subsystem of general economic policy and an intellectually exciting and entertaining legal spectacle of immeasurable theoretical and practical potential.

The *ratio legis* of the entire monetary legislation, the development of which was initiated, advocated and expanded by the ECB in the EU and, at the domestic level, by the National Bank of Serbia (NBS), is the preservation of *monetary stability*, which is a fundamental value of monetary legislation. The preservation of monetary stability in globalised economic relations is associated with numerous challenges. One of them certainly is the efficient coordination of the cooperation of the agents responsible for the preservation of monetary stability when they are situated at different levels of state organization,[4] which is especially noticeable in federal states or monetary unions, but it can be challenging as well in the unitary states (Satragno, 2021, pp. 59-60).

The National Bank of Serbia, as the supreme monetary institution at the national level, has largely adapted its work to the good practices, axiology, and the way the ECB is conducting monetary policy. As already noted, over the last twenty years, the ECB has developed its branch of law, which according to some theoreticians of European monetary law, in parallel, has grown into a discipline outside the EU law. Regardless of whether they argue for the more conservative or more modern approach to the ECB law, the scholars generally agree that the *modus operandi* of the ECB in the system of monetary management is its legal acts which *de lege artis* must be respected (to a lesser or greater extent) in all monetary jurisdictions of the world. The influence of the ECB on improving the effectiveness and efficiency of domestic monetary regulations is present not only in the European values and solutions that find their justification for application and the necessity of existence in the domestic monetary system but also in the very way of determining and presenting goals, monetary strategy and the results achieved in the field of monetary policy. We believe that increasing the level of transparency of regulations, their clarity and precision is needed to bring monetary legal issues closer to all citizens in a way they can understand them. The object of monetary legislation is monetary stability and the preservation of a special category of social and economic rights derived from it, such as a right to a stable and safe currency, controlled inflation and a credible monetary system in the service of all citizens in the economy.

[4] Monetary management can be seen as a segment of state management aimed at preserving monetary stability and establishing and strengthening international monetary cooperation with leading monetary institutions, primarily the IMF, which is the *actor primus* in shaping the settings, categories, and principles of international monetary law.

The high degree of transparency in the work of the NBS and its unequivocally clear and consistent commitment to the realization of monetary targets is confirmed not only by the valid regulations that regulate the work of the NBS but also by the logical and systematic arrangement and transparency of the National Bank's website, where all interested parties can find a simple and free way to get acquainted with the results of domestic monetary policy and get to know how to protect their rights and legal interests. Here, it could be pointed out that, when it comes to the relationship between independence, responsibility, and transparency in the work of central banks, the empirical research shows that there is a high degree of correlation between the degree of transparency and degree of responsibility demonstrated in the work of central banks (Laurens, Arnone & Segalloto, 2009, p. 170). Namely, if the central bank shows a high degree of responsibility in its work, it also means a high level of transparency. That certainly applies to the activities of the domestic monetary authority. A responsible approach to own mandate is primarily seen as the presence of clearly defined goals that the bank wants to achieve, while transparency means the public disclosure and publication of macroeconomic reasons that call for a specific type of monetary policy. It is quite logical that clearly defined goals enable the central bank to communicate detailed information about the monetary strategy and the medium-term outcomes, as well as the mathematical models and assumptions behind them. Although, at first glance, it seems that the development of the economic system of a specific country can influence the fact that sometimes there is a high degree of responsibility in performing the mandate and a low degree of transparency, as well a vice versa situation in which there is a low degree of responsibility, and a high degree of transparency, this does not always have to be the case as shown in the high level of clarity of domestic legal solutions. According to some IMF studies, this discrepancy can be explained by the fact that the degree of transparency can be relatively easily increased by issuing a greater number of publications on the central bank's work. At the same time, a more responsible approach to its mandate requires changing the legal regulations on the central bank's work, which is a more complex process.

We are of the opinion that when it comes to transparency, the question of its scope must be raised because monetary laws are not *lex certa* (no matter how much the derogations bring them closer to that ideal), *i.e.* their content cannot be easily understood by the ordinary citizens, this being even more so when it comes to by-laws and other secondary legal acts adopted by the central bank. The demand for clarity and precision in monetary legislation must suffer justified limitations. That is why monetary legislation has not been codified in any monetary jurisdiction and is difficult to implement from a legal-technical point of view because of the extraterritorial effects of many segments of monetary legislation. It is necessary to have the specialized legal knowledge to understand the monetary regulations, which only a small number of citizens possess, so transparency in an effective sense can only be achieved among scholars and professionals and not among the general public, or at least not of the same quality.

An effective application of European monetary law is not possible without the independent position of the ECB and, in general, the central banks of the member states, which is defined negatively as the obligation of states to refrain from issuing instructions and orders and as the obligation of the ECB to directly or indirectly request or receive

orders from member states or other EU institutions. However, this guarantee should not be understood in the sense of the existence of an absolute ban on the communication of the ECB with other institutions and cooperation with national banks, which is not only not prohibited and harmful but is desirable and useful in harmonising the monetary policies of the Eurozone members. That is also valid for domestic monetary policy. According to these provisions, the ECB and national central banks have long been prohibited from granting negative balances or any other form of credit to institutions and bodies of the Community, central administrations, regional and local public organizations, bodies, as well as to companies of member states. In Serbian law, this prohibition refers to the ban on the so-called "soft budgeting", which is determined in the Law on the Budgetary System and the provisions of the Law on the National Bank (Article 61).[5] We can note that, although these are primary law norms that have an imperative character (*ius cogens*), member states often behaved as if they were dispositive norms that best respond to the needs created by the global financial crisis, which asked for different actions on the part of the ECB to preserve the monetary stability of the Union. Deviation from the basic rules of successful coordination of monetary policy caused the need to reform the old coordination mechanisms, change the role of the ECB and create new institutions outside the framework of primary law.

In the circumstances of the global financial crisis, the National Bank of Serbia, by looking at the actions of the ECB, extended its jurisdiction to the area of general financial policy, thus providing support for a harmonised and sustainable fiscal framework that serves to prevent the deepening of the consequences of the crisis. Accordingly, the NBS, even with the amendments to the Law on the National Bank (2010), has secondary jurisdiction in the area of fiscal policy. That is not surprising because there is a high degree of interrelatedness between monetary and fiscal policy measures and instruments, as the two most significant subsystems of general economic policy. We can note that, according to the interpretation of the positive law of the ECB, the mandate of the National Bank of Serbia cannot be viewed as a static category, but sufficient room for manoeuvre must always be left for the acquisition of some new competencies that market conditions require. The acquisition of new financial competencies by central banks is justified by the concept of the so-called "bank of the last bank". That concept is based on the fact that the central bank approves loans to all institutions, including public ones financed from the budget, which have problems with liquidity, *i.e.* to meet their financial obligations. Such financial support is usually intended for banks to regulate their solvency; it is not limited in time and lasts as long as there is a justified need. However, certain penalties for late interest payments may be charged in some instances. There is also the requirement of the central bank that the commercial banks deposit a certain type of pledge and the discretionary assessment on (dis) approval of loans based on an assessment of specific cases (Steinbach, 2016, pp. 364-365).

[5] Law on the National Bank of Serbia, *Official Gazette of the Republic of Serbia*, no. 72/2003, 55/2004, 85/2005, 44/2010, 76/2012, 106/2012, 14/2015, 40/2015, 44/2018, Art. 8-a. Also, according to Article 4, item 4 of the Law, the National Bank of Serbia "determines and implements, within its competence, activities, and measures to preserve and strengthen the stability of the financial system".

Considering the above-mentioned, it is important to emphasize that the full implementation of the monetary-fiscal policy goals in the Serbian monetary law demands the full commitment of the central bank and other monetary and fiscal authorities whose actions affect financial flows. Monetary and financial stability are two fundamental goals of the central bank. Therefore, the monetary policy pursued by the central bank cannot be viewed in isolation from the economic policy pursued by the government because while recognising this connection, the modern monetary legislation seeks to regulate not only the responsibility of the central bank for monetary and financial stability but also establishes its obligation to support the realisation of other economic policy goals (Golubović, 2018, pp. 80-82). The relationship between the central bank and the government in modern monetary law cannot be reduced to the question of its independence because, in practice, it is much more complex (Lastra, 2015, p. 200). During their history, the central banks have built a specific and, we would say, rather burdensome two-sided relationship with the governments, in which the government is expected to fully fulfil its tasks in ensuring the conditions for independence of the bank, while the central bank is expected to provide for the privileged position to government that, in the first place, means to credit its debts. The National Bank of Serbia also has an enviably high number of interstate protocol agreements and memoranda of cooperation with the most important bodies of the EMU, which shows its willingness to apply monetary norms through a wide range of technical instruments and continuously monitor developments in this field. The National Bank of Serbia also provides programs for the continuous training of its employees, which points to the National Bank of Serbia's capacity to respond to lawyers' real and logical need to acquire specialized skills in this area. That contributes to an easier resolution of disputes, which are very frequent in the practice of the European Court of Justice and represent a new type of administrative dispute in which the different procedural roles of the ECB come to the fore, *i.e.* its ability to be the plaintiff or the defendant in the proceedings. Among the most recent cases is Case C-62/14 on the legality of the ECB programme of outright monetary transactions, which refers to the request for a preliminary ruling under Article 267 TFEU from the Bundesverfassungsgericht in which the ECJ confirmed its mandate. At this point, it is important to emphasise that the ECB law, as a special branch of monetary law, began to develop in the late nineties of the last century. Its main task initially was to ensure price stability, but in the circumstances characterising the outbreak of the debt crisis, it became more focused on providing financial and monetary supervision in the Eurozone (Gorstos, 2020, pp. 1-2).

It is important to emphasize the fact that since the beginning of the process of European integration, the National Bank of Serbia (NBS) has been a credible and accountable participant in all its phases, while the harmonisation of the monetary legal and institutional framework with the EU convergence criteria and standards is one of the priorities of the NBS. The participation of NBS representatives is envisaged in all bodies of the coordination structure of the Republic of Serbia for the EU accession process. In the chapter on Financial Services and Economic and Monetary Policy negotiations, the NBS is the presiding institution. At the same time, it also has a crucial role in the negotiations in the chapter on the Free Movement of Capital. During the regular annual meeting within the

Economic and Financial Dialogue of the EU member states in 2019, the Western Balkans and Turkey, as well as the European Central Bank and the European Commission, the European Central Bank assessed that the domestic banking sector is well-capitalized and liquid (Joint Conclusions of the Economic and Financial Dialogue between the EU and the Western Balkans and Turkey, 2019, pp. 1-16). Significant results of Serbia in terms of reducing the share of problematic loans, with further dynamic growth of its lending activity both with regards to the business sector and the natural persons, were especially noted, as well as measures related to the unsecured, non-purpose lending to households after long repayment periods (Ibid).

Besides this, on July 25, 2018, the NBS signed an Agreement on Cooperation with the Single Resolution Board (SRB), the European regulatory body responsible for restructuring financial institutions. With this agreement, the NBS and the Single Restructuring Board reaffirmed their commitment to further improve their mutual communication and cooperation, to improve and facilitate the restructuring of banks and banking groups with a cross-border element and to preserve financial stability in the event of a crisis.[6] The Agreement's main aim is to provide a basis for the exchange of information and coordination in planning and implementing the restructuring of financial institutions operating in Serbia and within the Banking Union in the European Union (sections three and four of the Agreement). By signing the Agreement on Cooperation with the Single Resolution Board, in terms of the growing globalisation of the world's financial markets and the increase in cross-border operations and activities of financial institutions, the NBS and the Republic of Serbia also expressed their willingness to cooperate in order to fulfil their respective statutory objectives, enhance communication and cooperation, assist each other in planning and conducting the agreed tasks, with the aim of maintaining confidence and financial stability in Serbia and the European Banking Union. In that capacity, the NBS is responsible for planning, initiating, and implementing the restructuring of banks and banking groups under its jurisdiction to protect the public interest.

Restructuring of a bank and a banking group implies the application of restructuring measures and instruments by the National Bank of Serbia to avoid the negative impact of the bank's closure on financial stability, economy and households while minimizing budget costs and use of other public funds. Restructuring of a bank or a banking group is an alternative to bankruptcy and liquidation proceedings, which are resorted to when it is estimated that the public interest would not be adequately protected in these proceedings or when it is estimated that the termination of a bank through regular bankruptcy or liquidation proceedings can cause significant negative consequences for financial stability, the economy, and the population. In these provisions, we can recognize the direct impact of the EU Banking Union law by adopting the Single Supervisory Mechanism and the Single Resolution Mechanism. The position of the national central bank on the euro integration path is indispensable in creating optimal public monetary conduct, establishing credible macroeconomic dialogue, and a sound

[6] Amendments to the domestic Law on Banks, *Official Gazette of the Republic of Serbia*, no. 107/2005, 91/2010, 14/2015, which came into force on April 1, 2015, established a comprehensive legal framework for restructuring of banks, and the National Bank of Serbia has been entrusted with the function of the body responsible for bank restructuring.

fiscal framework under EU values and standards. Its new monetary jurisdiction in the field of macroprudential policy and maintaining general financial stability will contribute to the consistent preservation of monetary stability as an important public good and protection of lex monetae (Dimitrijević, Golubović, 2020, pp. 79-91).

Also, the influence of European integration is reflected in the domestic conception of the so-called "humanised monetary legal regulations" that also take into account the citizen as an individual because central banks have ceased to be a public body, the work of which remains abstract to the life and behaviour of citizens. The jurisdiction of the National Bank of Serbia is today largely shaped in a way that respects basic human rights, so we can say that it fully corresponds to the tenet of humanised monetary regulations. A useful concept in analysing monetary stability management in complex economic circumstances is the so-called "common concerns of humankind", which emphasises humanity in the analysis of monetary values. The application of this concept in the field of monetary law and the ECB law is very important for identifying different channels and levels of monetary cooperation. The theoretical paradigm of the concept of "common concerns of humankind" is derived from everyday life circumstances that correspond to the social and individual sense of shared problems and to the need to establish joint responsibility for events, happenings, and objects of human reality that arise outside the entity of international law, that is, the state as defined by that same law in formal-organizational sense (Cottier, 2021, p. 378).

In the trend of the ubiquitous digitization of rights and the ECB's announcement that central banks should start thinking about issuing their digital currency, which would resolve problems related to the protection of personal rights, privacy, and the preservation of monetary sovereignty, Serbia adopted the Law on Digital Assets (2019), where competence for the implementation and control of law enforcement is divided between the National Bank of Serbia and the Securities Commission. That confirms that the concept of digital assets has both private and public law aspects.[7] The domestic Law on Digital Assets defines digital (virtual) assets very extensively as "a digital record of value that can be digitally bought, sold, exchanged or transferred and that can be used as a medium of exchange or for investment purposes", whereby digital assets do not include digital currency notes that are legal tender (Art. 2). At this point, we must note that with the adoption of the given law, the domestic monetary legislator did not accept digital currency as a legal tender. The digital currency is not issued, nor is its value guaranteed by the central bank or by any other public authority, for the reason of which it is not a legal tender and has no legal status of money or currency, but natural or legal persons accept it as a means of exchange, which means that it can be bought, sold, exchanged, transferred and stored electronically. The law also allows the issuance of financial instruments in the form of digital assets by using blockchain technology and establishes a liberal system adapted to the needs of small and medium-sized enterprises. We can note that the attention of the domestic legislator is also directed towards the development of digital entrepreneurship and the adaptation of the domestic financial market to monetary and financial innovations developed on the global stage, with the fact that continuous monitoring of the circumstances concerning digital assets is a necessity.

[7] Law on Digital Assets, *Official Gazette of the Republic of Serbia*, no. 153/2020.

5. CONCLUSION

The impact of European monetary law on the domestic monetary system contributed to the improvement of its transparency, normative and economic efficiency, and effectiveness of domestic legal solutions. It also redefined the role of by-laws and soft law instruments, as well as the way the legal science now approaches these sources of law, which in a certain sense in the national legal frameworks always appeared as sources of law of lower importance. The provisions of the law on the work of the domestic central bank show respect for the European standards and values that no longer treat the work of central banks as panaceas because it is unreasonable to expect that the central bank would be able to solve and should be responsible for all problems in an economy. The new competencies that the National Bank of Serbia has in the area of fiscal policy, as well as the measures it undertakes to contribute to the fight against financial crimes, social cohesion, and the digitalization of the financial market and its derivatives, follow the main trends in the field of European monetary law. These competencies and measures find their legal expression in the domestic monetary policy. With the expansion of its competencies *vis-à-vis* the preservation of monetary stability and a stable economic environment, the reputation of the National Bank of Serbia, as the highest monetary and legal institution at the national level, has been growing as well and, as such, gave an important impetus for the society based on knowledge and long-term sustainable economic development.

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INSIGHTS INTO REGIONAL DEVELOPMENT FINANCE INSTITUTIONS – REGULATORY AND INSTITUTIONAL FRAMEWORK[1]

Development Finance Institutions are legally independent, state-supported institutions that foster sustainable development through private sector investments in developing and underdeveloped countries. Their role is not only financial and investment, but this type of institution is also focused on achieving sustainable development goals such as job creation, poverty reduction, financing of micro, small and medium enterprises and entrepreneurs, as well as on supporting projects of environmental protection, energy efficiency, renewable energy sources. Giving a brief sketch of the conceptual ground and practical significance of DFIs, the paper provides insights into the regulatory and institutional framework of countries of the region in this field, by using normative and comparative methods. Accordingly, recommendations in terms of tackling the global challenges i.e. sustainable economic growth, social inequalities, and environmental protection ought to be identified based on the analysis of the Slovenian, Croatian and Serbian legislation in the developing finance sector and on the ground of critical consideration of national normative and institutional solutions.

Keywords: development finance institutions, sustainable development, regional countries, institutional framework.

1. INTRODUCTION

Development finance institutions (DFIs) significantly contribute to the achievement of sustainable development goals by initiating economic, social, and environmental changes

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in developing and underdeveloped countries around the world. Accordingly, the DFIs are legally independent, state-supported institutions that foster sustainable development through private sector investments. Their role is not only financial and investment, but this type of institutions is also focused on achieving sustainable development goals such as job creation, poverty reduction, financing of micro, small and medium enterprises and entrepreneurs, as well as on supporting projects of environmental protection, energy efficiency, renewable energy sources, i.e. providing climate finance to support actions that should be taken to adapt to climate change and effectively mitigate the negative consequences (Savoy, Carter & Lemma, 2016, p. 5). The significance of DFIs, particularly, was emphasized during and after the COVID-19 pandemic. Response of the creators of international, primarily, EU policy was harmonized, and represented in the "Building Back Better" concept. The notion of "Building Back Better" refers to the policy strategy aimed to reduce future risk of disasters and shocks by creating a resilient economic system - green, and inclusive, which also takes into account the gender aspect, including social care for vulnerable categories (Fernandez & Ahmed, 2019). The transformation of the economic system in terms of sustainability implies the establishment of a new production and business model. In addition to the achievement of economic goals of profit maximization, such a transformation does not exclude the social component of development based on the fair inclusion of different social groups, accompanied by the ecological component of environmental protection and concern for the well-being of future generations.

The DFIs of the leading countries of the European Union (hereinafter: EU) have the role of international strategic mechanism, performed by placing funds in developing countries, even in those outside Europe. Often, these institutions invest through the national development institutions of the regional countries to realize the interests of integration into the EU, including the integration of the economic-social-ecological system. Contrary, the DFIs that are established in the countries of the region are predominantly oriented toward the domestic market and the implementation of the national economic policy goals. Unlike the leading EU member states, as well as the states of the region, the national development bank was not established in the Republic of Serbia. The paper aims to gain insights into comparative models of DFIs in the countries of the region, namely Croatia and Slovenia, as well as to explore the regulatory and institutional framework of the DFIs in the Republic of Serbia.

2. OVERVIEW OF THE DEVELOPMENT FINANCE INSTITUTIONS MODELS IN THE COUNTRIES OF THE REGION – A COMPARATIVE PERSPECTIVE

Following the example of the EU leading countries, DFIs conduct business based on the strategic framework determined by the national sustainable development strategies in terms of achieving the goals of the United Nations 2030 Agenda for Sustainable Development (2015) in the countries of the region. The scope of national DFIs activities, as well as ownership structure, will depend on the counties' economic development level. On the other hand, the territorial expansion of business activities beyond national borders, implies the introduction of innovative mechanisms to support certain sectors in which

investments are associated with higher costs and risks, such as energy efficiency sector and climate change mitigation. The paper deals with two models of DFIs in the countries of the region - the Republic of Croatia and the Republic of Slovenia. Both are EU member states, but with different business orientations. The Croatian Bank for Reconstruction and Development is under significant government influence and directs the activity toward the national market and the national development goals achievement. The Slovenian Export and Development Bank is market-oriented, regulated by the commercial bank's rules and regulations, with territorial action also defined beyond national borders and strong coordination of activities with the strategic goals and policies of the EU. Due to those characteristics, the Slovenian Export and Development Bank differs from the Croatian Bank for Reconstruction and Development.

2.1. Development finance institutions in the Republic of Croatia

The Croatian Bank for Reconstruction and Development was founded in 1992, by the Law on the Croatian Credit Bank for Reconstruction, and in 1995 it changed its name to Croatian Bank for Reconstruction and Development. The following year, a new law was passed that expanded the scope of business to include less developed regions of Croatia (Vujović, Vukadinović & Ćosović, 2014). At the time of its establishment, the Croatian Bank for Reconstruction and Development was framed on the model of Germany's Promotional and Development Bank (Kreditanstalt für Wiederaufbau-KfW) (Gaćeša, 2010, p. 74). The bank is wholly owned by the government of Croatia, and the funds are allocated from the budget. However, a certain part is provided on the international capital market in the form of loans from foreign international financial institutions, usually the European Investment Bank, as well as the European Bank for Reconstruction and Development, while government guarantees cover the bank's liabilities (Vujović, Vukadinović & Ćosović, 2014). The legal regime of operations of the Croatian Bank for Reconstruction and Development is regulated by the Law on the Croatian Bank for Reconstruction and Development which governs its status, scope, ownership, powers, and organizational structure.[2] The bank's status is determined as a Croatian development and export bank of non-commercial character, and as such it is not liable for bank profit tax, contrary to the Germany's Promotional and Development Bank, whose model was used for its establishment. The Croatian Bank for Reconstruction and Development has the status of a separate legal entity, with the exception that it is not registered in the court register, while bankruptcy or liquidation proceedings are not allowed. The basic capital is determined by the law and is paid directly from the budget without the possibility of division, transfer, or pledging. Furthermore, the Law on the Croatian Bank for Reconstruction and Development provides for the possibility of membership in other international financial organizations, upon the approval of the bank's supervisory board. The activities of the bank are also determined by the said law and in accordance with the general strategic goals of the Republic of Croatia, with the possibility of performing other tasks based on the government's resolution related

[2] Law on the Croatian Bank for Reconstruction and Development, *Official Gazette Narodne novine*, br. 138/06, 25/13.

to infrastructure financing, financing economic renewal and development, supporting the development of micro, small and medium-sized enterprises, as well as encouraging environmental protection, exports incentives and export risk management. Loans, bank guarantees, insurance and reinsurance contracts, investments in debt and proprietary financial instruments are used for the realization of established activities that are carried out through other banks and legal entities. In addition, the Law on the Croatian Bank for Reconstruction and Development stipulates that the Croatian Bank for Reconstruction and Development does not operate to make a profit, meaning that the objectives are exclusively public, thus, the bank is to be classified as a public institution that does not operate according to market principles.

It appears from the statutory scope of its activities that the role of the Croatian Bank for Reconstruction and Development should be defined as limited. Namely, the determined activities relate to the proclaimed achievement of sustainable development goals, and to the transformation of the economic systems of the EU countries towards a low-carbon, i.e. green economy. Namely, the legal provisions governing the bank's activities do not reflect the challenges of modern society, such as climate changes, geopolitical risk, and disruption or demographic challenges. That further undermines harmonization and/or coordination with multilateral, bilateral, and DFIs of other EU countries. Thus, it should be noted that the recently adopted strategic, public policy document of Croatia named "The 2030 National Development Strategy of the Republic of Croatia" does not identify the National Bank for Reconstruction and Development as an implementing entity, considering the EU practice in this regard.[3] One of the key challenges of not only Croatian but also European economic growth are investments through innovations and new technologies, such as digitalization and the development of artificial intelligence, which requires the allocation of resources towards productive and innovative industries. In the context of Croatia, technological modernization and increased productivity are necessary, along with raised investments in green infrastructure, digitization, healthcare, and educational institutions. The special focus is on the support and development of small, innovative, knowledge-based companies such as start-ups, scale-up, and high-tech companies. In addition, according to the Croatia National Development Strategy 2030, one of the goals also refers to macroeconomic stability and the development of financial markets. The Strategy defines four core objectives:

1. Sustainable economy and society, which implies a competitive and innovative economy, educated staff, efficient judiciary and public administration, global recognition and strengthening of international cooperation;

2. Stronger resistance to the crisis, including a healthy, active and quality life, demographic revitalization, improved position of families, and ensured security in general;

3. Green and digital transition, including ecological and energy transition towards climate neutrality, biodiversity, sustainable mobility, a digital transition of society and economy; and

[3] National Development Strategy of the Republic of Croatia until 2030 - 2021. Available at: http://europski-fondovi.eu/sites/default/files/dokumenti/Nacionalna-razvojna-strategija-RH-do-2030.-godine_3.pdf (27. 07. 2022).

4. Balanced regional development, with the development of vulnerable areas and increased regional competition.

The roles of micro, small and medium-sized enterprises in the context of the green economy transition are also recognized. Furthermore, those strategic goals will be achieved through "platforms for financing companies that already exist on the capital market, but are underutilized" (National Development Strategy of the Republic of Croatia until 2030, 2021). In this regard, the said Strategy only recognizes investment funds as instruments with strategic importance for financing companies and as the mechanism of directing financial resources from European funds. Also, the Strategy has highlighted that the Croatian financial market is dominated by banks financing stable economic entities. It explains why an objective is to increase the availability of favourable sources of financing, for which the activation of resources from European funds is foreseen. Therefore, the National Bank for Reconstruction and Development is not fully determined as an institution that participates in the implementation of Croatian strategic development goals, which is the practice in the most developed countries of the EU. Croatia lags far behind other EU countries in recognizing the role of the mixed, i.e. hybrid financial entities and instruments, as well as in the achievement of the goals of national economic policies, according to the determined positive effects of the implementation of the public-private partnership concept. One of the reasons may be the very nature of the Croatian Bank for Reconstruction and Development, i.e. its ownership structure, which is completely state-owned, as well as the structure of management boards. The said bank operates exclusively in public interests, and its actions could be characterized as a form of state interventionism. One of the possible solutions would be to transform the Croatian National Bank for Reconstruction and Development in a direction that implies that its role is not only in directing public (budget) funds into projects, i.e. sectors of public interest but also in mobilizing private capital, in the context of public-private partnership and risk sharing in sectors of strategic importance in order to promote sustainable growth. Given that, German Promotional and Development Bank (KfW) may serve as an example, which was also the model for the establishment of the Croatian National Bank for Reconstruction and Development.

2.2. Development Finance Institutions in the Republic of Slovenia

International development cooperation in terms of achieving sustainable development goals in the Republic of Slovenia is regulated by the Law on International Development Cooperation and Humanitarian Aid, adopted in 2018.[4] The public strategic framework for the implementation of sustainable development goals was previously determined by the Resolution on Development Cooperation and Humanitarian Aid of 2017 (hereinafter: Resolution). The Resolution is a long-term, strategic document of indefinite duration, which defines the territorial and sectoral domains, i.e. the priorities in achieving sustainable development goals of the Republic of Slovenia. Based on this Resolution,

[4] Law on International Development Cooperation and Humanitarian Aid, *Official Gazette of the Republic of Slovenia*, no. 30/18.

the 2030 Development Cooperation and Humanitarian Aid Strategy was adopted.[5] The said strategy defined goals and established concrete mechanisms for their achievement, including priority areas for the action. Thematically, the areas of strategic action are defined as follows: achieving full and productive employment and decent work, a peaceful and inclusive society, sustainable management of natural resources, and action to combat climate change (Jones, Veron, Czaplicka & Mackie, 2019). Territorially, the domain of the Slovenian national sustainable development policy application is directed towards Western Balkans countries, the neighbouring countries of Europe, and the area of Sub-Saharan Africa, especially the least developed countries of this region. In addition, the 2030 Sustainable Development Strategy, adopted in 2017, with the aim of sustainable development goals implementation, defines 12 development goals and six strategic orientations. The strategic orientations are as follows: inclusive, healthy, safe and responsible society; lifelong learning; a highly productive economy that achieves the goals of all social groups; preserved and healthy environment; high level of cooperation; and efficient and competent governance (Jones, Veron, Czaplicka & Mackie, 2019).

When it comes to the implementation of bilateral cooperation strategies in the field of sustainable development, the most important legal entities, established by the Government of Slovenia, are the Slovenian Export and Development Bank, and the Centre for International Cooperation and Development. The Centre is established as an independent, non-profit organization of the Slovenian Export and Development Bank, whose main activity is the implementation of cooperation infrastructure projects to improve the economic, social, and ecological infrastructure (Jones, Veron, Czaplicka & Mackie, 2019). Unquestionably, the most important development finance institution of Slovenia is the Slovenian Development and Export Bank, founded in 1992 as the Slovenian Export Corporation, with the main goal of financing Slovenian export companies, but in 1996 it was transformed into a specialized bank for export and development. Since 2008, the said bank has been wholly owned by the government of Slovenia (Gnjatović, 2012). The role, ownership, and organizational structure, status, and activities of the Slovenian Export and Development Bank, as a specialized financial institution in the field of promoting development, international trade, economic cooperation, entrepreneurship development and innovation, encouragement of research and educational activities, development of ecological, energy and construction infrastructure of interest to the Republic of Slovenia, are regulated by a special law - the Law on the Slovenian Export and Development Bank.[6] The said law stipulates that the Slovenian Export and Development Bank conducts business according to the objectives set by the public policy documents of the Republic of Slovenia and the EU, while all activities, i.e. transactions, projects, investments, as well as other forms of financial operations, shall be subject to economic, environmental and social quality

[5] 2030 Development Cooperation and Humanitarian Aid Strategy – 2018. Available at: https://www.gov.si/assets/ministrstva/MZZ/Dokumenti/multilaterala/razvojno-sodelovanje/Development-Cooperation-and-Humanitarian-Aid-Strategy-of-the-Republic-of-Slovenia.pdf (28. 07. 2022).

[6] Law on the Slovenian Export and Development Bank, *Official Gazette of Republic of Slovenia,* no. 56/08, 20/09, 25/15, 61/20.

assessment based on international standards.[7] The given law further establishes the basic principles of the bank's operations, i.e. non-competition in relation to other financial institutions on the market, the principle of non-discrimination, i.e. equal access to financial services for all potential users, and the principle of transparency of operations.[8] The principle of non-competition in relation to other financial institutions on the market is relevant since the status of the Slovenian Export and Development Bank corresponds to a public financial institution, instead of corresponding to a traditional commercial bank. The bank's activity is regulated by Article 11 of the Law on the Slovenian Export and Development Bank, with a focus on support in the implementation of economic, social, and other structural policies, on provision of financial services in sectors where challenges of the self-regulating market are most noticeable and require additional support. These are, among others, micro, small and medium-sized enterprises, entrepreneurs, the innovation sector, the education sector with a special focus on the development of management skills, the area of additional qualification and adoption of specific knowledge. It also includes employment promotion, especially of vulnerable categories of workers such as persons with disabilities and their inclusion in the labour market, development of green infrastructure, support for balanced regional and local development, all following the principle of public-private partnership, while international development cooperation is also enhanced at the international level through established project activities. The Slovenian Export and Development Bank provides financial services according to the procedures established by the said law but also follows the regulation of commercial banks and the company regulations, under the supervision of the Central Bank of Slovenia and the Ministry of Finance. An annual report is submitted to the National Assembly of the Republic of Slovenia.[9]

3. REGULATORY AND INSTITUTIONAL FRAMEWORK OF THE DEVELOPMENT FINANCE INSTITUTIONS IN THE REPUBLIC OF SERBIA

Unlike the regional countries (Croatia and Slovenia), a specialized development bank has not been founded in the Republic of Serbia, although there was an initiative since the proposal for a special law on a development bank was drafted in 2012. However, the development financial activities of public national interest in the Republic of Serbia are carried out through the Development Agency of Serbia (hereinafter: DAS), the Development Fund of the Republic of Serbia, and the Green Fund of the Republic of Serbia. The status of the DAS is regulated by the Law on Investments which was adopted to improve the investment potential and encourage direct investments by domestic and foreign investors, and to ensure economic development and employment growth.[10] Unlike the adopted models of DFIs of the EU leading countries and the countries of the

[7] Law on the Slovenian Export and Development Bank, Official Gazette of Republic of Slovenia, no. 56/08, 20/09, 25/15, 61/20.

[8] *Ibid.*

[9] *Ibid.*

[10] Law on Investments, *Official Gazette of the Republic of Serbia,* no. 89/2015, 95/2018.

region, particularly the Republic of Slovenia, the DAS is an exclusively public institution that does not operate according to market principles, and has the status of a government agency, under the control of the competent public authority. The DAS has the status of a legal entity and operates according to the public agency's rules, while not according to the commercial bank's rules and regulations (Article 28). The DAS was founded to foster direct investment, promote and increase export, by improving the competitiveness of economic entities, as well as to promote development and improve the reputation of the Republic of Serbia (Article 27). The Development Fund of the Republic of Serbia was formed by a special Law on the Development Fund of the Republic of Serbia.[11] The Development Fund of the Republic of Serbia has the status of a legal entity registered in the court register, and it appears from the said law that it can be organized as a joint stock company. The DAS and the Development Fund of the Republic of Serbia share the same founding objectives. These are the promotion of balanced regional development, increase in the business productivity and competitiveness of legal entities and entrepreneurs in Serbia, and export and employment promotion (Article 2). The same objectives indicate unjustified overlapping of these two development organizations. To address the strategic interest of the Republic of Serbia which refers to EU integration in terms of environmental protection, a special Green Fund was established by the Decision of the Government of the Republic of Serbia in 2016.[12] The Green Fund is established within the Ministry of Environmental Protection, with the aim of determining special funds for financing the preparation, implementation, and development of programs, projects, and other activities in the field of energy conservation, sustainable use, and environmental protection. Projects in the field of climate change mitigation and application of adaptation measures, as well as disposal, and waste management are particularly addressed.

However, in the literature, far too little attention has been paid to the national development banks' role in achieving sustainable development goals. The dominant argument against the national development bank's establishment is the prevention of state interventionism, particularly having in mind the period of privatization of the state-owned banks in Serbia after 2000, which represented a reform process and the path to the introduction of a market economy. In addition, it is pointed out that the establishment of a national development bank "increases the risk of political influence on the criteria for resource allocation, endangers the banking sector efficiency and creates financial system instability" (Marinković & Golubović, 2011, p. 183). The argument in favour of development banks is the "correction of allocative distortion of the credit market", noticed in the domestic financial system (Marinković & Golubović, 2011, p. 185). Some studies have shown that the establishment of a national development bank would also have a positive effect on the rise of the employment rate of vulnerable categories, e.g. persons with disabilities, older workers, migrant workers, and women, as well as on the promotion, finance, and development of social enterprises (Stojković Zlatanović, 2019). Moreover, it is also worth noting that the Council of the EU defined

[11] Law on the Development Fund, *Official Gazette of the Republic of Serbia, no.* 36/2009, 88/2010, 119/2012, 5/2015.

[12] Decision on the establishment of the Green Fund of the Republic of Serbia, *Official Gazette of Republic of Serbia*, no. 91/16, 78/17.

the social economy as a key factor in achieving the goals of sustainable development, due to the United Nations 2030 Agenda on Sustainable Development, which Serbia has also joined. Moreover, the Council of the EU in its document entitled 'Initiative to start your own business' pointed out the importance of improving and introducing new forms of financing, with the aim of ensuring access to the market and creating conditions for the visibility of economic and social economic entities.

4. CONCLUSION

Two different approaches of public policymakers were determined in terms of the place and role of DFIs in the implementation of the strategic goals of national and consequently EU economic policies in the Republic of Croatia and the Republic of Slovenia. Namely, the Croatian Bank for Reconstruction and Development differs from a commercial bank because it does not operate in line with market principles and has the status of a public government institution following the concept of state interventionism. On the other hand, the Slovenian Export and Development Bank operates according to market principles and regulations of commercial banks, performing financial activities in line with the concept of public-private partnership having the role of "mobilizer" of private sector activities in cases of high economic risk where national interest is determined. Finally, the DAS and the Development Fund, as the only national development institutions in the Republic of Serbia, are not able to adequately respond to the demands of the market and economic transition process towards a green and inclusive society. They have a role similar to the DFIs of the countries of the region, but at the same time, they are characterized by the dominant influence made by the public authorities. Therefore, the establishment of a national development bank in the Republic of Serbia could be an option to consider and the possible path to provide a green economic transition, particularly following the Slovenia model of a DFI. The Inclusive Green Economy model supports the establishment of a national development bank modelled on the public-private partnership concept, combining the protection of both, public and private interests to deal better with inequity and environmental issues while aiming to reach sustainable economic growth. Investing in private sector projects of public interest, national development banks as a dominant form of DFIs significantly contribute to green transition and broader social inclusion where the "hidden state interventionism" could be properly overcome by ensuring transparency in their operations i.e. by providing publicly available basic information about project investments, financial terms, development impacts, as well as a possible negative impact on affected communities.

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