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FOREWORD

In front of you is the fourth volume of RLR collection of papers, this time with a record number of authors from eleven countries in Europe and all over the world. We are doing our best that our efforts become traditional. This is one more chance to read about legal topics from the region and beyond.

This year we have a new partner, the Faculty of Law of the University of Ljubljana in Slovenia. As in the previous years, we tried to encompass most of neighbouring countries from the region. Additionally, we have extended our reach this year to include South Africa, Bangladesh, and Mexico. This expansion was in response to the eagerness of our non-European colleagues to be involved in our venture.

Since the previous conference, RLR collection of papers has been indexed in DOAJ, a widely recognized platform among scientific researchers in our region. Inclusion in DOAJ demonstrates our commitment to the best practices in open access publishing. In the coming years, we hope to include the collection of papers in several other research databases. For the second year, we are partnering with HeinOnline Law Journal Library.

As every year, I would like to express my gratitude to the whole organizing crew for making yet another issue of the collection of papers possible, at the highest standards of editing and publishing. Besides the authors, my gratitude goes to our reviewers, all thirty-five of them, who did exceptional work during the summer months, which is always particularly challenging time of the year to perform tasks of this kind.

Starting from the next year's edition, we will try to focus thematically on several important topics in the current law and practice. Despite many challenges in further development, I hope you will remain loyal contributors and readers in the years to come, all having in mind the joint aim of further improving the quality and visibility of our work.

In Belgrade, October 2023

Dr. Mario Reljanović
RLR Editor

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Aleksandar MIHAJLOVIĆ*
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APPLICATION OF ANTI-DISCRIMINATION LAW IN THE FIELD OF LABOR AND EMPLOYMENT IN THE REPUBLIC OF SERBIA: THE ECONOMIC ANALYSIS OF LAW APPROACH

The aim of this paper is to analyze the problem of labor market discrimination through the methodology of economic analysis of law, as a special discipline, as well as the doctrinal approach, focusing on the legislative framework in the concrete filed in the Republic of Serbia. The main research question is do we really need anti-discrimination law in the field of labor and employment, or we can use only free market mechanisms to eliminate employers who discriminate employees who are in the labor market and/or the labor force which pretend to enter the market. Economic analysis of law starts from the premise that employers are rational players at the market who want to maximize their profits, and the only important thing is the productivity of employees, not their personal characteristics which do not affect their labor performance (productivity). Although this reasoning sounds rational, we witness that discrimination in the labor market has been persisting and governments intervene with anti-discrimination legislation and public policies, as well as special institutional solutions, trying to suppress it and support economic development and social inclusion of marginalized social groups. The author's special attention in the paper is on the two economic models of discrimination, Becker's Taste for Discrimination and Statistical Discrimination Model, which will explain the necessity of anti-discrimination law in the field of labor and employment. Concurrently, the focus will be on the Serbian legal framework and the importance of the impact assessment, as a tool for improving the quality of legislation and policies in the concept of respect of the principle of equality and non-discrimination.

Keywords: Economic analysis of law, discrimination, labor market, impact assessment.

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1. INTRODUCTION

The main research question of this paper is do we really need anti-discrimination legislation in the field of labor and employment or the labor market mechanism will be a regulator sufficient to solve this social problem. In this framework, the aim of this investigation is to analyze the problem of labor market discrimination through the methodology of economic analysis of law, as a special discipline, as well as the doctrinal approach, focusing on the legislative framework in this field in the Republic of Serbia.

In the simplest way we can explain the labor discrimination as an unequal treatment of equally productive workers, who possess equal qualifications, the consequence of which is a barrier to enter the labor market or wage disparities for the same jobs and same qualifications (when they enter the market). Economic analysis of law (hereinafter: EAL) uses the economic reasoning and tries to explain the complexity of legal problems and institutions and to provide the best solutions for their efficient solving. Employers have the aim of maximizing the profit and of being as much as possible competitive with other employers in the same field. This approach of rational employers is related to the concept called *homo economicus*, seen as a rational agent, who tends to maximize their benefits, both economical and non-economical (Mojašević, 2021, pp. 24-25). On this reasoning there is no space for discrimination towards employees based on their personal characteristics, because the fact that an employee is a woman, gay, Roma, black etc. is not important and does not affect their productivity. This ideal economic model of rational employers unfortunately does not work in practice, because we witness different forms of discrimination in the field of labor and employment. Governments all over the world introduce anti-discrimination legislation and public policies, trying to suppress discrimination in the labor market and support the inclusion of marginalized social groups and economic development. The intervention does not include only legislation, there are also different public policies, new institutional solutions, such as the establishment of independent human rights institutions, using the situation testing to prove discrimination in a concrete case or in an economic field towards the concrete social group(s), implementation of special rules for providing evidence in anti-discrimination litigations etc. The two economic models of discrimination, Becker's Taste for Discrimination and Statistical Discrimination Model, will also be the subject of this paper, and their explanation will justify the necessity of the anti-discrimination intervention, which comes as the lack of free market mechanisms to eliminate employers who discriminate. In an ideal economic model, an employer who discriminates, who has a *"taste for discrimination"*, will be eliminated from the market because the cost of employing only selected workers is too high and the employer will lose the "battle" in the market for a long period of time. On the other side, a rational employer, who does not have discriminatory preferences, will employ people who are discriminated, and who will cost him/her less than when employing only selected groups which satisfy the employer's taste. This economic rationality will provide conditions for lower prices of products/services in comparison to the employer-discriminator who will use higher prices as a way to provide enough resources to cover all costs. Higher prices will

make him/her less competitive in the market, and the competitive pressure will squeeze him/her out from the market. The last part of the paper investigates the anti-discrimination legal framework in the field of labor and employment in Serbia, as well as the rules of conducting the impact assessment, focusing on the social impact and the principle of equality in the process of drafting legislation and public policy documents. Although there is an "umbrella" anti-discrimination act in Serbia called the Law on the Prohibition of Discrimination, there are other legal acts which norms also prohibit discrimination in the field of labor and employment. This kind of various norms in different legal acts can cause difficulties in their implementation, and problems with measuring their effectiveness and efficiency in practice.

2. ECONOMIC ANALYSIS OF LAW AND ITS APPLICATION TO LEGAL INSTITUTIONS

EAL represents a scientific field which combines the knowledge of economics and law, and tries to explain the legal institutes using the microeconomic tools and economic reasoning. Although there is still a strong resistance among some legal scholars to EAL and its incorporation to legal education, using the explanation that the economist's objective of efficiency will minimize the importance of justice and fairness, it represents now an inevitable part of the legal education in Europe, the USA and worldwide (Spurr, 2015, pp. xv-xvii). Its approach is that the legal institutes are changeable over time, because people make different decisions (Mojašević, 2007, p. 90). The subject of modern EAL are not only legal fields which are traditionally connected with economics, such as torts, contracts, property rights, antitrust law, there are also some non-traditional disciplines and topics very popular among ELA scholars, such as family law[1], criminal law, corruption[2], marriage, family relations, domestic labor, rule of law[3], drug addiction etc. (Vrban, 2006, p. 64).

There are four basic premises used in EAL due to its application to different legal issues: the first, *the methodological individualism*, which includes decisions made by an individual. Collective behavior has to be analyzed as a system of individual decisions which are based on different preferences. If we place this concept to the labor market discrimination in the context of economic theories of discrimination, a conclusion is that some employers discriminate because they have a preference for it (Becker's Taste for Discrimination), in another case of Statistical Discrimination Model, they do it not because of the taste, but because due to the asymmetry of information in the labor market in the relationship between employer and employee, and it is easier to make a decision

[1] See more: Beuker, M. 2022. Benefits of a Legal-Economic Approach to Comparative Family Law. In: Boele-Woelki, K. (ed.), *Comparative Family Law Methodology*. Paris: International Academy of Comparative Law, pp. 99-127.

[2] See more: Begović, B. 2007. *Ekonomska analiza korupcije*. Beograd: Centar za liberalno-demokratske studije. Available at: http://www.clds.rs/newsite/Boris-Begovic-Ekonomska-analiza-korupcije.pdf (28. 8. 2023).

[3] See more: Jovanović, A. 2019. Srbija i ekonomske implikacije vladavine prava. *Zbornink radova Pravnog fakulteta u Nišu,* 85(4), pp. 55-71.

based on the stereotypical attitudes which are commonly known. In this situation, an employer, who does not pretend to discriminate (does not have a taste for discrimination), can decide to employ a male worker instead of a female candidate, not because he/she has more preference to males, but because it is common (statistically proved) that female workers take parental leave more often than their male counterparts; the second, individuals are *rational decision makers* who want to *maximize their interest* (both material and non-material, for example, if someone wants to earn more money and travel to his/her favorite destination, the other one wants to have more free time for leisure activities). This kind of predictability of human behavior in the context of rational maximization is very important for the creation of legal rules and policies which should cause concrete changes although it is important to mention that behavioral sciences[4] teach us that the human behavior is not always rational and is driven by biases; the third, *human preferences are stable* over a period of time although they are changeable throughout life, depending on individual characteristics as well as on different social factors; the fourth, *a human interaction tends to be in a balance* (Barković, 2009, pp. 120-121).

EAL puts in its heart the concept of efficiency which "[…] contains two values: a valuable goal and valuable means (inputs) with which that goal is achieved. Maximum efficiency consists of achieving a maximum value of output from a given value of inputs" (Stigler, 1992, p. 458). For some lawyers, like the judge Richard Posner, the common law system is more efficient than civil law, because judges, who make rules, are in a better position to create a norm which will figure out efficiently concrete circumstances (Garoupa, Ligüerre & Mélon, 2017, p. 14). On the other side, the opposition to the former view sees the law as a synonym of justice, derived from the natural law concept, where there is no place for quantification and qualification (Devlin, 2010, p. 170). Efficiency criteria is a part of welfare economics, where microeconomics, as a basic tool of EAL, deals with behavior of individuals and market effects, while welfare economics evaluates the effects of a concrete economic policy of regulation and will consider if such measures increase or decrease welfare (Mathis, 2008, p. 31). When we examine this theoretical concept in line with labor discrimination, the author's aims are: to analyze labor discrimination through the behavior of individual employers who do have and do not have taste for discrimination (using the two economic models of discrimination), to consider why market mechanisms are not sufficient to resolve this problem, and to evaluate existing legislation which is used as a government's intervention in the legal framework of the Republic of Serbia. EAL reasoning opens a space for a wider observation of labor discrimination, beyond just doctrinal approach, including a public policy approach which encompasses also administrative, social, economic and political side of a state intervention (Kreis & Christensen, 2013, p. 41).

[4] Based on the approach that the human behavior is not always rational and is driven by biases, there is a development of a new scientific field called Behavioral Economic Analysis of Law or Behavioral Law and Economics. For more details, see: Jolls, C, Sunstein, R. C, & Thaler, R. 1998. A Behavioral Approach to Law and Economics. *Stanford Law Review*, 50(5), pp. 1471-1550; Sunstein, R. C. 1997. Behavioral Analysis of Law. *The University of Chicago Law Review*, 64, pp. 1175-1195 and Zamir, E. & Teichman, D. 2018. *Behavioral Law and Economics*. New York: Oxford University Press.

In the context of application of EAL to labor discrimination, it is inevitable to mention that all resources are limited, included also human resources in the market (Miller, 1985/86, p. 433). Every choice has its own cost which is borne by a decision maker. Making one decision means that we miss a chance to achieve another goal because of limited resources, while our wishes are unlimited (Jovanović, 2008, p. 22). Based on the economic language, all rare goods have a price, while goods which are unlimited are not in the interest of economists (for instance, this is a case with air, but not also with fresh air, which due to the global pollution, becomes a limited resource and a luxury) (Jovanović, 1998, p. 17). An employer who discriminates makes a risk to miss an opportunity to employ a genius who can increase his/her profit and make him/her more competitive, and there is an economic punishment in a format of a price which will be paid by a discriminator.

EAL distinguishes two types of analysis, the positive EAL and the normative EAL. The former is predictive, and its aim is to show how concrete legal rules work in practice (Dnes, 2018, p. 12), for instance, to what extent the anti-discrimination legislation will change the behavior of employers who discriminate employees who are members of concrete social groups, while the latter analysis aims to investigate if an existing mechanism or a norm is desirable (Begović, Jovanović & Radulović, p. 13), and it can involve suggestions or recommendations how the concrete system can be improved by a more desirable solution, for instance if a legal punishment for an employer-discriminator should be more rigorous or a concrete public policy should be replaced by a new, more efficient one.

3. LABOR MARKET IMPERFECTIONS AND THE NECESSITY FOR A STATE INTERVENTION

There are different definitions what the market is, and one explanation is that "A market is a mechanism through which sellers and buyers are connected for the exchange of goods and services." (Nikolić & Mojašević, 2015, p. 131). Its basic assumptions are a division of labor and a specialized production of goods and services which are a subject of exchange in the market (Božić, 2009, p. 104). The forces of supply and demand are basics which shape the market activities and make allocation of resources to the economic activities where the demand is greater and where the production will be higher. The perfect labor market includes two components: the transaction cost of exchanging goods and services is zero, and qualitative information between producers and consumers; because based on precise information, both sides can make decisions which maximize their welfare.

There are four functions of the market: the first, *the selective function* which is related to the competitiveness of producers in the market, the more competitive the more successful they will be in the market. Less competitive producers will use higher prices for selling their goods and services, and they will be "punished" by consumers who will refuse to buy such goods and services. As a final result, this kind of producers will leave a market and the selection will be done; the second, *the informative function* which shares signals which goods and services consumers want to buy, and for producers which

amount of goods and services should be produced. Based on this information a price can be set; the third, *the allocative function* of available resources towards the most efficient outcomes; the fourth, *the distributive function* which means distribution of social product based on the factors of production (labor, land, capital) and their prices (Milošević, 2020, pp. 83-84).

When we come to the labor market, there are employers and employees. Their exchange in the labor market and cooperation have a final aim to maximize their welfare. Of course, we cannot miss consumers, who are also very important part of this chain, because their preferences provide signals which kind of services and goods should be produced. In this paper this part of the consumers' role will not be analyzed. It is important to be mentioned that in some cases consumers can have a taste for discrimination towards one group of people and this can provoke their boycott of buying services and goods produced by a concrete group of workers. In this case, an employer who does not have a taste for discrimination can start refusing to employ such group of workers who are not accepted by consumers because of economic reasons (for instance, consumers do not like to buy food produced by a black cook or guests in a night club do not like to be served by waitresses who are over 30 years old). In this situation, there are no legal mechanisms which can change the behavior of consumers, the solution is related to prices, when an employer starts to employ "desired" workers, he/she must increase prices of services and goods, as a way to cover higher costs which come as a consequence of discrimination of a concrete labor force. Higher prices can provoke changes of consumers' behavior.

Markets in general, as well as labor markets, are not perfect, they are usually imperfect, and a state intervention is inevitable. This comes because in some cases there is not a fair-play game in a market, and the second reason is the asymmetry of information or imperfect information among participants. In our explanation of labor market discrimination, we will start from the assumption that a labor market is competitive (this characteristic will be very important for understanding the two theories of discrimination), but there is asymmetry of information. In this condition an employer can make decisions towards employees based on stereotypes and some statistical generalization regarding some groups of people. Although we start this article with a presumption that employers are rational in making decisions and want to maximize their profit, discrimination in the labor market exists and consequences can be seen as different wages for the work of a same value or barriers to enter concrete markets or jobs. Some economists, such as Gary Becker, think labor market imperfections will be solved by a market itself and legislation can affect the efficiency of resource allocation[5], but this explanation does not work in practice. Anti-discrimination legislation is an inevitable instrument, and there are two main reasons why it is necessary: the first, equality and human rights approaches which mean that all human beings are equal in their rights and dignity, and there is no reason that someone does not have equal opportunity in the labor market only because he/she has some personal characteristics which do not affect his/her productivity; the second,

[5] See more: Epstein, A. R. 1995. The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake. *Harvard Law Review*, 108, pp. 1085-1109.

the efficiency of allocation of resources, including the human capital (Boeri & Ours, 2013, p. 117). There is also an approach of making the difference between imperfect and non-competitive labor markets and the role of anti-discrimination legislation. Based on this reasoning, in competitive labor markets employers will be punished by the market's power, and anti-discrimination legislation and policies are not necessary (the market is seen as a sufficient regulator), while in imperfect labor markets there are some other conditions which can affect the persistence of discrimination, and where the legislative intervention is inevitable (Boeri & Ours, 2013, p. 117).

4. TWO ECONOMIC MODELS OF DISCRIMINATION IN THE LABOR MARKET

Gary Becker was a pioneer among economists who developed the theory of discrimination in the neo-classical economic tradition and who introduced "non-pecuniary motives into economic theory" in the explanation of labor discrimination (Dex, 1979, p. 90). His approach is that some people have a preference to work with one group of workers instead with another group, and these people *are willing to pay for* this kind of their preference or taste (Stiglitz, 1973, p. 288). Social scientists have analyzed discrimination from different perspectives: sociologists have included a perspective of a social distance towards some groups of people or their disadvantaged socio-economic position in one society which both make them more vulnerable in the labor market; psychologists place their attention on different types of personalities; while economists, including Becker, have changed these perspectives and included *economic productivity* (Becker, 1971, p. 14). In that sense, discrimination is seen as "[…] a difference in pay between two workers of equal productivity", and it is Becker's definition of understanding (Guryan & Charles, 2013, p. F420).

The taste for discrimination should be understood that some employers have a taste/preference not to employ workers who are members of concrete social groups, who have some personal characteristics which make them less attractive for employers. In some situations, Becker makes a distinction when an employer discriminates based *on prejudices* or based *on ignorance* of the efficiency of workers (for example, an employer does not like to employ black workers – a prejudice, or because he/she thinks that they are not very-well skilled and efficient in their performance – an ignorant approach; ignorance can be eliminated by a concrete action and making sure in practice that a candidate is efficient, while in a case of prejudices, this situation cannot be overcome very easily) (Becker, 1971, p. 16). In another cases, the taste-based discrimination comes as an effect of employees' or customers' taste (England & Lewin, 1989, p. 240). For instance, employees can pressure their employer not to hire black or female workers, and as a condition for working with them, employees can ask for higher salaries as a compensation if such workers would be employed. Customers can also have an influence to an employer to discriminate some groups of people if they do not like to buy products or use services provided by members of concrete communities.

Becker's idea is that in a competitive market a discriminator-employer will lose the competition battle and will leave the market. This will come as a price of discrimination, because this employer will have higher costs for salaries and production instead of an employer who does not discriminate. The demand for preferred workers will be higher in comparison to non-preferred workers, for whom demand will be lower, and the cost of their employment will be cheaper in comparison to the first group of workers (this means that the cost of production will be also cheaper and prices of these products/services more competitive in comparison to discriminator-employer). In this situation, a rational employer focused to maximize the profit will tend to employ workers who are discriminated. Such rational employer could sell his/her products and services at lower prices compared to an employer discriminator. In the longer market run, a discriminator loses this market game because the cost will be too much and he/she cannot cover it. The competition pressure will squeeze out him/her from the market (just to remind that the condition for this economic model is absolutely a free market and a fair-play game among competitors). In other words, Becker's model will work in practice if the supply of entrepreneurship is elastic enough with a zero price or if there is a majority of employers who will employ discriminated employees and make a stronger competition pressure towards discriminators (in this cited article the author focused on black workers as a discriminated group, because the model was created based on racial discrimination towards black workers, anyway, this logic can be applied in the context of every discriminated group in a labor market) (Heckman, 1998, p. 112).

Statistical discrimination can be explained as one group characteristics used for the estimation of productivity of an individual who is a member of this group (England & Lewin, 1989, p. 241). The reason why it happens is *the information cost* (Sunstein, 1991, pp. 26-27) to realize an individual's productivity and capability to complete labor tasks. An employer will always have less information regarding a candidate who will be at an advantage about information which will use to present himself/herself in the best possible way. There are also limitations based on different legal norms which protect privacy and do not allow employers to ask employees or job applicants concrete questions during their employment or a job interview. It is important to emphasize that in this model of discrimination an employer does not have a taste for discrimination although he/she can have it, but a decision regarding an individual is based on average and statistically based characteristics of members of one group of people. For instance, an employer can refuse to employ a woman because women take parental leave more often than men, or a Roma applicant will be refused because of statistic data that this population has lower levels of skill and education in general in comparison to the non-Roma population. In this example an employer has a too high cost due to the asymmetry of information to realize concrete characteristics of these applicants (a woman and a Roma applicant), and he/she will use average characteristics related to the members of these social groups (women and Roma people). This informative aspect of statistical discrimination can be summarized in the following way: "The more informative the signal of the individual applicant is – the more complete the information is – the greater the weight the employer places on that information; the less informative the signal is, the more weight

he places on the average productivity of other workers from the same group." (Guryan & Charles, 2013, p. F418). There are some views from the economic perspective that statistical discrimination can increase the overall efficiency, but it has to be underlined that "[…] it uses average valuations, rather than marginal valuations which are necessary for efficient resource allocation" (Schwab, 2000, p. 8).

Both analyzed models of discrimination are forbidden from the legal perspective and the anti-discrimination legislation in the field of labor and employment does not allow them access to the labor market. This is in accordance with the stance that the act of discrimination can be done both when a discriminator has a taste for it, and when the subjective motive is dominant, as well as when it is not coming as a consequence of someone's taste, but as an objective action which is based on an average conclusion about one group characteristics which are applied automatically to each of its members. In other words, this is in accordance with the anti-discrimination law which prohibits both direct and indirect discrimination, no matter if an employer wants to discriminate (when has a taste for it) or when he/she does it not knowing about the prohibition of such kind of behavior in general, and uses only general observations of some groups of people which are supported by statistics.

5. ANTI-DISCRIMINATION LEGISLATION IN THE FIELD OF LABOR AND EMPLOYMENT IN THE REPUBLIC OF SERBIA

In this part of the article the author's focus will be on the norms which prohibit discrimination in the field of labor and employment based on the Law on the Prohibition of Discrimination[6] (hereinafter: LPD), which represents an "umbrella" anti-discrimination law in the Republic of Serbia. The anti-discrimination provisions which are stipulated by the Labor Law are also part of the LPD, and will not be analyzed additionally. After this the focus is on the impact assessment of regulations[7] and public policy documents which aim to improve their quality in the context of implementation of the principle of equality, focusing also on the field of labor and employment.

As we mentioned before, purposes of anti-discrimination law are to provide fairer allocation of resources, including this among the human capital and equal opportunities in accessing labor market, as well as to "[…] prevent employers from considering various personal characteristics in making employment decisions" (Donohue III, 1994, p. 2586). The LPD recognizes *an open clause* of personal characteristics and prohibits discrimination based on them. Some characteristics can be seen *prima facie*, for instance some forms of disability, worship of some religion if a person wears symbols, race, nationality, while others are not disclosed, e.g. sexual orientation (Reljanović, 2010, p. 75) or gender identity. Further, the LPD in Article 16 paragraph 1 stipulates that discrimination in the field of work is prohibited, including the violation of equal opportunities for establishing an employment relationship or the enjoyment under equal conditions of all rights in the field of work, such as the right to work, free choice of employment, promotion in the service,

[6] Law on the Prohibition of Discrimination, *Official Gazette of the RS* no. 22/2009 and 52/2021.

[7] In this context, regulations encompass both laws and by-laws.

professional training and professional rehabilitation, equal compensation for work of equal value, right to real and satisfactory working conditions, right to vacation, education and joining a trade union, as well as protection against unemployment. It is very important that the LPD recognizes implementation of *special (affirmative) measures* in Article 14 paragraph 1 which aim is achieving full equality, protection and advancement of persons, or groups of persons in an unequal position, and which do not constitute discrimination. This kind of unequal treatment will be tolerated under the legal framework, because its purpose is to alleviate existing inequalities among concrete social groups, e.g. affirmative measures for employment of Roma people or persons with disabilities.

In many situations it is not very easy to provide enough evidence to prove discrimination, because of the fear of victims that reporting such cases can reveal their identities and make them more vulnerable. For this purpose, the institute called *situation testing* can be used as a social experiment. This means that a potential discriminator will be put in a situation where his/her behavior will be tested. We can distinguish a potential discriminator, experimental groups whose members pose some grounds for discrimination, and a control group whose members are equal as members of an experimental group, except concrete personal characteristics (grounds for discrimination). For instance, Roma people, who pose all necessary qualifications for a concrete job, will apply and go through the interview, as well as their non-Roma counterparts, who form a control group. If all Roma candidates are refused and only non-Roma persons are employed, this can be a clear sign of discrimination of Roma people in a labor market. Situation testing is done in the partnership with the Commissioner for Protection of Equality, it is used as a valid proof in litigations or procedures before the Commissioner for the Protection of Equality, and based on the LPD Article 46 paragraph 4, the Commissioner has to be informed in a written format regarding the testing. Generally speaking, situation testing has two main purposes: to provide a proof of evidence of discrimination in a concrete case and to provide a wider picture to what extent discrimination exists in different fields of social life, e.g. labor market, medical and dental services etc. (Poverenik za zaštitu ravnopravnosti, 2018, p. 21).

The LPD stipulates also special provisions regarding evidence, which aim is to support victims of discrimination and provide incentives for reporting cases of discrimination. Based on the Article 46 paras 1-2, in a situation of direct discrimination, a defendant cannot be released from responsibility by proving that he/she is not responsible, while in a case when a plaintiff makes it probable that the defendant committed an act of discrimination, the burden of proving that as a result of that act there was no violation of the principle of equality, respectively the principle of equal rights and obligations, is borne by the defendant. These rules are applicable equally in court's proceedings or before the Commissioner for the Protection of Equality.

Beside the existing anti-discrimination legislation, it is very important when drafting laws, by-laws and public policy documents to assess their potential effects which they can have in practice during their implementation. This is related to protection of human rights and the principle of equality. In general, every decision by an individual, a family as a union, or a government has its own effects, both positive and negative. Good

planning and assessing different options are the best way to achieve goals with as little as possible negative consequences.

For the first time since 2018/2019, the Law on the Planning System of the Republic of Serbia[8] (hereinafter: LPS RS) and an accompanying by-law called the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents[9] (hereinafter: Regulation) regulate the planning system, including the impact assessment which is applicable equally to laws, by-laws and public policy documents.

Based on the LPS RS, the impact assessment is seen as a part of the public policy management system, and Article 2 paragraph 1 point 7 defines impact assessment as an analytical process conducted during public policy and legislation planning, formulation and adoption with a view to identifying change that should be achieved, their elements and cause and effect relationship, and the choice of optimal measures for achieving public policy goals (*ex-ante* impact assessment), during and after the implementation of adopted policies and regulations with a view to evaluating performance, and reviewing and improving the public policy and/or legislation (*ex-post* impact assessment). The implementation of the principles of equality and non-discrimination are among the priorities in the policy system management.

The Regulation in Article 9 paragraph 1 distinguishes the following steps in the process of conducting an *ex-ante* impact assessment, and they are: 1) the analysis of the existing situation and identifying the change to be achieved by implementing the public policy measure, conditions for implementing such a change and the causal relationships between such conditions; 2) establishing the goals and objectives of the public policy, and performance indicators to be used for measuring the achievement of objectives; 3) identifying options – potential measures, and/or groups of measures for achieving the objectives and resources for their implementation; 4) the analysis of the effects of options – potential measures and risks for implementing each of the options; 5) conducting the selection of the optimum option or optimum combination of the reviewed options; 6) determining the type of a public policy document, and/or regulation they will intervene with; 7) identifying the resources required for implementing and monitoring the implementation of public policies and establishing performance indicators at the level of measures.

There are six impact analyses and assessment of public policy options and solutions from regulations based on the Article 24 paragraph 1 of the Regulation: 1) analysis of financial impact; 2) analysis of economic impact; 3) analysis of social impact; 4) analysis of environmental impact; 5) analysis of governance impact; 6) risk analysis.

The analysis of *social impact* is very important in assessing potential positive and negative effects of public policy documents and regulations towards vulnerable social groups and *labor market*. The Appendix 7 of the Regulation contains a list of questions which answers should be used for this analysis, and the question number 4 is directly connected

[8] Law on the Planning System of the Republic of Serbia, *Official Gazette of the RS* no. 30/2018.

[9] Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, *Official Gazette of the RS* no. 8/2019.

to the labor market: *Would the selected option affect the labor market and employment, as well as the working conditions (e.g. changes in employment rates, dismissal of redundant workers, eliminated or newly-formed jobs, existing rights and obligations of workers, needs for requalification or additional training imposed by the labor market, gender equality, vulnerable groups and forms of their employment, etc.) and how?* Beside this question, other questions[10] from this Appendix contribute to the implementation of the concept called human rights impact assessment which aim is to prevent violations of human rights which can come as a consequence of concrete government's measures and legislations.

The last amendments to the LPD from 2021 in Article 14 paragraph 4 stipulates an obligation not only for the central authorities, but also for the local authorities, that they should conduct an *ex-ante* impact assessment of regulations or public policy documents in the context of their compliance with *the principle of equality* in a case when a regulation or a public policy is important for the realization of the rights of socio-economically disadvantaged persons or groups of persons.[11] This article emphasizes also that vulnerable social groups in the labor market have to be in a special focus when an assessment is done. This novelty is important because the *ex-ante* impact assessment has been recognized as obligation for local authorities, and not only for central, the human rights impact assessment through the respect of the principle of equality has been recognized by the main anti-discrimination law in the Republic of Serbia, and the labor market context is in the focus.

The implementation of the human rights impact assessment by the Republic of Serbia authorities has been recognized as of a special importance by the UN Committee on Economic, Social and Cultural Rights which recommended to the Serbian authorities

[10] The full list of key questions from the Appendix 7 of the Regulation which are used for the social impact assessment: 1) What costs and benefits (material and non-material) will the selected option cause for the citizens? 2) Will the effects of the implementation of the selected option have a harmful effect on a specific group of the population and will this negatively affect the successful implementation of this option, and what measures need to be undertaken to minimize such risk? 3) What social groups, particularly what vulnerable social groups would be affected by the measures of the selected option and what would this impact be reflected in (primarily persons in poverty and socially excluded individuals and groups, such as persons with disabilities, children, youth, women, persons aged 65 and over, members of the Roma national minority, undereducated persons, unemployed persons, refugees and internally displaced persons and the population of rural areas and other vulnerable social groups)? 4) Would the selected option affect the labor market and employment, as well as the working conditions (e.g. changes in employment rates, dismissal of redundant workers, eliminated or newly-formed jobs, existing rights and obligations of workers, needs for requalification or additional training imposed by the labor market, gender equality, vulnerable groups and forms of their employment, etc.) and how? 5) Do the selected options provide for an equal treatment, or lead to direct or indirect discrimination of various categories of persons (e.g. based on national affiliation, ethnic origin, language, sex, gender identity, disability, age, sexual orientation, marital status or other personal characteristics)? 6) Could the selected option affect the price of goods and services and the living standard of the population, how and to what extent? 7) Would the realization of the selected options positively affect changes in the social situation in a given region or county and how? 8) Would the realization of the selected option affect changes in the financing, quality or availability of the social welfare system, healthcare system, or educational system, particularly regarding equal access to services and rights of vulnerable groups and how?

[11] For more details about the application of this provision, see: Mihajlović, A. 2023. Application of the principle of equality in the process of impact assessment of regulations and public policy documents in the Republic of Serbia. In: Čelić, D. & Miljković, S. (eds.), *Law between the Ideal and the Reality.* Kosovska Mitrovica/Belgrade: University of Priština, Faculty of Law and Institute of Comparative Law, pp. 213-226.

the following: the Republic of Serbia has to systematize the application of impact assessment through the dimension of human rights in the process of preparing regulations and public policy documents in the field of economic, social and cultural rights[12] (economic rights are related to the labor rights and labor market); expression of concern about the lack of systematic collection and processing of desegregated data that would enable an accurate assessment of the fulfillment of economic, social and cultural rights in the Republic of Serbia, and recommends the use of appropriate indicators that can be used to monitor the level of enjoyment of economic, social and cultural rights.[13] The UN Committee recommended the application of the methodology[14] for the development of indicators, which was prepared by the Office of the United Nations High Commissioner for Human Rights.

6. CONCLUSION

Economic analysis of law approach was used in this paper to explain two models of discrimination in the labor market, Becker's Taste for Discrimination and Statistical Discrimination Model. Becker's Taste for Discrimination Model means that an employer has a taste to discriminate concrete groups of people in the labor market and is ready to pay a price for this kind of preference. Becker also explained that in the longer period of time, a discriminator will be eliminated from the market because the price of discrimination would be too high that he/she can cover such costs. The second model, Statistical Discrimination comes because an employer does not have always enough information about candidates in the labor market and his/her decision regarding one individual will be based on some statistical/average characteristics of a group whose member is an individual. In this model, an employer does not have a taste for discrimination although in some cases it can be a combination of a taste and not accurate information about concrete candidates.

Due to the market imperfections in general, including the labor market, it cannot be seen as a regulator which will eliminate employers-discriminators and establish a market equilibrium. The normative intervention in a format of anti-discrimination law is inevitable for two reasons: this is a question of respect of human rights and the principle of equality, as well as a mechanism which will allocate resources, including labor force as a human capital, where they are necessary and where their engagement will provide the highest level of utility. The Law on the Prohibition of Discrimination was in a focus in this paper as a main anti-discrimination legal act in the Republic of Serbia which prohibits different forms of discrimination in different fields, including a labor market, based on different grounds/

[12] Concluding observations on the third periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/3, 06/04/2022, paragraph 7.

[13] Concluding observations on the second periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/2, 10/07/2014, paragraph 7.

[14] United Nations Human Rights Office of the High Commissioner, 2012. *Human Rights Indicators – A Guide to Measurement and Implementation*. HR/PUB/12/5. New York/Geneva: United Nations Human Rights Office of the High Commissioner.

personal characteristics. A special attention was also on the impact assessment of regulations and public policy documents in a context of implementation of the principle of equality in the process of legislative drafting or formulation of public policy documents, and their potential implications to the labor market and employees. This has been regulated by the Law on the Planning System of the Republic of Serbia and the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents. The last amendments of the Law on the Prohibition of Discrimination have concretized the application of the principle of equality in the process of drafting legislation and public policy documents, especially in the field of labor. This novelty also recognized a wider circle of subjects who are responsible for their implementation, beside central authorities, there are also local authorities.

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TRENDS ON FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN LEGAL SPACE – 2023 PROSPECTIVE

Within the geographical Europe, on supranational and international level, we come across two distinct, yet interconnected human rights protection regimes; the Council of Europe (hereinafter: CoE) and most importantly, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR, Convention), and the European Union (hereinafter: EU) that safeguards fundamental rights through the provisions of the EU law and in conjunction with the case-law of the Court of Justice of the European Union (hereinafter: CJEU).

While some member states co-exist within EU and CoE in parallel, others are being expelled from the CoE or exiting the EU on their own, questioning thus the membership status quo in times that appear to bring deterioration on the landscape of human rights.

Starting off with essentially different mandates both organisations, i.e. the CoE and the EU have today more features that unite them, at least from the perspective of their human/fundamental rights work. As such, two fundamental rights catalogues, well-established procedural mechanisms and overarching principles stand out as signs of convergence within the two regimes.

To analyse the interconnection between the two regimes is even more timely as the negotiation talks between the CoE and the EU resume, including suggestions to overcome issues previously contested by the CJEU of Justice of European Union in its infamous 2/13 Opinion on Accession of the European Union to the ECHR. The renewed efforts include potential solutions on co-respondent mechanism, joint responsibility, advisory opinion and other previously disputed issues, though the scepticism on the actual progress seems justified.

Keywords: European legal space, human rights, Convention for the Protection of Human Rights and Fundamental Freedoms, European Union, accession of European Union to the ECHR.

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1. INTRODUCTION – CONTEXT – RESEARCH METHODOLOGY

Within the geographical Europe, on supranational and international level, two distinct, yet interconnected human rights protection regimes co-exist; the Council of Europe (hereinafter: CoE) and most importantly its most successful instrument, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), and the European Union (hereinafter: EU, European Union) that floated considerable fundamental right protection through its primary law and case-law of the CJEU.

The system as such is not symmetric, but rather a complementary one, as on the one hand the EU is a supranational organisation, while on the other hand ECHR and the European Court of Human Rights (hereinafter: ECtHR) are parts of an international regional organisation, the CoE.

The system approach is true at least for the individuals from the member states that have double membership or other affiliation with the EU and CoE which encounter 27 countries to date.

The complex relationship between the two distinct regional regimes, including their interconnectedness, remains on the forefront of many attempts to analyse "two Europes". This allegation is appropriate in times which – due to many current challenges, such as the high inflation rates across Europe, the ongoing war in Ukraine and the post-pandemic period – are generally considered as bringing the erosion of rule of law.[2] Conversely, attempts to intensify institutional co-operation and thus strengthen the coherence of human rights protection, such as through the failed and awaited accession process of the EU to the ECHR, are welcomed.

The terminology of European legal space references CoE and EU as two interconnected organisations that both offer fundamental rights protection to their subjects on supranational and international level. Although this terminology might seem as a comprehensive one, from the author's understanding it mirrors most adequately the reality of human rights protection within the European region. The reason behind this choice of words is manifold and tries to account for different approaches taken by the EU and CoE. The EU refers to the protected goods mainly as fundamental rights (not going into further details between potential division of rights and principles) whereas under the ECHR they are called human rights (while not excluding the potential dogmatic differences between human rights and fundamental rights) and building on the concept of *espace juridique*[3] the so-called legal space as referenced by ECtHR in its judgments and decisions.

The concept of European legal space certainly presumes the existence of national laws and the international law apart from the CoE and EU, however it is not in the focus of the aforementioned concept.

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[2] See e.g. The Erosion of the Rule of Law in Europe: A Case Study in Poland and Impact on Extradition, Bindmans LLP 2021. Available at: https://www.bindmans.com/knowledge-hub/blogs/the-erosion-of-the-rule-of-law-in-europe-a-case-study-in-poland-and-impact-on-extradition/ (24. 6. 2023); Camela, E. 2019. *The Rule of Law Erosion in the EU: Are We Solidly Built to Hinder It? Between Ineffective Tools and New.* Available at SSRN: https://ssrn.com/abstract=3449979 or http://dx.doi.org/10.2139/ssrn.3449979 (24. 6. 2023).

[3] Areas where the European Convention on Human Rights cannot be implemented.

To add a further nuance to the interconnectedness, as some authors rightly outline (von Bogdandy, 2021, p. 3), all EU Member States are bound by the ECHR under international law, and in some the ECHR enjoys constitutional rank.[4]

The research question is especially timely, as the negotiation talks between the EU and CoE resume and intensify pertaining to the accession of the EU to the ECHR. The renewed attempt serves as a good milestone to look back and evaluate earlier accession attempts, as described in the sections 2 and 3. It is important to dedicate sufficient attention to the past experience and examples as only through those efforts is possible to understand the present day conditions and potential future prospects. Furthermore, it is an opportunity to provide general reflection to the issue of systemic human rights protection in Europe as concluded in the last chapter.

The research methodology of this article is based on legal positivism and combines several research modalities, including desk research, textbooks, international document, books, and legal reviews. The dominant research methods are the normative legal, and the comparative legal methods.

2. THE RELEVANCE AND EFFECTS OF THE EU ACCESSION TO ECHR

As an introduction, it is important to underline that the EU's ECHR accession is a way to more coherent human rights protection across the European legal space. It might not be the only solution nor the remedy for all human rights violations across the European legal space, but it certainly remains the most relevant prospect. That is why it is not an overstatement to say that the accession of EU to the ECHR will ultimately cross the t's and dot the i's when it comes to the Europe-wide standards on human rights protection. This chapter is supposed to convince all the sceptics who think otherwise.

Starting with essentially different mandates both the EU and the CoE have gradually expanded their areas of (joint) engagement that ultimately lead to closer mandates signalling certain degree of convergence, at least from the perspective of their human rights work. Two fundamental rights catalogues, well-established procedural mechanisms and principles stand out as signs of convergence within the two regimes. Despite the existing indicators of convergence, this relationship is neither systematic nor ideal. As outlined by Kuijer (2023, p. 1008) "the often problematic interaction between both European courts in recent years highlights the lack of an institutionalised arrangement between them despite the fact that both are working in the same geographic area interpreting similar human rights standards."[5]

The question of the importance of EU accession to ECHR can be answered in manifold ways, let me outline two of them. First there is a normative requirement for the EU to join the ECHR. The Lisbon Treaty, back in 2009, introduced Treaty on European Union,

[4] Von Bogdandy, A. 2021. Constitutional Adjudication in the European Legal Space. *MPIL Research Paper Series*, 25. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937301 (24. 6. 2023).

[5] Kuijer, M. 2020. The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession. *The International Journal of Human Rights*, 24(7), p. 1008.

Article 6 paragraph 2 outlining that "the Union shall accede to the ECHR"[6]. Furthermore, one can find a fair share of references of the Treaty on Functioning of the EU pertaining to the Union's ECHR accession. Regulating consequential setup consequences, Article 218 para 6 (ii) or the Protocol (No. 8) relating to the Article 6(2) of the Treaty on European Union on the Accession of the Union to the ECHR, which imposes the duty of accession on the level of primary law and constitutes *pacta sunt servanda* for the EU.

The second reason is more of a holistic nature. Looking at the concept of European legal space as a whole rather than a fragmentised protection scheme, the ECtHR within that space can be considered as an *ultima ratio* guardian of minimum standards. This standard setting function of the Convention is beneficial, however there are some improvements still to be made to make this statement accurate. The accession would allow for a much greater consistency and established minimum level of protection of fundamental rights across European legal space.

To date, the acts, actions and omissions of the EU are not subjected to supervision of any external mechanism when it comes to their compliance with human rights. This practically means, that the EU is still a missing link in the architecture of European legal space pertaining to external human rights protection supervision mechanism.

This of course does not preclude and minimise the very existence of the comprehensive fundamental rights case-law developed by the CJEU over the decades, which regrettably is not within the scope of this article.

However, one might wonder what is the added value of such control at all. Having an external human rights control mechanism – such as the ECtHR – represents, as some authors say (Callewaert, 2014, p. 15), "added value in relation to purely national supervision exercised 'from within'. The international court's different position and perspective, marked by a greater distance in relation to the constituent elements of a dispute, introduce added impartiality and objectivity, providing a view which is not better than that of the domestic court but different from it and complementary to it."[7] In addition, on a more positive note as some authors argue (Callewaert, 2014, p. 17) when it comes to the decisions taken by national authorities, "the latter receive a major boost to their credibility at both national and international level"[8]. These statements are *mutatis mutandis* applicable to international organisation's (in our case EU's supervision) mechanism. This means that – building on the metaphor above – the EU's fundamental rights regime, including the provisions of the Charter and the case-law of the CJEU – are considered as supervision from within. This external supervision mechanism is applied in the same manner as with member states, regardless of the fact that the EU has indirect international legal personality.

One further aspect to address is the question how the accession will impact those CoE/ECHR member states that are not EU member states (yet)?

To get an idea of what the response might be, I singled out anecdotally three examples, Bosnia and Herzegovina (hereinafter: BiH), Turkey and the Russian Federation,

[6] *OJ* C, 326/19.

[7] Callewaert, J. 2014. *The Accession of the European Union to the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, p. 15.

[8] *Ibid.*, p. 17.

because of their concerning practices either in non-implementation of ECtHR judgements, or for high human rights violation rate as established by the ECtHR practice.

None of the CoE/EU member states is perfect in its human rights safeguard, this is why external supervision mechanism is welcomed. As argued by Dzehtsiarou (2022) "All member States have some problems with some human rights, but of course it is a question of degree and red lines, raising political rather than legal questions."[9] There is a differing level of adherence to human rights across the CoE space, where BiH's, Turkey's and Russian Federation's efforts – to put it mildly – seem quite modest.

As for BiH, to provide some exact figures, in 2022 alone the ECtHR received 823 applications and delivered 10 judgments[10] which is a relatively high number of applications for a country with less than 3 million inhabitants.

The country's constitution – setting up a complex and rather fragile legal system – underlines that the "rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly".[11] Despite such a promising place in hierarchical sources of law, the case-law declaring passive suffrage along ethnical lines discriminatory as triggered by the Sejdić and Finci[12] judgment from 2009 followed up with cases such as *Zornić v. Bosnia and Herzegovina*[13], *Šlaku v. Bosnia and Herzegovina*[14] remain non-implemented to date.

I believe the statement on fragile legal system is echoed also by judges Mijović and Hajiyew outlining that "it might be said that all of the weak features of Bosnia and Herzegovina's statehood, visible but ignored at the moment of its accession to the Council of Europe, have shown themselves to their full extent in the case of Sejdić and Finci."[15]

The non-implementation of judgments echoed concern not only by the CoE but also the EU. The Council of European Union's 2010 conclusions[16] put Sejdić-Finci case at the top of the EU's agenda, making its resolution a condition for BiH to submit a credible membership application. Since then, considerable time and multiple efforts have been dedicated to this issue, to no avail.[17] In the meantime, BiH received EU-member candidate state status.

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[9] Dzehtsiarou, K. 2022. *The Closing Door in Strasbourg An Interview with Kanstantsin Dzehtsiarou on the Council of Europe's Suspension Decision.* Available at: https://voelkerrechtsblog.org/the-closing-door-in-strasbourg/ (24. 6. 2023).

[10] ECHR. 2023. Bosnia and Herzegovina – Press Country Profile. Available at: https://www.echr.coe.int/documents/d/echr/CP_Bosnia_and_Herzegovina_ENG (24. 5. 2023).

[11] Constitution of Bosnia and Herzegovina. Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (24. 5. 2023).

[12] *Sejdić and Finci v. Bosnia and Herzegovina*, applications no. 27996/06 and 34836/06.

[13] *Zornić v. Bosnia and Herzegovina*, application no. 3681/06.

[14] *Šlaku v. Bosnia and Herzegovina*, application no. 56666/12.

[15] *Sejdić and Finci v. Bosnia and Herzegovina*, partly concurring and partly dissenting opinion of judge Mijović joined by judge Hajiyew, p. 41.

[16] European Parliament. 2015. Bosnia and Herzegovina: The 'Sejdić-Finci' case. Available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf (22. 6. 2023).

[17] European Parliamentary Research Service. Available at: https://www.europarl.europa.eu/at-your-service/en/stay-informed/research-and-analysis (22. 6. 2023).

As the efforts of both the CoE and EU pertain to establishment of an inclusive, non-discriminatory electoral system in BiH, the efforts of both organisations are on the same page, supporting the same goal with the ultimate aim of enhanced human rights protection. That being said, it can be concluded that the ECHR's standard setting function has a catalysing role for BiH's EU membership and fulfilling 14 priorities outlined by the European Commission[18]. Though it is evident, that there is a discrepancy between the formal conclusions of both the EU and CoE on what should be done and tolerating the country's bare minimum efforts when it comes to human rights compliance. This essentially means that both organisations only formally express concern that is not followed up by an adequate reaction. This practice is portrayed by the case of BiH which received EU candidate membership status despite the failure to implement Sejdić-Finci case and many other priorities.

As for Turkey, over the period 1959-2022 it had 3,458 judgments delivered by the ECtHR, establishing at least one violation.[19] Bringing thus the country to the infamous top in the number of judgments finding at least one violation, the number and complexity of those human rights violations is a good indicator for the EU as well. Consequently, the motion of the Committee on Foreign Affairs of the European Parliament in the 2021 Commission Report on Turkey leans on the ECHR as an instrument and the case-law of ECtHR when noting "the serious backsliding in the freedom of assembly and demonstration, which is increasingly under pressure in the light of the routine use and extension of bans on protests and demonstration by provincial governors, the excessive use of force against peaceful demonstrators and journalists amid general impunity of law enforcement officials."[20] This is another compelling example of the complementary and supportive relationship in human rights standard setting of the two regimes.

The example of Turkey proves that the ECHR case-law and Convention mechanisms have a catalytic role reinforcing the standards of Copenhagen criteria. Though the Copenhagen criteria is a much broader "checklist" for future EU member states, its box ticking the human rights aspect by requesting rule of law and human rights compliance from the candidate states, therefore they ultimately contribute to a more coherent human rights system in the European legal space by ensuring the respect for European values, at least in theory.

If we look at the number of violations for Russian Federation, there were 3,317 judgments delivered in the period 1959-2022 with at least one violation.[21] "Six months after its exclusion from the CoE, the Russian Federation ceases to be party to the ECHR on

[18] Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2019-05/20190529-bosnia-and-herzegovina-opinion.pdf (30. 6. 2023).

[19] Violations by Article & by State. Available at: https://www.echr.coe.int/documents/d/echr/Stats_violation_1959_2021_ENG (22. 6. 2023).

[20] REPORT on the 2021 Commission Report on Turkey | A9-0149/2022 | European Parliament, paras. 10, 12, 13. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2022-0149_EN.html (26. 6. 2023).

[21] Violations by Article & by State. Available at: https://www.echr.coe.int/documents/d/echr/Stats_violation_1959_2021_ENG (26. 6. 2023).

16 September 2022. 2,129 judgments and decisions have yet to be fully implemented by Russia and remain pending before the Committee of Ministers."[22] As rightly stated by Dzehtsiarou (2022) "While the exit is not first in the history it is a radical step even if we consider suspension of Russia from the Council of Europe is a correct solution in the circumstances but this does not come without a cost. This cost is inability to protect victims of human rights in Russia."[23]

Supporting and complementing each other, the two regimes in the long run will create a closed system of a high(er) level of human rights standard, but on the other hand those states who only uphold their CoE membership will be considered as some form of "leftover" states and will mostly continue to suffer to meet the basic human rights criteria.

3. ACCESSION IDEAS AND ATTEMPTS

There is nothing new under the sun as they say. This is also true for the European Community's, now EU's accession path to the ECHR. Namely, the thought of the accession of the European Community / the EU to the ECHR as a concept has been on the agenda for several decades. Throughout times this concept evolved from a mere idea and desire, to an actual possibility it is likely to happen.

As such, the first idea of the accession of the European Community to the ECHR was raised back in 1979 as "desirable for a whole series of reasons. Ultimately leading to improving the image of Europe."[24] The memorandum outlining the idea served as a basis for enhancing discussion on the idea of accession itself, prior to delving into the search for "appropriate institutional mechanisms".[25] The memorandum portrays an important milestone in recognising and conceptualising the Community for its fundamental rights safeguards and providing a possible future evolution of its fundamental rights work.

More than forty years after the memorandum was signed, the idea of accession still remains to be implemented with a few failed accession attempts meanwhile due to political and legal reasons.

Back in 1994, the Court of Justice received a request for an Opinion, from the Council of the European Union pertaining to the exceptional procedure with regards to the compatibility of an envisaged agreement with the provisions of the Treaty. The question posed wanted to ensure whether "the accession of the European Community to the ECHR is compatible with the Treaty establishing the European Community?"

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[22] Russia ceases to be party to the European Convention on Human Rights. Available at: https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights (5. 8. 2022).

[23] Dzehtsiarou, K. 2022. *What Would Russia's Departure from the Council of Europe Mean for the Strasbourg System of Human Rights Protection*? Available at: https://www.echrblog.com/2022/03/what-would-russias-departure-from.html (26. 6. 2023).

[24] Memorandum on the Accession of the European communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51979DC0210&from=EN (30. 6. 2023).

[25] *Ibid*.

In responding to the request, the Court of Justice ruled that "as Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."[26]

It is important to outline that the Court duly noted the absence of specific setting which would operationalise the accession, by stating that the question posed did not refer to arrangements "under which the Community envisages submitting to the present and future judicial control machinery established by the Convention."[27]

The evolution of the community and afterwards the EU law – among others – with the entry into force of the Lisbon Treaty, remedied the competence issue outlined by the 2/94 CJEU opinion.

As part of the new attempt, in 2010, upon the recommendation of the EU Commission, the Council of the EU authorised the opening of negotiations for the EU's accession to the ECHR and the Council designated the Commission as negotiator.[28]

The accession negotiations took place within the institutional framework of the CoE through working groups. Interested CoE member states took part in the negotiations, some of them being the members of the EU, others not.[29]

The Commission's request for an Opinion to the CJEU was accompanied by the draft agreement and all the other draft legal instruments that were not shared publicly.[30]

Advocate general Kokott's opinion proposed conditional green light to the accession, by stating that "the draft revised agreement on the accession of the EU to the ECHR is compatible with the Treaties" however, she outlined further minor, primarily procedural polishments needed when it comes to the areas such as the co-respondent mechanism, prior involvement of the CJEU and joint responsibility.

The Opinion of the Court of Justice was much awaited, and when it finally arrived, it mostly caused disappointed reaction from academics.[31] It is no overstatement to say that it came as a full surprise when the full court in its 2/13 opinion reached a diametrically differing conclusion from AG Kokott's reasoning. The CJEU concluded that "The agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the ECHR."[32]

The issue sparked the attention not only of the EU institution but also of 24 EU member states – all CoE member states submitted their observations, too.

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[26] Opinion 2/94 of the Court pursuant to Article 228(6) of the EC Treaty. Available at: https://curia.europa.eu/juris/showPdf.jsf?docid=99493&doclang=EN (europa.eu) (30. 6. 2023).

[27] *Ibid*., paras. 20-21.

[28] View of Advocate General Kokott delivered on June 13, 2014. Para 5-6 ECLI:EU:C:2014:2475.

[29] *Ibid*.

[30] Request for an opinion of the European Court of Justice. Available at: https://ec.europa.eu/dgs/legal_service/submissions/avis2013_2_en.pdf (1. 7. 2023).

[31] Mohay, Á. 2015. Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note. *Pécs Journal of International and European Law*, 1, p. 35.

[32] Opinion of the Court (Full Court) of 18 December 2014. ECLI:EU:C:2014:2454.

The CJEU found the subject matter of the request was indeed an 'agreement envisaged' within the meaning of Article 218(11) TFEU[33]. Furthermore, the Court concluded that "All those instruments together constitute a sufficiently comprehensive and precise framework for the arrangements in accordance with which the envisaged accession should take place, and thus enable the Court to assess the compatibility of those drafts with the Treaties."[34] These statements, present better the preparedness of the Commission as opposed to the earlier request for a 2/94 opinion.

The CJEU also gave some contextual elaboration on the nature of the EU law and its specific institutions, such as mutual trust,[35] and outlined the reasons for non-compatibility of accession with specific concepts, such as the dichotomy between preliminary ruling procedure and advisory opinion,[36] the disputed setting of the co-respondent mechanism,[37] the inaccurate solution pertaining to the prior involvement of the CJEU[38], and lastly the matter of Common Foreign and Security Policy's (CFSP) judicial review.[39]

These issues are important for future accession attempts' caveats given that, as outlined by Peers (2014) "the Court has in effect provided a checklist of amendments to the accession agreement that would have to be made to ensure that accession is compatible with EU law."[40]

As argued by some authors (Peers & Mohay 2014) "most of the Court of Justice's conditions for accession are of a procedural nature, and are meant essentially to accomplish one thing: preserving the competence of the CJEU as the adjudicator of EU law as an autonomous legal order"[41] therefore such reasoning might indicate that, as concluded by Perez de Nanclares (2013), this is more than a legal issue.[42]

The post 2/13 opinion period – as put by Timmermans – was a reflection period[43] meaning that the accession talks were *de facto* put on hold.

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33 Opinion of the Court, para. 110.

34 Opinion of the Court, para. 148.

35 See paras. 168, 191 and 194.

36 See paras. 27, 36, 65,196 and 198. See also: Daka, M. 2020. Advisory Opinion and Preliminary Ruling Procedure – A Comparative and Contextual Note. *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku*, 36(3-4), pp. 289-308.

37 See paras. 215-235.

38 See paras. 236-248, for the observation submitted by individual member states, see paras. 136-139.

39 See paras. 249-257.

40 Peers, S. 2014. *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection.* Available at: http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html (30. 6. 2023).

41 *Ibid*. Mohay, Á., 2015. *Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR* - Case note, pp. 38.

42 Perez de Nanclares, J. M. 2013. The Accession of the European Union to the ECHR: More than just a Legal Issue. *WP IDEIR* (15). Available at https://www.ucm.es/data/cont/docs/595-2013-11-07-the%20accesion.pdf (29. 6. 2023).

43 Commission Statement: EU framework for democracy, rule of law and fundamental rights. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4402 (26. 6. 2023).

4. NEWEST DEVELOPMENTS

After a five year break the accession journey continued with renewed motivation. In 2019, the President and the First Vice-President of the European Commission informed the Secretary General of the CoE that the EU stood ready to resume the negotiations on the accession to the Convention.[44] In 2020, representatives of the CoE's steering committee for human rights (hereinafter: CDDH) and EU jointly, in an ad hoc working group (the so called 46+1 group) started developing modalities and instruments on the EU accession to the ECHR in an intensified manner.[45]

The working group prepared a comprehensive set of documents targeting the accession process, the package consisting of five items: (1) Draft revised Agreement on the Accession of the EU to the ECHR, (2) Draft declaration by the EU to be made at the time of signature of the Accession Agreement, (3) Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party, (4) Draft model of memorandum of understanding between the EU and X [State which is not a member of the European Union], and lastly (5) Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The groundwork was laid down by the referred, infamous 2/13 CJEU opinion and the issues flagged therein which the working group proactively grouped in four "baskets": (1) the EU-specific mechanisms of the procedure before the ECtHR; (2) the operation of inter-party applications (Art. 33 of the ECHR) and of references for an advisory opinion (Protocol No. 16 to the ECHR) in relation to EU Member States; (3) the principle of mutual trust between the EU Member States; and (4) EU acts in the area of the common foreign and security policy (CFSP) that are excluded from the jurisdiction of the CJEU[46].

The "basket" approach might be the consequence of the EU's position paper that unilaterally opted to divide the issues into four areas that were consequently marked as "baskets".[47]

The working group achieved progress in terms of baskets no. (1) on the EU specific mechanisms of the procedure before the ECtHR pertaining to the more permissive interpretation of the co-respondent mechanism, and basket no. (2) relating to the interparty cases and

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[44] CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, Report to the CDDH. Available at: https://rm.coe.int/report-to-the-cd-dh/1680aa9816 (29. 6. 2023).

[45] For detailed negotiation meeting agendas and reports, see: EU Accession to the ECHR - Human Rights - Intergovernmental Cooperation. Available at: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:[14]} (26. 6. 2023).

[46] CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, Report to the CDDH. Available at: https://rm.coe.int/report-to-the-cd-dh/1680aa9816 (29. 6. 2023).

[47] 6th Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms. Available at: https://rm.coe.int/eu-position-paper-echr-march-2020/1680a06264 (29. 6. 2023).

reference for an advisory opinion. This new solution establishes a certain schedule when it comes to seeking advisory opinion from the ECtHR *and/or* preliminary ruling procedure from the CJEU with regard to a right secured both in EU law and in the ECHR. As argued in my previous article,[48] under current setting, if the national court refers the same question to both courts, i.e. to the CJEU to interpret and review EU law and to the ECtHR to provide guidance on the principle, this can be a source of divergence in the application of law. In such cases the autonomy of EU law could come into question and the national courts could possibly be engaged in "*forum shopping*" between the Strasbourg and Luxembourg courts. Therefore it is reassuring to see that the draft accession agreement foresees a certain schedule for a court of tribunal to *first* turn to the CJEU *and* only afterwards to the ECtHR[49]. As for the basket no. (3) Capturing the issue of mutual trust, the text proposes not to affect the application of the principle of mutual trust within the European Union, which is basically not a substantive approach to the solution.[50]

This basically means upholding the *status quo* between the EU member states and EU itself. Proposed Article 6 establishes jurisdictional link by outlining that the expression "*everyone within their jurisdiction*" per ECHR's Article 1 "refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the EU, as referring to persons within the territories of the member States of the EU to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply."[51] As this provision includes ground for potential extraterritorial application of the ECHR as an option, especially relevant in military actions,[52] it will be interesting to see how the basket no. (4) area will be resolved, as those act, actions or omissions in theory might trigger extraterritorial effect. Article 7 contains language adjustments transforming the current wording from country to territory of the state, which in practice should not be a contested provision. Article 8 clarifies the nature of proceedings before the CJEU stating that those do not constitute "neither procedures of international investigation or settlement within the meaning of the ECHR"[53].

An unexpected turn occurred by the EU which announced that it would resolve Basket 4 issues internally. Such approach means that once the EU consolidated its view on Basket 4 issues, CoE will also need to confirm whatever view the EU will take. This can potentially trigger further delays and interpretational issues, further down the road.

Despite the relatively quick and productive efforts of the working group and its absence of further formal meetings, the scepticism on the actual progress seems justified.

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48 Daka, M. 2020, p. 299.

49 Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5. Available at: https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd (30. 6. 2023).

50 *Ibid*., Article 6.

51 *Ibid*., Article 5.

Ibid., para. 6.

52 See: Kis Kelemen, B. & Daka M. 2017. Extraterritorialitás az emberi jogi bíróságok gyakorlatában. *Jura*, 1. pp. 207-218.

53 Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 8.

5. CURRENT TRENDS AND CHALLENGES IN THE EUROPEAN LEGAL SPACE

Over the past decades, the accession of the EU to the ECHR became the synonym for enhanced coherence of human rights protection within the European legal space as indicated in chapters one and two. The EU accession does so "by strengthening participation, accountability and enforceability in the Convention system."[54]

As stated by Krommendijk (2023, p. 17) "accession is also beneficial for the coherence of the two legal systems of the EU and the ECHR, reducing the likelihood of conflicts between the two orders."[55]

The existence of European legal space brings an added safeguard to uphold the values of the above-mentioned sanctity triangle including its enshrined rights, mechanisms and nevertheless the envisaged EU's ECHR accession.

From the perspective of the dialogue of courts, "this shared responsibility is exercised in different forms, for each institution is primarily responsible to the legal order on which it is based. The shared responsibility within the European legal space suggests taking the decisions of other courts into consideration, especially if they express a different tendency. This does not imply that harmony should always be the preferred outcome. Rather, it suggests that differences should be reflected in view of the common whole."[56]

Reason for further signal of shared agenda stems from the fact that the EU recently ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence, commonly known as Istanbul Convention that has a matching supervision mechanism (GREVIO) to ensure effective implementation of its provisions to which the EU committed to adhere as of 1 October 2023.

On a less positive note, as argued throughout the article, the overall erosion of the rule of law in the European legal space signals the wide spectrum of differing level of human rights compliance as presented through the examples of BiH, Turkey and the Russian Federation. However, the same goes for countries having membership statuses in both, the EU and CoE respectively, such as Poland and Hungary. Those countries continue to display systemic human rights and rule of law violations that have been modestly addressed by both the EU and the CoE.[57] As put by Bard (2021) such continuous "backsliding and the EU institutions' lack of willingness to stop this trend show the ugly face of the EU – and there is no portrait in the attic".[58]

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[54] Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[55] Krommendijk, J. 2023. *EU Accession to the ECHR: Completing the Complete System of EU Remedies?* Available at SSRN: https://ssrn.com/abstract=4418811 or http://dx.doi.org/10.2139/ssrn.4418811 (7. 1. 2023).

[56] *Ibid*., p. 5.

[57] For a recent example relating to judicial independence and the preliminary ruling procedure, see the CJEU judgment in Case C-564/19. For analysis see Mohay, Á. & Szijártó, I. 2022. Criminal procedures, preliminary references and judicial independence: A balancing act? Case C-564/19 IS. *Maastricht Journal of European and Comparative Law*, 29(5), pp. 629-640.

[58] Bárd P., Grabowska-Moroz, B. & Kazai, V. Z. 2021. *Rule of Law Backsliding in the European Union Lessons from the Past, Recommendations for the Future.* Available at: https://reconnect-europe.eu/blog/

Based on the above, the conclusion to be drawn presents itself that the values of the European legal space as elaborated above "currently appear to be in considerable danger, especially due to measures with which governments are weakening institutions of review. The value of the rule of law appears most at risk, but the values of democracy and respect for human rights are also affected."[59]

Therefore, the EU's accession journey is even of greater significance.

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rule-of-law-backsliding-in-the-european-union-lessons-from-the-past-recommendations-for-the-future/ (last visited June 29, 2023).

[59] Von Bogdandy, A. 2021, p. 14.

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PROTECTION OF HUMAN RIGHTS AT THE INTERNATIONAL LEVEL: THE ROLE OF THE HUMAN RIGHTS COMMITTEE

The United Nations, as a guardian of peace and security in the world, from the moment of its inception, has been involved in promoting and protecting human rights. Although the Universal Declaration of Human Rights was adopted by the General Assembly in 1948, and the process of drafting the International Bill of Human Rights was completed by 1966, the international human rights treaty system has continued to strengthen with the adoption of new instruments and the establishment of UN treaty bodies which fulfill a unique function in the global human rights system. This paper stresses that observed from a historical perspective, the establishment of instruments and bodies whose main purpose was the protection of human rights brought numerous advantages in the international system of human rights protection, but at the same time predicted various challenges when implementing protection on a practical level in certain areas that were of special interest to the international community. Taking into account the facts that the UN Human Rights Committee is an independent expert body that monitors the implementation of the International Covenant on Civil and Political Rights by its States Parties, and that it is known for its impartial, credible, and comprehensive expert presentation of the content of the said Covenant, this paper will discuss the results of the activities of the Committee from the perspective of its functions and the legitimacy of its decisions, as well as of its effectiveness in ensuring the respect, protection, and promotion of human rights at the international level.

Keywords: human rights, promotion and protection of human rights, strengthening of the United Nations human rights treaty bodies, Human Rights Committee.

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1. INTRODUCTORY REMARKS

The term "human rights" came into usage after World War II, particularly with the founding of the United Nations in 1945. The term "human rights" replaced the phrase "natural rights" due to the fact that it became a matter of controversy and the later phrase the rights of man was not understood universally to include the rights of women.[1] As stated by Professor Marks, human rights constitute a set of norms governing the treatment of individuals and groups by states and non-state actors on the basis of ethical principles regarding what society considers fundamental to a decent life. He further argues that these norms are incorporated into national and international legal systems, which specify mechanisms and procedures to hold the duty-bearers accountable and provide redress for alleged victims of human rights violations.[2] International human rights law emerged following the Second World War with the creation of the United Nations (hereinafter: UN) and the adoption and ratification of the core human rights treaties.[3] The UN defined human rights as those rights which are inherent in our state of nature and without which we cannot live as human beings.[4] As one of ten human rights treaty bodies comprised of independent experts of recognized competence in human rights, the Human Rights Committee (hereinafter: CCPR) monitors the implementation of the International Covenant on Civil and Political Rights of 1966 (hereinafter: ICCPR) and its optional protocols. This paper will primarily discuss the results of the activities of the CCPR from the perspective of its effectiveness in ensuring the respect, protection, and promotion of human rights at the international level.

2. UNITED NATIONS HUMAN RIGHTS SYSTEM

The Charter of the UN (1945) proclaims that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms for all. This call was first given concrete expression with the promulgation of the Universal Declaration of Human Rights by the UN General Assembly in 1948 (hereinafter: Universal Declaration). Adopted against the background of the horrors of the Second World War, the Universal Declaration was the first attempt by all states to agree, in a single document, on a comprehensive catalogue of the rights of the human person.[5] Broadly speaking, the

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[1] Symonides, J. 2002. *Human Rights, Concepts and Standards*. New Delhi: Rawat Publications. pp. 347-349.

[2] Marks, S. P. 2014. *Human Rights: A Brief Introduction*. Boston: Harvard T.H. Chan School of Public Health, p. 1. Available at: https://dash.harvard.edu/bitstream/handle/1/23586712/Human%20RightsA%20Brief%20Introduction%2c%202014%20ed.pdf?sequence=1&isAllowed=y (11. 6. 2023).

[3] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights. 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 41. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

[4] Mishra, P. 2000. *Human Rights Global Issues*. Delhi: Kalpaz Publications, p. 4.

[5] As its name suggests, it was not conceived of as a treaty but rather a proclamation of basic rights and fundamental freedoms, bearing the moral force of universal agreement. Its purpose has thus been described as setting "a common standard of achievement for all peoples in all nations". See: Office of the High Commissioner

Universal Declaration sets down two broad categories of rights and freedoms: civil and political rights, on the one hand, and economic, social, and cultural rights, on the other.[6]

At the time of the adoption of the Universal Declaration, there was already broad agreement that human rights should be translated into legal form as a treaty, which would be directly binding on the States that agreed to be bound by its terms. The ICCPR and the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR) were adopted by the General Assembly in 1966. The two International Covenants on Human Rights form the cornerstone of an extensive series of internationally binding treaties covering a wide variety of issues in the field of human rights. The treaties define human rights and fundamental freedoms and set basic standards that have inspired more than 100 international and regional human rights conventions, declarations, sets of rules, and principles.[7]

Human rights are "the bedrock principles which underpin all societies where there is rule of law and democracy". [8] Since the end of World War II, the core importance of human rights has been universally acknowledged. Today, against a backdrop of multiple conflicts, humanitarian emergencies, and severe violations of international law, it is all the more essential that policy responses be firmly grounded in human rights, and that states comply with the binding obligations they have contracted when ratifying international human rights treaties.[9] We should always start from the fact that "human rights are inherent to all human beings, and that they define the relationship between individuals and power structures, especially the state". [10] On the one hand, human rights delimit the power of the state, and on the other hand, they require states to take positive measures to ensure an environment that allows all people to enjoy their human rights.[11] Human rights pertain to all aspects of life - their exercise enables all individuals to shape and determine their own lives in liberty, equality, and respect for human dignity and encompass civil, political, economic, social, and cultural rights, as well as the collective rights of peoples.[12]

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for Human Rights 2005. *Human Rights Civil and Political Rights: The Human Rights Committee***.** Fact Sheet No. 15 (Rev.1). Geneva: Office of the High Commissioner for Human Rights, p. 1. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf (27. 5. 2023).

6 *Ibid*.

7 Office of the High Commissioner for Human Rights. *Human Rights Civil and Political Rights: The Human Rights Committee***.** Fact Sheet No. 15 (Rev.1). Geneva: Office of the High Commissioner for Human Rights, p. 1. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf (27. 5. 2023).

8 Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 8. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

9 *Ibid*., p. 8.

10 *Ibid*., p. 19.

11 *Ibid*.

12 *Ibid*., p. 20.

2.1. Promoting and protecting human rights in the United Nations System

Alongside securing peace and security and working to realize development throughout the world, the promotion and protection of all human rights for all people is one of the three pillars of the UN, as it is established in the UN Charter and international human rights law. The UN strives to promote and protect human rights in three basic ways:

a) The Office of the High Commissioner for Human Rights (hereinafter: OHCHR) is the lead organization within the UN working for human rights promotion and protection. It works closely with UN specialized agencies, funds, and programmes (e.g. World Health Organization, UN Refugee Agency, UNICEF, International Labour Organization, UNESCO, etc.) to maximize the impact of human rights work.[13]
b) International human rights treaties (covenants and conventions) establish panels of independent experts, or treaty bodies, to regularly and periodically consider countries' implementation of human rights obligations.[14]
c) Inter-governmental bodies, or assemblies, composed of Member States of the UN are established to discuss human rights issues and situations. The primary inter-governmental body for this purpose is the Human Rights Council which is supported in its work by independent experts called Special Procedures, and a mechanism called the Universal Periodic Review (hereinafter: UPR), among others.[15]

Although the aforementioned three elements of human rights protection within the UN are independent, it should be noted that they complement each other.

2.2. Human rights monitoring mechanisms within the United Nations System: The treaty-based bodies

The success of UN human rights treaty monitoring mechanisms depends largely on the influence that findings of the relevant monitoring body exert on national legal orders.[16] As stated by Nollkaemper and Van Alebeek, "while the practice of these bodies may influence the interpretation and development of treaties in the international legal order, the main rationale of human rights treaty monitoring mechanisms is that they affect the protection of human rights at the domestic level".[17] As is well-known, the challenges facing the treaty body system have been escalating for decades and there has been no shortage of creative ideas proffered from within and outside the UN itself on

[13] A Practical Guide for Civil Society: Civil Society Space and the United Nations Human Rights System, Geneva: Office of the High Commissioner for Human Rights, p. 5. Available at: https://www.ohchr.org/sites/default/files/CS_space_UNHRSystem_Guide_0.pdf (12. 6. 2023).

[14] *Ibid*.

[15] *Ibid*.

[16] Heyns, Cf. C. & Viljoen, F. 2002. *The Impact of the United Nations Human Rights Treaties on the Domestic Level.* The Hague: Kluwer Law International, p. 1.

[17] Van Alebeek, R. & Nollkaemper, A. 2012. The legal status of decisions by human rights treaty bodies in national law. In: Keller, H. & Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy (Studies on Human Rights Conventions).* Cambridge: Cambridge University Press, p. 356.

how to address them. Part of the arising difficulties stem from the fact that the treaty system is a *de facto* one that was in fact never designed to be a "system" but rather has evolved informally into one over time. This has occurred through the development of ten human rights treaties, each with dedicated treaty bodies mandated to monitor the implementation by States Parties of the obligations assumed by them on ratification.[18] The shared characteristics of these treaty bodies, in terms of their nature, functions, and powers, have led them to gradually become conceptualized as a system, in need of reform as a comprehensive whole. However, it is important to note that steadily increasing, occasionally overlapping, and sometimes contradictory demands were also occasionally placed on States Parties due to the aforementioned shared characteristics of those treaty bodies. It can be said that the establishment of the human rights treaty bodies is one of the greatest achievements in the efforts of the international community to promote and protect human rights. As observed by the OHCHR: "the treaty bodies are custodians of the legal norms established by the human rights treaties".[19] International human rights law obliges states to respect, implement, and enforce the treaty bodies they have ratified at a national level. Mechanisms and bodies have been established within the UN System to monitor the states' overall compliance with human rights law. These UN bodies adopt findings, recommendations, and decisions aimed at closing human rights gaps and indicate how states, supported by other stakeholders, can move toward the full enjoyment of human rights.[20]

The UN human rights treaty body system, which combines noble ideals with practical measures to realize them, is "one of the greatest achievements in the history of the global struggle for human rights".[21] Treaty bodies are at the heart of the international human rights protection system and they can be justifiably seen as "engines that transform universal norms into social justice and individual well-being". [22] Using a growing set of tools, this system provides authoritative guidance on human rights standards, advises on how treaties apply in specific cases, and informs States Parties of what they must do to ensure that all people enjoy their human rights. The incremental growth of the system over the past few years, with the adoption by states of new human rights instruments and the creation of new treaty bodies for their effective realization, is testimony to their global standing. All States Parties benefit from their work.[23] The human

[18] Egan, S. 2013. Strengthening the United Nations Human Rights Treaty Body System. *Human Rights Law Review*, 13(2), p. 210.

[19] Pillay, N. 2012. *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights*. Geneva: Office of the High Commissioner for Human Rights, p. 8. Available at: https://www.refworld.org/pdfid/4fe8291a2.pdf (29. 9. 2023).

[20] Carazzone, C. & Mazzarelli, S. *United Nations Human Rights Mechanisms*, *Advocating for Girls' and Women's Health and Human Rights,* p. 5. Available at: https://www.glowm.com/pdf/AWHHR-chapter2.pdf (29. 9. 2023).

[21] Pillay, N. 2012. *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights*. Geneva: Office of the High Commissioner for Human Rights, p. 7. Available at: https://www.refworld.org/pdfid/4fe8291a2.pdf (29. 9. 2023).

[22] *Ibid*.

[23] *Ibid*.

rights treaty bodies are committees of independent human rights experts, nominated and elected by States Parties for a period of four years, renewable to another term of four years. Treaty bodies perform a number of functions in accordance with the provisions of the treaties that established them.[24]

The UN system has two main types of bodies to promote and protect human rights: *Charter Bodies* and *Treaty Bodies*. *Charter Bodies* are established under the UN Charter in order to fulfil the UN's general purpose of promoting human rights. They have broad mandates that cover promoting human rights in all UN Member States.[25] The charter-based bodies include the Human Rights Council, UPR, and the Commission on Human Rights (replaced by the Human Rights Council) and encompass the Special Procedures of the Human Rights Council and the Human Rights Council Complaint Procedure.[26] *Treaty bodies* have responsibility for monitoring and promoting compliance with a particular human rights treaty. As such they are only concerned with States Parties to the respective treaty.[27] There are ten human rights treaty bodies, comprised of independent experts of recognized competence in human rights, which the States Parties nominate and elect for fixed renewable terms of four years. One of them is the CCPR, which monitors the implementation of the ICCPR and its optional protocols.[28]

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[24] Carazzone, C. & Mazzarelli, S., p. 13.

[25] Australian Human Rights Commission 2009. Fact Sheet 8: Promoting and protecting human rights in the UN system. p. 1. Available at: https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS8_UN.pdf (13. 6. 2023).

[26] Živanović, M. 2016. *Brief Overview: Compilation of the Recommendations of the UN Human Rights Mechanisms and Their Implementation in Bosnia and Herzegovina*. United Nations, p. 11. Available at: https://bosniaherzegovina.un.org/sites/default/files/2019-11/UN_comp_EN_BiH.pdf (14. 6. 2023).

[27] Australian Human Rights Commission 2009. Fact Sheet 8: Promoting and protecting human rights in the UN system. p. 1. Available at: https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS8_UN.pdf (13. 6. 2023).

[28] The remaining nine treaty bodies are as follows: The Committee on Economic, Social and Cultural Rights (CESCR), which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966); the Committee on the Elimination of Racial Discrimination (CERD) , which monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Committee on the Elimination of Discrimination against Women (CEDAW), which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); the Committee against Torture (CAT), which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); the Committee on the Rights of the Child (CRC) , which monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); the Committee on Migrant Workers (CMW), which monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Committee on the Rights of Persons with Disabilities (CRPD), which monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); Overview: Treaty-Bodies, the Special Procedures of the Human Rights Council and the Universal Periodic Review the Committee on Enforced Disappearances (CED), which monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006), and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) , which was established pursuant to the Optional Protocol to the Convention against Torture (OPCAT) (2002) and visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. See: Živanović, M., pp. 9-10.)

2.2.1. The Functions of Treaty Bodies

The basic function of the treaty bodies is to monitor the implementation of human rights instruments.[29] The treaty bodies perform a number of functions in accordance with the provisions of the treaties that established them. These include consideration of periodic reports by States Parties, consideration of individual complaints and conducting country inquiries as well as the adoption of general comments on the interpretation of treaty provisions and the organization of thematic discussions related to the treaties. A country assumes the legal obligation to implement the rights recognized under a specific treaty once it has ratified that treaty. Therefore, it has the duty to take the necessary steps to ensure that everyone in the state is able to enjoy the rights set out in the treaty. Along with the obligation to implement the substantive provisions of a treaty a State Party also has the responsibility to submit periodic reports to the relevant treaty body on how the respective rights are being implemented.[30] Treaty Bodies consider reports from States Parties on their compliance with the treaty and some treaty bodies can receive individual complaints of treaty body violations. When it comes to *reporting obligations and monitoring*, treaty bodies consider periodic reports from States Parties about the measures they have adopted to carry out their obligations under each treaty. When treaty bodies assess reports from States Parties they may also consider information contained in 'shadow reports'. Shadow reports are those submitted to the treaty bodies by nongovernmental organizations (hereinafter: NGOs) and national human rights institutions (rather than the government). After considering the reports, treaty bodies make recommendations (often called Concluding Comments or Recommendations) about how the State Party can improve its compliance with its treaty obligations.[31] When it comes to *individual complaints* some treaty bodies have additional powers to receive and consider complaints from individuals who allege they are the victims of human rights violations by the state. The CCPR is one of the bodies with the power to hear individual complaints.

3. HUMAN RIGHTS COMMITTEE – A TREATY BODY WITH THE ROLE OF MONITORING THE IMPLEMENTATION OF THE ICCPR AND ITS OPTIONAL PROTOCOLS

The CCPR was established under Part IV of the ICCPR in order to monitor the implementation of the various rights by the Member States. The ICCPR was adopted by UN General Assembly on 16 December 1966 and entered into force on 23 March 1976, three months

[29] Karimova, T., Giacca, G. & Casey-Maslen, S. 2013. *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflic*t. Geneva and Doha: Geneva Academy of International Humanitarian Law and Human Rights/ Protect Education in Insecurity and Conflict, p. 27. Available at: https://www.geneva-academy.ch/joomlatools-files/docman-files/Protection%20of%20Education%20in%20Armed%20Conflict.pdf (17. 6. 2023).

[30] Živanović, M., p. 10.

[31] Australian Human Rights Commission 2009. Fact Sheet 8: Promoting and protecting human rights in the UN system. p. 2. Available at: https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS8_UN.pdf (19. 6. 2023).

after the required 35 instruments of ratification had been deposited.[32] The *Optional Protocol* entered into force at the same time as the ICCPR. The *Second Optional* Protocol to the ICCPR, which aims at the abolition of the death penalty, was adopted on 15 December 1989 and entered into force on 11 July 1991.[33] The ICCPR basically concerns two types of rights: those pertaining to the physical integrity of the person, such as execution, torture, and enslavement, and those pertaining to legal proceedings, to the legal status of persons and to "intellectual" rights, such as the right to hold and communicate one's ideas and beliefs.[34]

The CCPR is the body of independent experts that monitors implementation of the ICCPR by its States Parties. The CCPR's work promotes the enjoyment of civil and political rights, resulting in numerous changes in law, policy and practice. As such, it has improved the lives of individuals in all parts of the world. It continues to strive to ensure all the civil and political rights guaranteed by the ICCPR can be enjoyed in full and without discrimination, by all people.[35]

3.1. Work and the membership of the Human Rights Committee

The CCPR is the body of 18 independent experts that monitors the implementation of the ICCPR [36]by its States Parties. All States Parties are obliged to submit regular reports to the CCPR on how civil and political rights are being implemented. States must report initially one year after acceding to the ICCPR and then whenever the CCPR requests. In accordance with the Predictable Review Cycle, the CCPR requests the submission of the report based on an eight-year calendar. The CCPR examines each report and addresses its concerns and recommendations to the State Party in the form of 'concluding observations'.[37]

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[32] Article 49 para. 2 of the ICCPR: "The present Covenant shall enter into force three months after the date of the deposit with the Secretary - General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession". See: United Nations. 1967. *International Covenant on Civil and Political Rights*. Available at: https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (19. 6. 2023).

[33] The International Covenant on Civil and Political Rights, whose entry into force gave birth to the Human Rights Committee, guarantees a comprehensive catalogue of civil and political rights. The other United Nations treaty bodies have more limited jurisdiction, dealing as they do with racial discrimination, rights of children or women, and torture. See more in: Buergenthal, T. 2001. The U.N. Human Rights Committee. *Max Planck Yearbook of United Nations Law*, 5(1), pp. 343-344.

[34] The first category is concrete and substantive: when these rights are violated, individuals suffer concrete, physical harm; and there are no formal procedures which can legitimatize these acts. The second category is quite different. For those rights concerned with the form of judicial and political proceedings, as long as there is due process and free elections, the outcome by definition cannot constitute a violation of one's rights. Those rights concerning speech, press and religious expression involve abstract entities – ideas, beliefs, information and the exchange or dissemination of these. For more details see: Gordon, J. 1998. The Concept of Human Rights: The History and Meaning of its Politicization. *Brooklyn Journal of International Law*, 23(3), p. 707.

[35] The Human Rights Committee. *United Nations Human Rights Treaty Bodies*. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr (19. 6. 2023).

[36] See more in: Buergenthal, T. 2001. The U.N. Human Rights Committee. *Max Planck Yearbook of United Nations Law,* 5(1), p. 342.

[37] The Human Rights Committee. *United Nations Human Rights Treaty Bodies. Introduction to the Committee*. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr (23. 6. 2023).

In addition, Article 41 of the ICCPR provides for the CCPR to consider inter-state complaints. The *Optional Protocol* to the ICCPR gives the CCPR competence to examine individual complaints regarding alleged violations of the ICCPR by States Parties to the Protocol. The Second Optional Protocol to the ICCPR relates to the abolition of the death penalty by states who have accepted the Protocol.[38] The CCPR also publishes its interpretation of the content of human rights provisions, known as general comments, on thematic issues or its methods of work. The CCPR meets in Geneva and normally holds three sessions per year.[39] More precisely, the CCPR meets three times a year, twice at the UN headquarters in Geneva, and once at the main headquarters in New York City. Each meeting lasts for three weeks. Working Groups of the CCPR, which perform various functions, convene for one week prior to each main meeting. Therefore, the CCPR operates on a part time rather than on a full-time basis.[40]

As stated by Shikhelman, the CCPR is "the most universal international institution which individuals can access in order to receive remedies for violations of their human rights".[41] Byrnss argued that the individual communications system in the CCPR serves three purposes: (1) providing an effective and timely remedy to a person whose right has been violated; (2) bringing law and practice changes in the state against which the petition was brought; (3) providing guidance to other State Parties on the meanings and guarantees in the treaties, as well as the measures needed to implement them.[42]

If a State Party to the ICCPR ratifies the First Optional Protocol (hereinafter: First OP), it means that it will permit individuals to submit complaints of violations of the ICCPR by that state to the CCPR.[43] The First OP to the ICCPR grants individuals the right to bring individual communications against Member States to the CCPR.[44] The First OP itself in the Preamble states that the individual communications mechanism was established in order to "achieve the purposes of the ICCPR […] and the implementation of its provisions."[45] No additional purpose for the individual communications mechanism was mentioned in the First OP.

Although originally the intention of the States Parties might not have been to provide individuals with a remedy which is enforceable on the national level, the CCPR itself had

[38] *Ibid*.

[39] *Ibid*.

[40] Joseph, S., Mitchell, K. & Gyorki, L. 2006. *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*. Geneva: World Organization Against Torture, p. 37.

[41] Shikhelman, V. 2017. *Access to Justice in the United Nations Human Rights Committee. Jean Monnet Working Paper 1/17*. New York: New York University School of Law, p. 16.

[42] See more: Byrnes, A. 2000. An Effective Complaint Procedure in the Context of International Human Rights. In: Bayefsky, A. F. (ed.). *UN Human Rights Treaty System in the 21st Century*. The Hague: Kluwer Law International.

[43] Joseph, S., Mitchell, K. & Gyorki, L. 2006. *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*. Geneva: World Organization Against Torture, p. 39.

[44] United Nations. 1976. *Optional Protocol to the International Covenant on Civil and Political Rights,* articles 1 and 2.

[45] See: Preamble of the *Optional Protocol to the International Covenant on Civil and Political Rights*.

been active in promoting its decisions under the First OP as binding upon the States Parties, and not only as mere recommendations. In General Comment 33, the CCPR promoted its view that the decisions under the First OP should be implemented by Member States, and that the remedy for a specific violation is an important part of the implementation.[46] For instance, the CCPR points out that Article 2 (3) of the ICCPR grants a remedy for a violation of a right protected by the ICCPR, and constantly refers to this paragraph in its decisions in individual communications. Moreover, in 1997 the CCPR has appointed a special rapporteur for the "follow-up of views, who monitors the compliance of states with decisions under the First OP, and the compliance of states is also reported in the annual report of the CCPR to the General Assembly. Finally, the CCPR also established a procedure to request interim measures "to avoid irreparable damage to the victim of the alleged violation."[47]

Given that no country's record of protecting and promoting civil and political rights is perfect and free from criticism, the CCPR's task is to encourage each State Party: a) to maintain in place those laws, policies and practices that enhance the enjoyment of these rights; b) to withdraw or suitably amend those measures that are destructive or corrosive of ICCPR's rights; c) to take appropriate positive action when a State Party has failed to act to promote and protect these rights; and d) to consider appropriately the effects in terms of the ICCPR on new laws, policies and practices that a State Party proposes to introduce in order to ensure that it does not regress in giving practical effect to ICCPR's rights.[48] One of the great strengths of the CCPR is the moral authority it derives from the fact that its membership represents all parts of the world. Instead of representing a single geographical or national perspective, the CCPR speaks with a global voice. The CCPR's work has a real effect in promoting the enjoyment of civil and political rights in many countries, even though the cause-and-effect relationship is at times difficult to identify. There are numerous instances of an individual complaint leading to positive results for the individual concerned, be it in the form of a payment of compensation, a commutation of a death sentence, a retrial, an investigation into particular events, or a number of other remedies, in the State Party concerned. Over the years, the CCPR's work has resulted in many changes of law, policy and practice, both at the general national level and in the context of individual cases.[49]

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[46] See: Shikhelman, V. 2017. *Access to Justice in the United Nations Human Rights Committee. Jean Monnet Working Paper 1/17. New* York: New York University School of Law, p. 17.

See also: Human Rights Committee. 2008. *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political* Rights, Ninety-fourth session Geneva, 13-31 October.

[47] Shikhelman, V. 2017. *Access to Justice in the United Nations Human Rights Committee. Jean Monnet Working Paper 1/17. New* York: New York University School of Law. p. 17.

[48] United Nations Human Rights Treaty Bodies. *The Human Rights Committee*: *Introduction to the Committee*. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr (25. 6. 2023).

[49] In a direct sense, therefore, the CCPR's discharge of the monitoring functions entrusted to it under the Covenant has improved the lives of individuals in countries in all parts of the world. It is in this spirit that the Committee will continue to make its work relevant and applicable to all States parties, and to strive for the enjoyment of all civil and political rights guaranteed by the Covenant, in full and without discrimination, by

When it comes to the membership, the CCPR as stated above is composed of 18 independent experts, who are persons of high moral character and recognized competence in the field of human rights.[50] New members of the CCPR are elected by secret ballot by the States Parties from a list of nominees, with due consideration being given to equitable geographical distribution, relevant legal experience and balanced gender representation.[51]

The important question that should be asked in the context of this research is: *May states restrict human rights?* Most human rights are not absolute and therefore are subject to certain restrictions, including through reservations, derogations and limitations. Further, the principle of progressive realization of rights means that the particular circumstances and capacity of each state must be taken into account in assessing whether that state has violated its human rights obligations. As such, while the core content of human rights is universal and some obligations have immediate effect, states enjoy a margin of discretion in implementing their obligations to respect, protect and fulfil human rights.[52] Many obligations to respect human rights are subject to so-called limitation clauses. For instance, the exercise of political freedoms, such as freedom of expression, assembly and association, carries with it duties and responsibilities and may, therefore, be subject to certain formalities, conditions, restrictions and penalties in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of public health or morals, or the protection of the reputation or rights and freedoms of others. If people misuse their freedom of speech and freedom to participate in a demonstration, to incite racial or religious hatred, to promote war propaganda or to encourage others to commit crimes, governments have an obligation to interfere with the exercise of these freedoms in order to protect the human rights of others.[53] It is also important to have in mind the possibility of derogation during a state of emergency. In exceptional circumstances,

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all people United Nations Human Rights Treaty Bodies. *The Human Rights Committee*: *Introduction to the Committee*. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr (25. 6. 2023).

[50] Members are elected for a term of four years by state parties in accordance with articles 28 to 39 of the Covenant. Members serve in their personal capacity and may be re-elected if nominated. Regularly scheduled elections are held to replace members of the Committee when their terms expire. By-elections are held in extraordinary Meetings of States parties to fill a casual vacancy arising from the resignation or death of a member of the Human Rights Committee. The International Covenant on Civil and Political Rights is unique amongst the human rights treaties in providing for elections to be organized to fill casual vacancies in United Nations Human Rights Treaty Bodies. Available at: *The Human Rights Committee: Membership*. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr/membership (25. 6. 2023).

[51] United Nations Human Rights Treaty Bodies. *The Human Rights Committee:* Meetings of the States parties & elections. Available at: https://www.ohchr.org/en/treaty-bodies/ccpr/meetings-states-parties-elections (26. 6. 2023).

[52] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights. 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 41. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

[53] Any interference, restriction or penalty must, however, be carried out in accordance with domestic law and must be necessary for achieving the respective aims and national interests in a democratic society.

including armed conflict, rioting, natural disasters or other public emergencies that threaten the life of a nation, governments may take measures derogating from their human rights obligations, provided that the following conditions are met. It is the task of international human rights bodies to assess on a case-by-case basis whether a particular form of interference serves a legitimate purpose, is based on a valid and foreseeable domestic law, and is proportionate to the legitimate purpose.[54] The ICCPR sets out in considerable detail the obligations incumbent on Contracting Parties and emphasises that the rights detailed are to be enjoyed by all without discrimination. The exercise of a right may only be restricted in very limited circumstances such as times of recognised state emergency. Any such restraint must be provided by law and be necessary for a legitimate purpose, and certain rights may not be suspended in any circumstances – the so-called non-derogable rights. Such rights are those protected by Articles 6, 7, 8 (i) and (ii), 11, 15, 16 and 18. Contracting Parties are obliged to fulfil the ICCPR immediately on ratification.[55] In addition to the above, the General comment No. 29 (2001) of the CCPR on derogations during a state of emergency should certainly be mentioned. The CCPR, as the supervisory body of ICCPR, may issue general comments to assist States Parties in the interpretation of ICCPR provisions. In its General Comment No. 29 on states of emergency, the CCPR stressed that the list of non-derogable rights contained in Article 4 (2) of the ICCPR is not necessarily exhaustive. Certain rights or elements of rights not listed in Article 4(2) of the ICCPR, such as the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person, or the prohibition of propaganda for war and advocacy of hatred, cannot be made subject to lawful derogation. The CCPR also took the view that procedural safeguards, including judicial guarantees, may never be made subject to measures that would circumvent the protection of non-derogable rights. Moreover, it held that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".[56]

States must in any case demonstrate the necessity of applying such limitations, and take only those measures which are proportionate to the pursuance of the legitimate aims. See: *Ibid*, p. 4.

[54] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights. 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 41. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

[55] Steinerte, E. & Wallace, R. M. M. 2009. *United Nations protection of human rights. Section A: Mechanisms for human rights protection by United Nations bodies*. London: University of London Press, p. 11. Available at: https://www.london.ac.uk/sites/default/files/uploads/study-guide-postgraduate-laws-un-protection-human-rights.pdf (27. 6. 2023).

[56] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights. 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 41. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

4. CONCLUSION

As stated by Shikhelman "the ICCPR is probably the most famous (and one of the most ratified) human rights treaties, and the CCPR itself is the most high-profile UN treaty body".[57] That is one of the reasons why the activities of the CCPR are the subject of this research. Even the CCPR is only one of the treaty bodies, the fact that it deals with the whole range of civil and political rights, gives us the important conclusion - it plays a prominent role in the field of international human rights monitoring.

The CCPR as the treaty body responsible for overseeing the implementation of the ICCPR is of special interest to researchers since it is a high profile and internationally acclaimed quasi-judicial body that can accept individual communications against 115 states.[58] It seems that because of its prestige and relative independence, through the individual communications system the CCPR can potentially help raising awareness to human rights problems, develop important jurisprudence on many subjects, and provide individuals with needed remedies. This is especially true for people from regions that do not have an effective and accessible regional human rights system - mainly Asia, Africa and some former communist countries.[59] The results of the research once again have brought into focus the fact that treaties and conventions on human rights are living instruments, because we can follow their development through the jurisprudence of courts and expert bodies that are responsible for monitoring the implementation of international and regional instruments on human rights, which provide very dynamic interpretations of international human rights norms, adapting their provisions to current circumstances.[60] In addition, the CCPR and the other treaty bodies face significant backlogs in their work, and have been forced to reduce the average time allocated to the review of each country report - endangering thereby the quality of their output.[61] States

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[57] Shikhelman, V., p. 20.

[58] *Ibid*., p. 455.

[59] *Ibid*., p. 20.

[60] For instance, the CCPR has found that the right to security of the person, guaranteed in article 9 of International Covenant on Civil and Political Rights (ICCPR) along with the right to liberty, was not intended to be narrowed down to mere formal loss of liberty: in a landmark decision (case of Delgado Páez v. Colombia, 195/1985), the Committee ruled that States may not ignore threats to the personal security of non-detained persons within their jurisdictions and are obliged to take reasonable and appropriate measures to protect them. Inter-Parliamentary Union and Office of the High Commissioner for Human Rights. 2016. *Human Rights: Handbook for Parliamentarians N°* 26. Geneva: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, p. 45. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf (11. 6. 2023).

[61] As stated by Shany, the tension between the widely perceived quality of the HRC's work, on the one hand. and the serious difficulties the Committee encounters in adequately performing its tasks, on the other hand, complicates attempts to assess its overall record of achievement. Put differently, it is difficult to ascertain whether the HRC is, on the whole, an effective body. In any event, whether the HRC is considered more or less effective, one may still discuss the merits or demerits of specific proposals aimed at improving its effectiveness. See: Shany, Y. 2013. The Effectiveness of the Human Rights Committee and the Treaty Body Reform. *International Law Forum of the Hebrew University of Jerusalem Law Faculty*, 13(2). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223298 (29. 9. 2023).

reports to the CCPR and to other treaty bodies create a system of international accountability for human rights practices of states. As already stated, this is probably the most impressive part of the system, even if it is difficult to pin-point the concrete effect it has on state practice and compliance with international norms.[62]

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Joseph, S., Mitchell, K. & Gyorki, L. 2006. *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*. Geneva: World Organization Against Torture.

[62] The very fact that states, including the large powers and players in the international arena, USA, Russia, India, Brazil, UK, France, Germany and Japan, to name a few, send representatives to defend and explain their human rights legislation, practice and policies before a body of independent experts in public meetings in Geneva and New York has a important symbolic function. While states parties are accountable towards the HRC, that body itself has neither the effective power nor the capacity to effect changes in the practices or policies of the accountable states. The accountability must be linked to the society in the reporting state party, the members of whom are the intended beneficiaries of the ICCPR. It is their rights that each government has the responsibility to respect and ensure. See: Kretzmer, David. 2010. *The UN Human Rights Committee and International Human Rights Monitoring. Straus Working Paper 12/10.* New York: New York University School of Law. p. 68. Available at: http://www.law.nyu.edu/sites/default/files/siwp/WP12Kretzmer.pdf (11. 6. 2023).

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THE RIGHT TO HUMAN DIGNITY IN WESTERN BALKANS

The right to human dignity is a cornerstone of modern constitutional structures. Accordingly, constitutions of the Western Balkans states (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia) unequivocally confirm the importance and gravity of human dignity in their respective legal systems.

The paper wishes to analyse the normative and the judicial status of the right to human dignity in the Western Balkans. In its first part, the paper outlines national sets of laws pertinent to the right to human dignity. Along firm constitutional guarantees, the paper tries to exemplify provisions in separate legal frameworks addressing social and cultural diversity relative to the right to human dignity within the region.

In the second part, the paper analyses cases of the European Court of Human Rights (ECtHR) corresponding to human dignity in applications filed against the Western Balkans states. Special attention is given to judgments in which ECtHR found that the respective Government's appeal to the notion of dignity did not amount to its absolution in situations when violation of the Convention has been identified.

Keywords: human dignity, personal dignity, human rights, European Court of Human Rights, the Western Balkans.

1. INTRODUCTION

Faced with the horrors of WW2, the founders of the United Nations determined to establish an improved international system, deemed it essential to base this enhanced global structure on fundamental human rights: rights deriving from the *dignity* and *worth* of every human being as such.[1]

The Allies' straightforward acknowledgment of the undisputed value of human dignity in the initial post-war international instruments, like the UN Charter (1945) or the Universal

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[1] UN. The Preamble of the United Nations Charter. Available at: https://www.un.org/en/about-us/un-charter/full-text (21. 6. 2023).

Declaration on Human Rights (1948)[2], their unequivocal recognition that "every human being is as worthy as every other human being" (Perry, 2023, p. 38), activated the insertion of 'the right to human dignity' within various treaties, declarations, and national constitutions.[3] Consequently, for many authors human rights and human dignity have become essentially equivalent concepts (Pollis & Schwab, 1980, pp. 4, 8), while others kept arguing that human rights present only one path, a distinctive approach to the realisation of human dignity (Donnelly, 1982, p. 303). Nonetheless, all agreed on the importance of the concept as such.

The notion of human dignity has been thoroughly examined within the German legal theory, especially as it takes a prominent place in the Basic Law of the Federal Republic of Germany[4]. After its Preamble proclamations[5], the very Article 1 of the German constitution stipulates that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[6] This central position of human dignity in German law is often interpreted in light of the fact that following the debacle of WW2, the adoption of its post-war Basic Law in 1949 ambitioned to indicate a new constitutional order, a solid distance from the horrors of Nazism, "a sharp break from this immediate past"[7] (Eberle, 2012, p. 203). It has been argued that in a legal system of relative values, human dignity is the only absolute one (Isensee, 2006, p. 175).

Human dignity is perceived as the cornerstone of all human rights. In addition, it is to be used as a guide to their interpretation. Recognised as a supreme value, it serves as a conceptual boundary in the limitation of human rights and freedoms, as well as a guide to settling constitutional value conflicts. Likewise, human dignity provides judicial review with a secure and legitimate basis (Botha, 2009, p. 171).

For Eberle (2012, p. 204) the concept of human dignity protected in Article 1 of the German Basic Law obligates the state to provide a basic minimal existence for citizens. In 1958 the German Federal Constitution Court found that "This value system, which finds its centre in the human personality and its dignity freely developing within the social community, must be applied as a constitutional axiom throughout the whole legal

[2] "All human beings are born free and equal in dignity and rights." Article 1 of the Universal Declaration of Human Rights. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (25. 8. 2023).

[3] The Charter of Fundamental Rights of the European Union (2000) declares in its preamble that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", with Article 1 stipulating that "Human dignity is inviolable. It must be respected and protected." Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (27. 8. 2023).

[4] Grundgesetz für die Bundesrepublik Deutschland, *Bundesgesetzblatt*, 1, 1949.

[5] The Preamble of the Basic Law of the Federal Republic of Germany expresses consciousness of national responsibility before God and men, as well as inspiration by determination to promote world peace. – "Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben."

[6] "(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt." – *Grundgesetz für die Bundesrepublik Deutschland*, Art. 1.

[7] Comparable attempts to utilise the affirmation of human dignity as an indication of overall discontinuation from former regimes are identifiable in the constitutions of Greece (1975), Portugal (1976), Spain (1978), Namibia (1990), or South Africa (1993 and 1996).

system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."[8]

The inviolable and inalienable human rights acknowledged by the German constitution are founded on the notion of human dignity which is in itself perceived as an absolute concept. As such, it is 'set apart' as precluded from any possibility of being revised by constitutional amendments.[9] However, this central point of human dignity in German legal system can every so often induce a misplaced assumption that it should serve as a panacea, a 'magic wand' "supposed to solve highly complex ethical questions such as those raised by new advances within the fields of biotechnology and human genetics" (Botha, 2009, p. 183).

So far there are no universally accepted definitions of the legal concept of human dignity. On that account, lawyers routinely resort to one of its highly influential explanations offered by Günter Dürig. Following the Kantian concept of 'categorical imperative'[10] by which humans are not to be treated as means to an end, but rather an end in itself, Dürig tries to explain the legal notion of human dignity contrasting it with degradation. Consequently, he argues that the violation of human dignity occurs when a person is reduced to a dispensable item, an object, a mere instrument (Dürig, 1956, p. 127).

This paper aims not to throw additional light on a notion of such complexity, as the right to human dignity unquestionably represents. An illustrious example of the length and the somewhat polysemous nature of the concept is found in the well-known *Wackenheim* case[11]. Howbeit, a rather elegant definition of the concept has been offered by the justices of the Supreme Court of Canada, who found that "Human dignity means that an individual or group feels self-respect and self-worth."[12]

This article presents a brief outline of constitutional and statutory provisions encompassing the notion of human dignity within the Western Balkans jurisdictions (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia), as well as a concise summary of a few ECtHR[13] decisions related to the region, in which the concept of human dignity formed a part of the Court's legal opinion.

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[8] *Lüth*, 7 BVerfGE 198, 205. 1958. Decision of the German Federal Constitutional Court (First Senate) of 15 January 15 1958. Available at: https://www.servat.unibe.ch/dfr/bv007198.html (21. 6. 2023). Available at: https://germanlawarchive.iuscomp.org/?p=51 (last visited June 21 6. 2023).

[9] "Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig." – Art. 79(3) *Grundgesetz für die Bundesrepublik Deutschland*.

[10] "There is, therefore, only a single categorical imperative and it is this: *act only in accordance with that maxim through which you can at the same time will that it become a universal law.*" – Kant, I. 2006. *Groundwork of the Metaphysics of Morals*. Cambridge: Cambridge University Press, p. 31.

[11] *Manuel Wackenheim v France* 2002, UN Human Rights Committee, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999

[12] *Law v. Canada (Minister of Employment and Immigration)*, 1999. The Supreme Court of Canada, [1999] 1 SCR 497, § 53.

[13] The European Court of Human Rights in Strasbourg.

2. THE RIGHTS TO HUMAN DIGNITY IN WESTERN BALKANS JURISDICTIONS

2.1. Constitutional Framework

All Western Balkans constitutions include the notion of human dignity. Apart from general proclamatory provisions where the notion appears simultaneously with sovereign declarations confirming the rule of law, the protection of human rights, or even, endorsing the rules of market economy[14], the majority of the constitutions within the region include further substantial provisions aimed at safeguarding human dignity in their respective jurisdictions.

2.1.1. The Preamble

The Preamble is often referred to as 'the enacting clause' of a constitution (Dodd, 1920, p. 638). Constitutional preambles delineate somewhat of 'national creeds', the constitutional faith of each country, its constitutional philosophy. Statements within preambles generally relate to national, political, even dogmatic ideals, based on the corpus of apparent inalienable rights, like liberty or human dignity (Orgad, 2010, p. 717).

Human dignity has been mentioned for the first time in the Preamble of the 1937 Constitution of Ireland, where the promotion of common good along with due observance of prudence, justice and charity have been declared as essential for the assurance of the dignity and freedom of individuals.[15] In the Western Balkans, the notion of human dignity appears in the Preambles of the constitutions of Albania, Bosnia and Herzegovina, and the Republic of Srpska.

The Preamble of the Albanian Constitution pronounces a national pledge "to the protection of human dignity and personhood"[16], conjointly with, *inter alia*, affirmations of national history, responsibility for the future, even faith in God. Similarly, the National Assembly of the Republic of Srpska declared adopting its national Constitution "upon the observance of human dignity"[17], in addition to a number of various shared values, including freedom and equality of human individuals, equality of ethnic communities (both in accordance with international standards), the rule of law, social justice, pluralistic society, non-discrimination, etc.

The Constitution of Bosnia and Herzegovina is to an extent different. Its Preamble consists of nine recitals, establishing, *inter alia*, dedication to peace, justice, tolerance and reconciliation (recital 2), conviction that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralistic society (recital

[14] The Preamble of the Constitution of the Republic of Srpska.

[15] The Preamble of the 1937 Constitution of Ireland. Available at: https://www.irishstatutebook.ie/eli/cons/en/html (12. 9. 2023).

[16] "[…] me zotimin për mbrojtjen e dinjitetit dhe të personalitetit njerëzor" – the Preamble of the Constitution of the Republic of Albania.

[17] "[…] да уставно уређење Републике утемеље на поштовању људског достојанства" – the Preamble of the Constitution of the Republic of Srpska.

3), even determination to ensure full respect for international humanitarian law (recital 7). However, its 'first line', the Constitution's initial proclamation is that it is "Based on respect for human dignity, liberty and equality".[18]

The Constitution of Bosnia and Herzegovina was defined by Annex IV of the Dayton Agreement[19]. As a post war fundamental legal instrument, one of its purposes (perhaps the primary one) was establishing peace and coexistence. In this respect, the notion of human dignity, no doubt aimed to become a part of the 'basic structure', the pillar of Bosnia and Herzegovina following a devastating armed conflict.

In this respect, certain parallels can be drawn between the Constitution of Bosnia and Herzegovina and the 1949 Basic Law of the Federal Republic of Germany. In accordance with its German model, the subsequent clauses of the 'Dayton Constitution' do not refer to the notion of human dignity. In both constitutions the concept is indicated only once, at the very opening of the instrument, and not once repeated.

2.1.2. Substantial Provisions

Nearly all Western Balkans jurisdictions[20] include a general clause with respect to the notion of human dignity. The right to human dignity is 'inviolable'[21] in constitutions of North Macedonia (Article 11 – *неприкосновен*), the Republic of Srpska (Article 13 – *неповредив*), and the Republic of Serbia (Article 23 – *неприкосновено*). As far as the latter is concerned, the inviolability of human dignity is stipulated as a separate clause, specifying that it is to be respected and protected by all.[22] Article 19 further outlines that each of the constitutional guarantees regarding inalienable human and minority rights bears the purpose of preserving human dignity and exercising full freedom and equality for every individual in a just, open, and democratic society based on the principle of the rule of law. In the first two constitutions, the right to human dignity is defined as inviolable together with other notions.[23]

The Constitution of North Macedonia introduces two general clauses regarding dignity. In Article 11, after setting forth a general rule that the right to physical and moral dignity[24] is irrevocable, the clause includes a constitutional prohibition of any form of

[18] "Oslanjajući se na poštovanje ljudskog dostojanstva, slobode i jednakosti […] = Ослањајући се на поштовање људског достојанства, слободе и једнакости […]" – the Preamble of the Constitution of Bosnia and Herzegovina.

[19] The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on December 14, 1995 in Dayton, OH (USA).

[20] With the exception of the constitutions of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

[21] Equivalent with the German: *unantastbar*, in line with Article 1(1) of the German Basic Law.

[22] „Људско достојанство је неприкосновено и сви су дужни да га поштују и штите." – Article 23 of the Constitutioin of the Republic of Serbia.

[23] E.g., within the Constitution of the Republic of Srpska, human dignity is protected together with physical and spiritual integrity, personal privacy, personal and family life. – „Људско достојанство, тјелесни и духовни интегритет, човјекова приватност, лични и породични живот су неповредиви." – Article 13 of the Constitution of the Republic of Srpska.

[24] The original text in Macedonian uses the term 'integrity' (интегритет), while the official English translation of the Constitution opts for 'dignity'.

torture, inhuman or humiliating conduct or punishment, as well as forced labour.[25] Further, Article 25 provides a constitutional guarantee as to the respect and protection of privacy, personal and family life, dignity and reputation for all citizens.[26] Hence, the notion of *inviolability* is coupled with the protection of corporal and psychological inviolability of North Macedonian citizens, while a constitutional guarantee of the protection of dignity is associated with values such as privacy, family life, and reputation.

The Constitution of the Republic of Albania stipulates that the foundation of the Albanian state (*baza e këtij shteti*), together with its independence and the integrity of its territory are "the dignity of an individual, human rights and freedoms, social justice, constitutional order, pluralism, national identity and national heritage, religious coexistence, as well as the coexistence and understanding of Albanians with minorities." The duty of the state is to respect and to protect each and every one of them (Article 3).[27]

The Montenegrin Constitution (Article 28) sets forth a general constitutional guarantee as regards personal dignity and security.[28] Within the same Article, similarly to the North Macedonian Constitution, inviolability is prescribed in terms of the physical and mental integrity of an individual, along with personal privacy. The provision includes prohibition of torture or inhuman or degrading treatment, slavery and servile position. Article 25 on temporary limitation of rights and liberties during state of emergency determines that there can be no limitations imposed on, *inter alia*, dignity and respect of a person.

With the exception of those of Bosnia and Herzegovina, the Republic of Srpska and North Macedonia, remaining Western Balkans constitutions include provisions regulating the notion of human dignity in relation to some specific issues. For example, the constitutions of Albania, Montenegro and Serbia all include a clause stipulating that persons deprived of liberty must be treated humanely and with respect to their dignity (Albania)[29], personality and dignity (Montenegro)[30], or personal dignity (Serbia)[31].

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[25] „Физичкиот и моралниот интегритет на човекот се неприкосновени. Се забранува секој облик на мачење, нечовечко или понижувачко однесување и казнување. Се забранува присилна работа." – Article 11 of the Constitution of the Republic of North Macedonia.

[26] „На секој граѓанин му се гарантира почитување и заштита на приватноста на неговиот личен и семеен живот, на достоинството и угледот." – Article 25 of the Constitution of the Republic of North Macedonia.

[27] „Pavarësia e shtetit dhe tërësia e territorit të tij, dinjiteti i njeriut, të drejtat dhe liritë e tij, drejtësia shoqërore, rendi kushtetues, pluralizmi, identiteti kombëtar dhe trashëgimia kombëtare, bashkëjetesa fetare, si dhe bashkëjetesa dhe mirëkuptimi i shqiptarëve me pakicat janë baza e këtij shteti, i cili ka për detyrë t'i respektojë dhe t'i mbrojë." – Article 3 of the Constitution of the Republic of Albania.

[28] „Jemči se dostojanstvo i sigurnost čovjeka." – Article 28(1) of the Constitution of Montenegro.

[29] „Çdo person, të cilit i është hequr liria sipas nenit 27, ka të drejtën e trajtimit njerëzor dhe të respektimit të dinjitetit të tij." – Article 28(5) of the Constitution of the Republic of Albania.

[30] „Jemči se poštovanje ljudske ličnosti i dostojanstva u krivičnom ili drugom postupku, u slučaju lišenja ili ograničenja slobode i za vrijeme izvršavanja kazne." – Article 31(1) of the Constitution of Montenegro.

[31] „Према лицу лишеном слободе мора се поступати човечно и с уважавањем достојанства његове личности." – Article 28(1) of the Constitution of the Republic of Serbia.

Section II B Article 2 of the Constitution of the Federation of Bosnia and Herzegovina, defining the office of the Ombudsman, stipulates that they[32] are to protect human dignity, rights, and liberties as provided in the Constitution, in the instruments listed in the Annex thereto, and in the constitutions of Cantons. In Article 5 of the same Section, it is prescribed that the Ombudsman may examine the activities of any institution of the Federation, Canton, or Municipality, as well as any instruction or persons by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects.

Montenegrin Constitution includes two provisions relating the notion of human dignity with bio-medicine[33] and the freedom of expression[34], while the Serbian Constitution specifies the notion of human dignity in connection with the right to work[35] and social protection.[36]

2.2. Statutory Framework

The right to human dignity, apart from being regulated within respective constitutions of the Western Balkans jurisdictions is likewise present in a number of the region's statutes.

2.2.1. Rules of Procedure

The overall constitutional guarantee that any person deprived of liberty in legal proceedings must be treated with dignity, is further specified in all of the Western Balkans' criminal procedure rules. Thus, Article 157 of the Serbian Code of Criminal Procedure[37] sets forth that search of persons shall be carried out cautiously, with respect to the individuals' personal dignity and their right to privacy.[38] Similar provisions are present in other criminal procedure codes within the region, like that of Albania[39] where

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[32] According to Article 1 of Section II B of the Constitution, in the Federation of Bosnia and Herzegovina there are three Ombudsman: one Bosniac, one Croat, and one Other.

[33] Article 27 sets forth that the dignity of a human being concerning the application of biology and medicine shall be guaranteed.

[34] Article 47 of the Montenegrin Constitution prescribes that the right to free speech may be limited only by the right of others to dignity, reputation and honour, as well as if it threatens public morality or the security of Montenegro.

[35] Article 60 stipulates that everyone shall have the right to the observance of personal dignity at work, together with safe and healthy working conditions, necessary workplace protection, limited working hours, daily and weekly rest, paid annual holiday, fair remuneration for work done and legal protection in case of termination of working relations. It is separately prescribed that no person may forgo these rights.

[36] Article 69(1) provides that citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence, shall have the right to social protection. Such provision is based on social justice, humanity and the respect of human dignity.

[37] Serbian Code of Criminal Procedure Code – Законик о кривичном поступку, *Службени гласник Рейублике Србије* бр. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – одлука УСС и 62/2021 – одлука УСС).

[38] „Претресање се врши обазриво, уз поштовање достојанства личности и права на интимност и без непотребног ремећења кућног реда." – Article 157(1) of the Serbian Code of Criminal Procedure.

[39] The Code of Criminal Procedure of the Republic of Albania = Kodi i Procedurës Penale i Republikës së Shqipërisë, (ndryshuar me ligjet: nr. 7977, datë 26.7.1995, 8027, datë 15.11.1995, nr. 8180, datë 23.12.1996, nr. 8460, datë 11.2.1999, etc.).

legislation further stipulates that a search of a person shall be carried out by an official of a same sex, except where such search is impossible due to circumstances.[40] In Montenegro, apart from a statutory protection of human dignity during search of a person,[41] the Code of Criminal Procedure[42] prescribes that when gathering information from general public, the police shall respect their personality and dignity.[43]

Civil procedure rules envisage a somewhat similar protection with respect to the notion of human dignity. For example, Article 228 of the Albanian Code of Civil Procedure[44] stipulates that during an examination of a person the court shall attend not to affect a given individual's personal dignity. If needed, the person in question can be substituted with a suitable expert witness.[45]

Further, the implementation of coercive measures during enforcement of judgments across Western Balkans is carried out in a manner that safeguards the dignity of the enforcement debtor, in all actions performed by the courts or various enforcement agents.[46]

2.2.2. Substantial Law

Within the Western Balkans' substantive laws, the notion of human dignity takes a number of differing forms within various acts of national parliaments. One such example is the region's anti-discrimination legislation. In line with the process of harmonisation of their national laws with *Acquis communautaire*, all across the region anti-discrimination legislation sets forth almost identical provisions prohibiting harassment and sexual harassment, as forms of violation of personal dignity.[47] Serbian legislation

[40] „Kontrolli bëhet duke respektuar dinjitetin dhe integritetin personal të atij që kontrollohet. Kontrolli i personit bëhet nga një person i së njëjtës gjini, me përjashtim të rasteve kur kjo nuk është e mundur për shkak të rrethanave." – Article 204(2) of the Code of Criminal Procedure of the Republic of Albania.

[41] „Pretresanje stana i lica treba vršiti obazrivo, uz poštovanje ljudskog dostojanstva i prava na privatnost, bez nepotrebnog remećenja kućnog reda i uznemiravanja građana." – Article 81(7) of the Montenegrin Code of Criminal Procedure.

[42] Zakonik o krivičnom postupku, *Službeni list CG*, br. 57/2009, 49/2010, 47/2014 – odluka USCG, 2/2015 – odluka USCG, 35/2015, 58/2015 – dr. zakon, 28/2018 – odluka USCG i 116/2020 – odluka USCG.

[43] „Obavještenja od građana ne smiju se prikupljati prinudno niti uz obmanu ili iscrpljivanje, a policija mora da poštuje ličnost i dostojanstvo građana." – Article 259(3) of the Montenegrin Code of Criminal Procedure.

[44] Kodi i Procedurës Civile i Republikës së Shqipërisë, Miratuar me ligjin nr.8116, datë 29.3.1996, etc.

[45] „Gjykata në këqyrjen e një personi duhet të bëjë kujdes që të mos preket dinjiteti personal. Ajo mund të mos jetë vetë e pranishme dhe të ngarkojë me këtë detyrë një ekspert të përshtatshëm." – Article 288 of the Civil Procedure Code of the Republic of Albania.

[46] E.g. „Приликом спровођења извршења суд ће пазити на достојанство извршеника." – Article 3(4) of the Enforcement Procedure Act of the Republic of Srpska = Закон о извршном поступку, *Службени гласник Републике Српске* бр. 59/2003, 85/2003, 64/2005, 118/2007, 29/2010, 57/2012 и 67/2013. „Prilikom sprovođenja izvršenja sud i javni izvršitelj dužni su da vode računa o dostojanstvu ličnosti stranke, učesnika u postupku i članova njihovih porodica." – Article 9 of the Montenegrin Enforcement and Security Interests Act = Zakon o izvršenju i obezbjeđenju, *Službeni list CG*, br. 36/2011, 28/2014, 20/2015, 22/2017, 76/2017 – odluka USCG i 25/2019.

[47] Neni 3 Ligji nr. 10221/2010 "Për mbrojtjen nga diskriminimi" – Shqipëria; Član 4 Zakona o zabrani diskriminacije – BiH; Član 7 Zakona o zabrani diskriminacije – Crna Gora; Член 10 Законот за

furthers the given framework with a provision stipulating that the elderly enjoy the right of dignified living conditions without discrimination.[48]

Given terminological inconsistencies (e.g., dignity, human dignity, personal dignity, dignified conditions) is evident in various acts of the Western Balkans parliaments. In order to exemplify such diversity, the paper will now offer an analysis of the notion of human dignity within the region's employment law legislation.

2.2.3. Employment Laws' General Protection Clauses

Aside from Montenegro and the Republic of Srpska, all of the Western Balkans employment legislations include a general provision requiring a workplace-related rapport based on the respect of (human) dignity.

In 2015, thirty years following its enactment, the Labour Code of the Republic of Albania[49] set forth the employer's liability for the respect and protection of the employee's personality in all work relations, and to act in a manner that prevents any attitude leading to the violation of employee's dignity (Article 32). Similarly, Article 7 of the 2016 Employment Act[50] of the Federation of Bosnia and Herzegovina sets forth an overall clause stating that the employer shall define the place and the manner of the work assigned with respect to the rights and dignity of employees.

The 2005 North Macedonian Employment Relations Act[51] has been amended on a number of occasions, as well as thoroughly scrutinised many a time by the national Constitutional Court. At its very beginning (Article 2), the Act defines as one of its objectives, *inter alia*, observing employees' right to freedom to work, their dignity and the protection of employees' interests arising from employment. Further, Article 43 of the Act provides a general obligation for the employer to both protect and respect the personality and the dignity of an employee, as well as to take into account and to protect her or his privacy.

The 2005 Serbian Employment Act[52] sets forth that one of the elementary rights of employees, apart from corresponding salary, safety and health at work, health-care protection, various rights in the event of illness, reduction or loss of work ability and old age, is the right to personal dignity (Article 12).

спречување и заштита од дискриминација – Северна Македонија; Члан 12 Закона о забрани дискриминације – Србија.

[48] „Старији имају право на достојанствене услове живота без дискриминације, а посебно, право на једнак приступ и заштиту од занемаривања и узнемиравања у коришћењу здравствених и других јавних услуга." – Article 23(2) of the Serbian Prohibition of Discrimination Act.

[49] Kodi i Punës i Republikës së Shqipërisë, ligj Nr. 7961, datë 12.7.1995. Amendments enacted by Act no. 136/2015, Dec 5, 2015 (Ndryshuar me ligjin nr. 136/2015, datë 5.12.2015).

[50] The Employment Act of the Federation of Bosnia and Herzegovina – Zakon o radu, *Službene novine FBiH* br. 26/2016, 89/2018, 23/2020 – odluka US, 49/2021 – dr. zakon, 103/2021 – dr. zakon i 44/2022.

[51] Закон за работните односи, *Службен весник на Рейублика Македонија* бр. 62/2005; 106/2008; 161/2008; etc.

[52] Закон о раду, *Службени ïласник Рейублике Србије* бр. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – одлука УС, 113/2017 и 95/2018 – аутентично тумачење).

2.2.4. Specific Employment Law Provisions

As regards rules dealing with specific issues related to the notion of (human) dignity, all Western Balkans's employment legislations include provisions prohibiting harassment, sexual harassment, and mobbing.

Workplace related harassment has a common regional statutory definition as any unwelcome behaviour caused by discrimination, aiming at or amounting to the violation of an employee's or job seeker's dignity, and which as such generates fear and creates a hostile, degrading or offensive environment.[53] The 2019 Montenegrin Employment Act expands the given definition stipulating that besides behaviour caused by direct or indirect discrimination, harassment can occur by audio and video surveillance, mobile devices, social media and the Internet.[54]

The 1995 Labour Code of the Republic of Albania prohibits the employer or other employees from harassing an employee with actions aimed at or resulting in the working conditions' degradation, to such a degree that it may lead to the violation of the rights and dignity of the person, to the impairment of employee's physical or mental health or to the detriment of his/her professional future.[55] The same Article, in line with other regional employment laws[56], sets forth that an employee stating to be the victim of harassment presents facts considering the harassment, while the burden of proof is on the person to whom the complaint is addressed in order to substantiate that her/his

[53] „Вознемирување, во смисла на овој закон, е секое несакано однесување предизвикано од некој од случаите од членот 6 на овој закон кое има за цел или претставува повреда на достоинството на кандидатот за вработување или на работникот, а кое предизвикува страв или создава непријателско, понижувачко или навредливо однесување." – Член 9(3) *Закон за работните односи*.

„Uznemiravanje u smislu stava 1. ovog člana je svako neželjeno ponašanje uzrokovano nekim od osnova iz člana 8. ovog zakona koje ima za cilj ili predstavlja povredu dostojanstva radnika i lica koje traži zaposlenje, a koje uzrokuje strah ili neprijateljsko, ponižavajuće ili uvredljivo okruženje." – Član 9(2) *Zakona o radu* (Federacija BiH).

„Узнемиравање у смислу става 1 овог члана јесте свако нежељено понашање узроковано неким од основа из члана 19 овог закона које има за циљ или представља повреду достојанства лица које тражи запослење, као и радника, а које изазива страх или ствара понижавајуће или увредљиво окружење." – Члан 24(2) *Закона о раду* (Република Српска).

„Узнемиравање, у смислу овог закона, јесте свако нежељено понашање узроковано неким од основа из члана 18 овог закона које има за циљ или представља повреду достојанства лица које тражи запослење, као и запосленог, а које изазива страх или ствара непријатељско, понижавајуће или увредљиво окружење." – Члан 21(2) *Закона о раду* (Република Србија).

[54] „Uznemiravanje, u smislu ovog zakona, jeste svako neželjeno ponašanje uzrokovano nekim od osnova iz čl. 7 i 8 ovog zakona, kao i uznemiravanje putem audio i video nadzora, mobilnih uređaja, društvenih mreža i interneta, koje ima za cilj ili čija je posljedica povreda ličnog dostojanstva lica koje traži zaposlenje, kao i zaposlenog, a koje izaziva odnosno ima namjeru da izazove strah, osjećaj poniženosti ili uvrijeđenosti, ili stvara odnosno ima namjeru da stvori neprijateljsko, ponižavajuće ili uvredljivo okruženje." – Član 10(2) *Zakona o radu* (Crna Gora).

[55] „Punëdhënësi ndalohet të ngacmojë punëmarrësit me veprime, të cilat kanë për qëllim ose sjellin si pasojë degradimin e kushtevetë punës, në një shkallë të tillë që mund të çojë në cenimin e tëdrejtave dhe dinjitetit të personit, në dëmtimin e shëndetit të tijfizik ose mendor ose në dëmtimin e të ardhmes së tij profesionale." – Neni 32(3) *Kodi i Punës i Republikës së Shqipërisë*.

[56] E.g., Article 23(2) of the Serbian Employment Act.

actions were not aimed at harassment, as well as to show such objective elements that can exclude harassment or disturbance.[57]

Sexual harassment is defined as any verbal, non-verbal or physical behaviour aiming at or amounting to the violation of employee's or job seeker's dignity in terms of sexuality, and which causes fear or creates a hostile, degrading or offensive environment.[58] In addition to prohibiting sexual harassment, the Employment Act of the Republic of Srpska prohibits any form of gender-based violence.

Albanian employment legislation defines sexual harassment as any unwanted form of behaviour expressed in words or physical and/or symbolic actions of sexual nature, which is intended or results in the violation of personal dignity, in particular when creating a threatening, hostile, humiliating, contemptuous or offensive environment, and which is carried out either by the employer against an employee or a jobseeker, or occurring among employees themselves.[59]

Finally, the statutory definition of mobbing within the majority of Western Balkans jurisdictions is styled as any repetitive behaviour towards an employee or a group thereof, aimed at or representing violation of an employee's dignity, reputation, personal and professional integrity, or position. Such conduct can generate fear or it can create a hostile, humiliating, or offensive environment that deteriorates working conditions or induces an employee's isolation and/or constructive dismissal.[60]

Employment legislations within Bosnia and Herzegovina, as well as North Macedonia, specify mobbing as a specific form of non-physical workplace related harassment, which implies repeating actions where one or more persons psychologically abuse and

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[57] „Punëmarrësi që ankohet se është ngacmuar në një ngamënyrat e parashikuara në këtë dispozitë, duhet të paraqesë fakteqë provojnë ngacmimin e tij dhe më pas i takon personit, ndaj tëcilit adresohet ankesa, të provojë se veprimet e tij/saj nuk kishinpër qëllim ngacmimin, si dhe të tregojë elementet objektive, të cilatnuk kanë të bëjnë me ngacmimin ose shqetësimin." – Neni 32(5) *Kodi i Punës i Republikës së Shqipërisë*.

[58] „Сексуално узнемиравање, у смислу овог закона, јесте свако вербално, невербално или физичко понашање које има за циљ или представља повреду достојанства лица које тражи запослење, као и запосленог у сфери полног живота, а које изазива страх или ствара непријатељско, понижавајуће или увредљиво окружење." – Члан 21(3) *Закона о раду* (Република Србија).

„Сексуално узнемиравање, у смислу става 1 овог члана јесте свако вербално или физичко понашање које има за циљ или представља повреду достојанства лица које тражи запослење, као и радника у сфери полног живота, а које изазива страх или ствара понижавајуће или увредљиво окружење." – Члан 24(3) *Закона о раду* (Република Српска).

[59] „Shqetësim seksual është çdo formë e padëshiruar sjelljeje, e shprehur me fjalë ose veprimefizike e simbolike, me natyrë seksuale, e cila ka për qëllim ose sjellsi pasojë cenimin e dinjitetit personal, në mënyrë të veçantë kurkrijon një mjedis kërcënues, armiqësor, poshtërues, përçmues osefyes, që kryhet nga punëdhënësi kundrejt një punëmarrësi, njëpunëkërkuesi për punë ose midis punëmarrësve." – Neni 32(2) *Kodi i Punës i Republikës së Shqipërisë*.

[60] „Zabranjen je svaki oblik zlostavljanja na radnom mjestu (mobing), odnosno svako ponašanje prema zaposlenom ili grupi zaposlenih kod poslodavca koje se ponavlja, a ima za cilj ili predstavlja povredu dostojanstva, ugleda, ličnog i profesionalnog integriteta, položaja zaposlenog koje izaziva strah ili stvara neprijateljsko, ponižavajuće ili uvredljivo okruženje, pogoršava uslove rada ili dovodi do toga da se zaposleni izoluje ili navede da na sopstvenu inicijativu otkaže ugovor o radu." – Član 14(1) *Zakona o radu* (Crna Gora).

humiliate another person, aiming to undermine that person's reputation, honour, dignity, integrity, working conditions or professional status.[61]

Finally, though the North Macedonian Employment Act adheres to the regional statutory definitions of non-physical workplace related harassment, it additionally sets forth a minimum time of six months for such a behaviour to amount as mobbing.[62]

2.2.5. Individual Employment Law Provisions

The 2019 Montenegrin Employment Act specifies that in the event of unjust dismissal, the aggrieved employee is entitled to claim non-economic damages in situations when the termination of employment violated her/his personal rights, honour, reputation, or dignity.[63]

The North Macedonian Employment Relations Act introduces another quite unique measurement within the region, prescribing a statutory fine of 7,000 euros for any employer formed as legal entity, in the event of failing to protect and respect the personality, dignity and privacy of an employee or for failing to ensure the protection of employees' personal information.[64]

3. THE NOTION OF DIGNITY IN ECtHR COURT PRACTICE WITH RESPECT TO THE WESTERN BALKAN JURISDICTIONS

The European Court of Human Rights in Strasbourg (ECtHR) invoked the notion of human dignity in few of its decisions with respect to the Western Balkans jurisdictions, though the 1950 Convention does not include provisions regarding the concept itself.[65]

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[61] „Mobing predstavlja specifičnu formu nefizičkog uznemiravanja na radnom mjestu koje podrazumijeva ponavljanje radnji kojima jedno ili više lica psihički zlostavlja i ponižava drugo lice, a čija je svrha ili posljedica ugrožavanje njegovog ugleda, časti, dostojanstva, integriteta, degradacija radnih uvjeta ili profesionalnog statusa."– Član 9(5) *Zakona o radu* (Federacija BiH).

„Мобинг је специфичан облик понашања на радном мјесту, којим једно или више лица систематски, у дужем периоду, психички злоставља или понижава друго лице с циљем угрожавања његовог угледа, части, људског достојанства и интегритета."– Члан 24(5) *Закона о раду* (Република Српска).

[62] „Психичко вознемирување на работно место (мобинг), во смисла на овој закон, е секое негативно однесување од поединец или група кое често се повторува (најмалку во период од шест месеца), а претставува повреда на достоинството, интегритетот, угледот и честа на вработените лица и предизвикува страв или создава непријателско, понижувачко или навредливо однесување, чија крајна цел може да биде престанок на работниот однос или напуштање на работното место."– Член 9-а(3) *Закон за работните односи*.

[63] „Ako se u postupku iz stava 1 ovog člana utvrdi da je otkaz imao za posljedicu povredu prava ličnosti, časti, ugleda i dostojanstva, zaposleni ima pravo na naknadu nematerijalne štete, u zakonom predviđenom postupku."– Član 180(8) *Zakona o radu* (Crna Gora).

[64] „Глоба во износ од 7.000 евра, во денарска противвредност ќе му се изрече за прекршок на работодавач - правно лице, ако […] не ги штити и почитува личноста, достоинството, приватноста на работникот и не се грижи за заштита на личните податоци на работникот (членови 43 ставови (1) и (2) и 44 ставови (1), (2), (3) и (4))."– Член 264(1)(3) *Закон за работните односи*.

[65] The recitals of Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances signed in Vilnius in 2002,

Cases in which the ECtHR resorted to the notion of human dignity concerned claims of alleged violations with respect to prohibition of torture (Article 3), the right to respect for private and family life (Article 8), and freedom of expression (Article 10).

3.1. Prohibition of Torture

The NGO Helsinki Committee for Human Rights in Skopje (HCHR) brought a case[66] before the ECtHR on behalf of an eight-year-old child (initials: L.R.) with moderate mental disabilities, severe physical disabilities (cerebral palsy) and a speech impediment. The child had been in the care of state-run institutions since he was three months old. In 2013, North Macedonia's Ombudsman visited a state-run institute and found L.R. tied to his bed, which subsequently gave rise to the NGO's interest in his case.[67]

The ECtHR found that an inadequate treatment which the applicant received was made worse by the fact that he was tied to his bed at night and frequently during the day. It is particularly worrying that such a 'measure', which in itself is incompatible with human dignity, was used for approximately a year and nine months in respect of an eight-year-old child (§ 80).

Hence, the ECtHR found that the authorities, which were under an obligation to safeguard the applicant's dignity and well-being, are responsible under Article 3 of the Convention for his inappropriate placement, lack of requisite care and the inhuman and degrading treatment that he experienced therein (§ 82).

3.2. Right to Respect for Private and Family Life

In *Špadijer v. Montenegro*[68] the applicant reported five of her colleagues for indecent behaviour at work on New Year's Eve. As established later in disciplinary proceedings, some of the male guards had entered the women's prison and one of them had had 'physical contact' with two inmates there, which had been tolerated by some of the female guards. Subsequent to the report, the applicant was intimidated and antagonised by her colleagues by telephone, having the front windscreen of her car broken in front of the building where she lived, etc. Following the disciplinary action in which the reported colleagues were fined, the applicant experienced continuous insults and humiliation at work which were causing health problems. Eventually, she was even assaulted in a car park where she was collecting her daughter after her classes with the attacker approaching her from behind and inflicting several blows on the back of her neck and the lower part of her back, and around the left elbow and the thighs. When leaving, the attacker told her: "Be careful what you're doing."

include an introductory declaratory statement of being "[c]onvinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings".

66 *L.R. v. North Macedonia* 2020, ECtHR, Application no. 38067/15.

67 Available at: https://strasbourgobservers.com/2020/02/27/who-can-represent-a-child-with-disabilities-before-the-ecthr-locus-standi-requirements-and-the-issue-of-curator-ad-litem-in-l-r-v-north-macedonia/ (30. 6. 2023).

68 *Špadijer v. Montenegro* 2021, ECtHR, Application no. 31549/18.

The Court of First Instance in Podgorica ruled against the applicant in civil proceedings. Though considered her submissions to be true, and finding that the applicant's psychological problems were related to conflict at work, the court considered that the events complained of did not amount to bullying as they had lacked the necessary frequency. The decision was upheld by superior courts.

The ECtHR found that the domestic courts made no attempt to establish how often incidents had been repeated and over what period, or to examine them individually and taken together with the other incidents. They also failed to consider the context and the alleged background to the incidents. The ECtHR cannot overlook the applicant's allegation that the acts of harassment to which she was subjected were in reaction to her reporting the alleged illegal activities of some of her colleagues and were aimed at silencing and 'punishing' her (§ 97).

Finally, the ECtHR found that the manner in which the civil and criminal-law mechanisms were implemented in the particular circumstances of the applicant's case, in particular the lack of assessment of all the incidents in question and the failure to take account of the overall context, including the potential whistle-blowing context, was defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention (§ 101).

3.3. Freedom of Expression

The case[69] of *Bodrožić and Vujin v. Serbia*[70] arose out of the two applicants' criminal convictions who were at the time journalists for the weekly local newspaper.

In April 2004, the first applicants published an article criticizing the domestic courts for imposing criminal sanctions against him and another journalist for their alleged offense of defamation. He also implicitly compared the attorney who prosecuted the cases to a blonde woman. In the same issue, the second applicant was the editor of the newspaper's comics column in which the prosecuting attorney's name was inserted next to a photograph of an unclothed blonde woman.

Shortly after the publication, the attorney brought a criminal defamation action against the applicants for their alleged insults. The Municipal Court found the applicants guilty and fined each of them with EUR 150. The court held that the publication resulted in insulting the attorney because it objectively humiliated him through comics that crossed the acceptable boundaries. The District Court upheld the convictions.

In a unanimous decision, the ECtHR found that the criminal conviction of the applicants was not a necessary inference with their freedom of expression under Article 10(2) of the European Convention on Human Rights. Regarding the content of the article, the Government submitted that "comparison of men to women, especially to blonde ones, constituted an attack on the personal integrity and dignity of men, as understood in the social environment which prevails in the respondent State" (§ 21).

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[69] The description of facts in this section is based on information available at: https://globalfreedomofexpression.columbia.edu (30. 6. 2023).

[70] *Bodrožić and Vujin v. Serbia* 2009, ECtHR, Application no. 38435/05.

The ECtHR reasoned that the entirety of the text being humorous in content and published under the newspaper's *Amusement* column, cannot be understood otherwise than as a joke rather than a direct statement maliciously aimed at offending the attorney's dignity (§ 33). Further, the ECtHR was struck [*sic*] by the argument of the domestic courts, as later endorsed by the Government, that "comparing an adult man to a blonde woman constituted an attack on the integrity and dignity of men. Moreover, the domestic authorities considered such a comparison objectively insulting within their society. However, the Court finds that argument derisory and unacceptable" (§ 35).

In the case of *Lepojić v. Serbia*[71] the applicant wrote an article that was published in the local newspapers during an election campaign. The applicant questioned the local mayor's position, given that he had been excluded from the party and because of his alleged misconduct while he was president of a state-run company. The applicant called the mayor "near-insane" due to his spending of the municipality's money on gala dinners, sponsorship, etc.

After the article was published, the mayor pressed criminal charges against the applicant, who was found guilty of defamation. This decision was confirmed by an appellate court. Domestic courts considered the applicant's accusations to be unfounded and defamatory since they were not supported by facts. Subsequently, the mayor filed a separate complaint seeking non-economic damages for mental anguish he claimed to have suffered due to the publication of the article. The court awarded the mayor with nearly 2,000 EUR monetary compensation. The award was upheld by an appellate court. With a 5:2 majority, the ECtHR confirmed that there had been a violation of Article 10 of the European Convention.

The domestic courts found, *inter alia*, that that criticism could not consist of untrue statements which "deeply offend" one's "honour, reputation and dignity"; and that the honour, reputation and dignity of the mayor, as an elected official and Director of a very successful local company, "had more significance than ... [the honour, reputation and dignity] ... of an ordinary citizen" (§ 16). In its decision, the ECtHR specifically expressed such reasoning of domestic courts to be 'dubious' and 'not necessary in a democratic society' (§ 78).

4. CONCLUSION

Though having a centuries-old philosophical, theological, social and even cultural tradition, the notion of human dignity has become legally relevant only after the WW2 experience. The savage brutality of the Nazi regime forced the international community to aspire for a global system that rests on a concept genuine enough to restrain the omnipotence of national lawmakers. Accordingly, human dignity has evolved into a notion surpassing state sovereignty, gradually becoming a standard, a (legal) measure of legislation and court practice. In effect, human dignity became the basis of inviolable and inalienable human rights.[72]

[71] *Lepojić v. Serbia* 2007, ECtHR, Application no. 13909/05.

[72] The supreme position of human dignity in international relations has experienced a notable decline following the 9/11 attacks, being if not replaced than to an extent deteriorated by the public demand of

Problems of incorporating wide philosophical, even idealistic concepts into a narrow legal context are almost self-evident (Kirste, 2013). This inherent challenge in judicial implementation of human dignity is further intensified by the fact that the legal community has not so far developed a somewhat internally recognised definition of such a far-reaching concept. One of the possible solutions is an attempt to delineate human dignity *ex contrario*, i.e., instead of formulating what the right to human dignity is, jurisprudence tries to mark degrees of humiliation and degradation that in themselves amount to violation of human dignity as such. An additional dilemma rests on a debate whether human dignity is one of the subjective individual rights, or an objective norm within the corpus of human rights.[73]

The standard practice of incorporating the notion of human dignity in national constitutions and statutes is present in all of the Western Balkans jurisdictions. In accordance with universally acknowledged standards, it is styled as a both inviolable and inalienable concept, imposing a clear duty of a given state to respect and protect it as a general rule. A rather commonplace invocation of human dignity simultaneously with various constitutional values (e.g., the rule of law, democracy, liberty, etc.) is to an extent distinct in relation to the Constitution of Bosnia and Herzegovina, where human dignity takes the prominent place as its first recital. Such legal structure resembles the practice introduced by the German Basic Law of 1949, in which human dignity was used to mark a clear institutional detachment from immediate past.[74]

Substantial provisions related to human dignity in region's constitutions are associated with usual constitutional guarantees e.g., freedom of expression, social protection, prohibition of torture, inhuman or humiliating conduct, etc. In some cases, special attention is given to the protection of human dignity of persons deprived of liberty in criminal and other judicial proceedings. A few Western Balkans constitutions utilise the notion of human dignity in a manner that is by some authors referred to as using

state and international security. Though examples of violations of human rights and human dignity have been accounted for before September 11, 2001 (e.g., the Tuskegee Syphilis Study, or the Vietnam war massacres) the Guantanamo Bay detention camp example might be perceived as a landmark of a clear conceptual shift. The notion of human dignity, though regarded as an absolute value, has run into a competing counter-value: the security of the world as we know it. Legal ramifications of such change can be detected in statutes like the subsequently repealed UK Anti-terrorism, Crime and Security Act 2001, or the legal opinion of the German Federal Constitutional Court in its 2006 decision (BVerfGE 115, 118) that shooting down a plane with only terrorists on board would not violate the terrorists' dignity, and that the infringement of their right to life was proportionate to the protection of innocent lives. It seems that the 'permanent war for permanent peace' slogan is becoming more and more persuasive in modern world, especially in the context of migration crisis, COVID-19 pandemics, or the ongoing Russo-Ukrainian War.

[73] This paper is predicated on the assumption that human dignity belongs to the group of objective norms within the human rights corpus. To say that 'human dignity is a human right' would be as erroneous as to suggest that 'to have an arm is a human right'. Ontological features of human beings (and human dignity is one such feature) cannot be understood as subjective rights as the latter are, for example, limited by the principle of proportionality. Human dignity is an absolute value, and it cannot be constrained either by actions of a given individual, or by human dignity of fellow persons. Each and every human being is inherently characterised by her or his human dignity.

[74] The German Basic Law is based on the notion of human dignity in order to clearly mark that in this respect the new German state renounces the former 'dignity of the Reich'.

the concept like a 'magic wand', a solution for complex social and ethical questions, e.g., bio-medicine (Montenegro), or even in relation to the Office of the Ombudsman (Federation of Bosnia and Herzegovina).

The region's statutory framework follows the constitutional manner of reproducing various international legal instruments in respective national legislations. E.g., an obligation of a state to protect the dignity of people involved in various judicial and administrative procedures, with special attention given to the defendants, is a general rule present as a universal standard in modern civilisation. Likewise, various EU law directives[75] are almost to the letter incorporated in national legislation of Western Balkans jurisdictions. E.g., all of the region's statutes stipulate a somewhat carbon-copy definitions of harassment, sexual harassment and mobbing in their employment law legislation, as they are laid down by the EU law.

A common feature of each national legal framework within Western Balkans in connection with the notion of human dignity is its widespread and repetitive terminological inconsistency in various legal instrument. The concept is often interchangeably referred to as 'dignity', 'personal dignity', 'human dignity', 'dignity of an employee', 'dignified living conditions', etc. It might be argued that such variety of verbalisations in connection with a unique legal concept is a result of various legislative formulations used in previous constitutions and statutes.[76] It seems only prudent to reach a national consensus of the notion and to adopt its uniform verbal formula throughout a given national legal system.

According to some authors such terminological diversity is not a mere coincidence. For Mattson & Clark (2011, p. 306) the Western conception of human dignity and its relation to human rights as embraced by individualist cultures (Europe, North America) is not widely accepted in communitarian cultures. The latter lean to emphasize peoples' duties and obligations rather than their rights, with dignity arising from the fulfilment of these obligations, and generally involving acknowledgment by others. In this context, personal dignity is construed around notions of honour, and it is subject to being violated through public acts that diminish the standing of the self, since it is always measured in relation to others.

This paper follows an assumption that communitarian societies prioritise the notion of *collective dignity* in which *personal dignity* derives from the community's acknowledgment that one's personal contributions to the common good brings about her or his (social) reward styled as reputation. Hence, the concept of personal dignity corresponds with the standing of a member in relation to the group, as acknowledged by the whole.

[75] E.g., Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[76] E.g., The Constitution of the Socialist Federal Republic of Yugoslavia (1974); the Constitution of the Federal Republic of Yugoslavia (1992); various national criminal and civil procedure regulations, employment law legislation, etc.

To the contrary, *human dignity* requires no additional merit other than being a member of the human race. Ergo, human dignity is intrinsic – it is not a potential, a possibility a virtuous personality might obtain if adhering to the common good (*personal dignity*); it is a trait no human being can ever be deprived of, irrespective of the damage she or he has caused to fellow humans.

The analysis of the selected ECtHR court practice demonstrates that within the Western Balkans region, state's duty to respect and protect human dignity, especially in relation to vulnerable social groups where such protection is indispensable, asks for genuine institutional improvements.

It should be noted that in all of the cases presented, violations of human dignity occurred in a workplace context, regardless of the status human dignity occupies in all of the region's employment legislations. Namely, it was the personnel of in state-run institutions who violated human dignity of individuals that were unable to defend themselves properly, or were unable to protect themselves at all. An institutional torture effectuated as state negligence and dehumanization was brought upon an eight-year-old abandoned child with a severe medical condition,[77] while a victim of a work place related harassment was a female employee in a predominantly male working environment (prison).[78]

Likewise, cases involving freedom of expression were in a clear connection with works of professionals, i.e., journalists were charged on account of their articles published in local newspapers. These two cases[79] even demonstrate an attempt of public officials to misuse the notion of human dignity by asserting that in given circumstances they were the victims of humiliation, i.e., their right to human dignity was violated in given newspaper articles. The ECtHR firmly rejected such misuse of the notion of human dignity by state officials.

In conclusion, it seems important noting that there are more and more attempts of reversing the so far acknowledged social functions of human rights. The initial ideal of observing the dignity of all men through the concept of human rights originated with the French Revolution whose attempt was to protect the vulnerable, i.e., the marginalised social groups (women, children, minorities). However, in our day and age, we come across resounding voices asserting their right not to be immunised by a vaccine in a pandemic surrounding, or the right to disregard the ongoing climate change, based solely on the protection of human dignity effectuated as every individual's right of choice. It seems that these and similar questions shall have to be answered in times to come.

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77 *L.R. v. North Macedonia* 2020, ECtHR, Application no. 38067/15.

78 *Špadijer v. Montenegro* 2021, ECtHR, Application no. 31549/18.

79 *Bodrožić and Vujin v. Serbia*; *Lepojić v. Serbia*.

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THE ALBANIAN LEGAL GUARANTEES FOR THE PROTECTION OF NATIONAL MINORITIES

This paper assesses the major issues in regard to previous Albanian Constitutions of 1921, 1976 and 1991. Moreover, it states the provisions of the current Constitution (1998 with amendments) for the recognition and protection of human rights. Some of the issues raised are the obstacles that Albanian institutions confront with both nationally and internationally in guaranteeing the protection of national minorities' rights. Moreover, the purpose of this paper is to shed light on the adoption of the new legislation on minority rights on the basis of its role and duties under the Framework Convention for the Protection of National Minorities. The essence of democracy is the protection of fundamental freedoms and human rights, and ensuring that these freedoms and rights are fully protected makes a state substantially democratic.

Keywords: human rights, national minorities, Albanian Constitution, minority rights, democracy, legislation, laws, Convention.

1. INTRODUCTION

"There can be no peace without development, no development without peace, and no lasting peace or sustainable development without respect for human rights and the rule of law." - Former UN Deputy Secretary-General Jan Eliasson. The above statement by Eliasson clearly expresses how a state's peace and progress can only be achieved if human rights are successfully protected. Albania's transition from a communist to a democratic system has prepared the ground for the enactment of legislation protecting human rights and fundamental freedoms. Albania is a developing country that has encountered several challenges in its endeavors to completely enable the protection of human rights.

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Albania is a party to a number of regional human rights treaties, including the European Convention on Human Rights, the European Convention against Torture and Inhumane Treatment, and the Framework Convention for the Protection of National Minorities (hereinafter: FCPNM).[1] This paper, however, will only focus on the Convention on the Protection of National Minorities, and the opinions of the Advisory Committee regarding Albania's progress in the sphere of human rights from 2001 to 2022. Moreover, it assesses the key areas Albania needs to work on in order to fully protect and respect human rights in accordance with the FCPNM.

There used to be two types of minorities in Albania: national ethnic minorities (Greeks, Macedonians, and Serbian-Montenegrins) and ethno-linguistic minorities (Vlach/Aromanian and Roma).[2] Albania's Constitution only acknowledges "national minorities", but dismisses ethno-linguistic minorities. As a result of this reality, there was a discussion about whether the state should acknowledge the second category, as Albanian citizens bearing the same rights as per nondiscrimination and fostering of their identity. Such issue was addressed by the Law 96/2017 on the Protection of National Minorities in the Republic of Albania which sanctions now the existence of nine different ethnic minorities (Greek, Macedonian, Aromanian, Roma, Egyptian, Montenegrin, Bosnian, Serbian and Bulgarian)[3]. Besides existing national and international legal protections, more progress is needed to assure the respect of human rights, integration, and social inclusion of minorities in practice (more on Law 96/2017 please refer below on 3.1.3).

2. PREVIOUS ALBANIAN CONSTITUTIONAL GUARANTEES OF MINORITY RIGHTS PROTECTION

2.1. The 1921 Constitution: Minority Rights

National minorities were given no importance at the beginning of the development of the Albanian state because Albania was still in its early stages of state formation. However, after World War I, Albania pledged to protect minorities by joining the League of Nations in 1920. The League of Nations assembly adopted a recommendation on December 15, 1920, stating that once Albania is accepted to the League of Nations, it should take appropriate measures to implement the Treaties' principles concerning minorities (Xhaxho, 2007, p. 134) . Albania made a declaration before the Council after its admission on December 17, 1920, stating that "full and complete protection of life and liberty will be assured to all inhabitants of Albania without distinction of birth, nationality, language, race, or religion". [4]

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1 International Justice Resource Center

2 Special Report on Minority Rights Republic of Albania, Ombudsman

3 Law on the Protection of National Minorities in the Republic of Albania no. 96/2017. Available at https://qbz.gov.al/eli/fz/2017/196/23dfc0be-d3a1-4f26-8ace-9eb38a1e9237;q=ligji%20i%20pakicave%20kombetare (29. 9. 2023).

4 Article 2 of Declaration Concerning the Protection of National Minorities in Albania, Geneva, October 2nd 1921.

Despite the above-mentioned Albanian declaration, the Albanian Constitution of 1928 was changed in 1933, particularly Articles 206 and 207. These articles stipulated elementary education compulsory for all[5] and free of charge in state schools, and the right and opportunity to be educated in private schools.[6] The amendment to the 1928 Constitution eliminated the right to private education. All private schools were closed down, leaving only state schools to provide education. As a result, even minority schools were forced to close. The Greek government protested against the closure of Greek minority schools, and the Albanian legislative proposal was evaluated by the League of Nations.

The Council requested an advisory opinion from the Permanent Court of Justice on whether the Albanian government's decision to abolish private schools was in accordance with Article 5(1) of the 1921 Declaration. An advisory opinion issued in 1935 determined that the Albanian amendments to the constitution were not in full compliance with the Declaration. Most importantly, the court stated that Albania was required to provide private education in the minority languages. Following the Court's advisory opinion, the Albanian government promptly took steps to reopen the Greek schools.[7]

2.2. The 1976 Constitution: Social and Economic Equality

The 1978 Constitution reflects Albania's entry into a new socialist development stage.[8] The state power in the People's Socialist Republic of Albania derived from and belonged only to the working people. [9] The Albanian Constitution of 1976 was based primarily on the fundamentals and philosophies of two major socialist constitutions: the Soviet Socialist Republic Constitution of 1936 and the People's Republic of China Constitution of 1954 (Toro, 2000, p. 36) . According to the People's Socialist Republic of Albania's Constitution, human rights are only guaranteed in terms of socio-economic rights.

The 1976 Constitution assured national minorities the protection and advancement of their culture, including the use of and teaching of their mother tongue in education. It ensured progress and equality in all areas of social life.[10] Nevertheless, the communist regime showed clear violations of the rights of all citizens, the rights of minorities as well. During Communism, Albania was regarded as the country with the worst human rights violations in Europe (Ludwikowski, 1995) . Some examples of human rights violations include: religious bans, forced settlement of citizens in Albania, modifying the names of citizens and places, etc. Finally, it could be concluded that minorities had been subjected to the same violations and limitations.

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5 Article 206 of the Albanian Constitution of 1928.

6 Article 207 of the Albanian Constitution of 1928.

7 PCIJ. 1935. *Minority Schools in Albania*. Available at: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_AB/AB_64/01_Ecoles_minoritaires_Avis_consultatif.pdf. (29. 9. 2023).

8 See: Albanian Constitution of 1976.

9 Article 5 of the Albanian Constitution of 1976.

10 Article 42 of the Albanian Constitution of 1976.

2.3. The 1991 Constitution

Following the fall of Communism[11], Albania emerged from isolation and set about reforming itself. The constitution-making process started in 1990, with the draft being forwarded for review to Western constitutional experts in March 1991. While the new constitution was being debated, the People's Assembly chose to adopt an interim constitution. The Assembly passed the Law on the Major Constitutional Provisions, which went into effect instantly on April 29, 1991. The list of rights was long, and the number of liberties to which all citizens were entitled had grown. While the Charter seemed impressive, Albania's official record on human rights protection was still concerning (Ludwikowski, 1995, p. 96).

Western observers were particularly concerned about the treatment of ethnic minorities. Frictions between the ethnic Greek minority and Albanians rose[12], with both sides accusing the other of abusive treatment and human rights violations. The February 1992 election law prohibited ethnically based parties from participating in elections. The Greek minority saw this law as directed at Omonia[13], which won five parliamentary seats in the 1991 elections. Omonia objected to the law but was not allowed to vote in the elections. In response, Omonia leaders formed the Unity for Human Rights Party, recognized by the state and successful in accepting candidates in ethnic Greek areas of southern Albania. On the other hand, Albanians were infuriated by Greece's treatment of Albanian minorities (Pettifer, 2001, p. 31).

Irrespective of the concerns, the democratic changes that occurred in Albania after the 1990s, including the protection of national minorities, were reflected in Albania's participation in international organizations such as the United Nations, the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), and others. Minorities were able to build and maintain relationships with their countries after the communist regime's isolation was lifted. Furthermore, many minority groups began to form their own organizations, such as the "Prespa" Organization for Macedonians and the Greek "Omonia" Associations (Pettifer, 2001).

3. MINORITY RIGHTS: INTERNATIONAL LEGAL FRAMEWORK

3.1. The Framework Convention for the Protection of National Minorities

The Republic of Albania signed the Framework Convention for the Protection of National Minorities on June 29, 1995.[14] This is the first legally binding multilateral instrument dealing with the overall protection of national minorities, aimed at protecting the existence of national minorities within the Parties' respective territories. The FCPNM lists minority rights, such as: the right to freely choose whether or not to be

[11] The fall of Communism occurred in 1990, with the establishment of democracy.

[12] Particularly in 1992 and 1993.

[13] The cultural and political organization of the Greek minority.

[14] It entered into force on January 1, 2000.

treated as such and no disadvantage will arise from the free choice[15]; the right to equality before the law and equal protection under the law, and discrimination based on belonging to a national minority is prohibited in this regard[16]; the right to preserve their culture, and the essential elements of their identity[17]; the right to manifest his or her religion or belief and establish organizations and associations[18] etc. (Xhaxho, 2007, pp. 64-66).

3.1.1. The Advisory Committee Opinion on the First Periodic Report on Minority Rights of Albania

In September 2002, the Advisory Committee (hereinafter: AC) on the FCPNM assessed the efficacy of Albania's mechanisms to implement the FCPNM's principles and issued its opinion. It recommended that additional efforts should be taken to accomplish the legal and institutional framework and guarantee its full implementation in practice, such as the right to use minority languages in interactions with state administration and the right to exhibit traditional local names, street names, and other topographical entities. Furthermore, the AC urged the Albanian government to consider the preparation of a law specifically on national minorities based on the principle of non-discrimination. The AC further expressed concern about the lack of statistical data on national minorities (Albania R. o., First Report Submitted by the Republic of Albania under Article 25/1 of the Council of Europe's Convention on the Protection of National Minorities , 2001).

Moreover, the AC was concerned about the Albanian government's exclusion of Egyptians from FCPNM protection and about the additional measures that are needed to improve minority language education for Greek, Macedonian Montenegrin, Roma, and Aromanian minorities in the areas where education is not accessible. Finally, the Committee was particularly sensitive to reports of discrimination and prejudice experienced by members of the Roma and Egyptian minority in many areas such as housing, education, employment, access to health and access to social services, etc. (Albania R. o., First Report Submitted by the Republic of Albania under Article 25/1 of the Council of Europe's Convention on the Protection of National Minorities , 2001).

3.1.2 Albania's Fifth Periodic Report

The latest resolution on the implementation of the FCPNM was unanimously adopted by the Committee of Ministers of the Council of Europe on January 13, 2021. Clearly, many recommendations were given in regard to the first report[19] and the fourth report[20]. Some recommendations given by the AC regarding the fourth report were: the preparation of by-laws to make operational the Law on the Protection of National Minorities, clear statistical data on national minorities, prevent discrimination against Roma and

[15] Article 3(1) of the FCPNM.

[16] Article 5(1) of the FCPNM.

[17] Article 5(1) of the FCPNM.

[18] Article 8(1) of the FCPNM.

[19] Albania's First Human Rights Report of 2001.

[20] Albania's Fourth Human Rights Report of 2018.

Egyptian Minorities, effective access to education in the language of national minorities, right to use minority language in interactions with state administration. Therefore, from 2001 to 2018, Albania did not make adequate progress in relation to the Advisory Committee recommendations (Minorities, 2018).

3.1.3. Law On the Protection of National Minorities

The FCPNM, the commitments of the country's European integration process, the expertise of international organizations, and a comprehensive consultation process with national minority associations contributed to the enactment of Law No. 96/2017 on the Protection of National Minorities in the Republic of Albania. The law provides legal safeguards for the rights of national minorities including civil, political, social, and political rights that the Constitution and the legal and sub-legal framework provide for all Albanian citizens. The protection of the rights of national minorities is determined on the basis established by international norms: factual criteria relating to the existence of stable ethnic, cultural, religious, and linguistic features by the majority of the people of this group, as an expression of the will to maintain their culture, traditions, religion, and language.

One of the main actual handicaps of the law is the lack of sub-legal acts which shall make possible its real application. Such sub-legal acts shall be of special importance when it comes to the real *in lieu* application of specific articles of the law.

For example:

a) Article 7 on data collection is strictly connected to the applicability of Article 6 on the rights of self- identification. But, on the other side, Article 7 is subject to the decision of the Council of Ministers, which is supposed to regulate it.[21] Such decisions have not been taken yet, making it therefore difficult to apply.
b) The same situation exists with the applicability of Art. 13, regarding the education in the mother tongue, with the same kind of decision still missing.[22] An important handicap in this aspect is the absence of Albania from signing the European Charter for Regional and Minorities Languages. Such signature would enable a more fulfilled legal framework which shall on its turn assist both the minorities and the Albanian State in clarifying mutual rights and obligations.

The law and its by-laws seek to protect the identity of national minorities, non-discrimination, and equality before the law by ensuring the enjoyment and full exercise of individual rights of individuals belonging to national minorities. (Albania R. o., Fifth Report of Albania on the Framework Convention for the Protection of National Minorities, 2021).

As an important aspect of legal failure (both by-laws and Municipality acts) as per human rights protection especially against Roma, the ECHR, in its decision *X and others v. Albania* found that despite logistic reasons brought in by the Albanian Government,

[21] Article 7 of the Law on protecting national minorities in the Republic of Albania, no. 96/2017.

[22] *Ibid.,* Article 13.

the enrolment of all Roma pupils in one single school in the city of Korca was to be considered as factual segregation.[23]

Also, the European Commission against Racism and Intolerance (hereinafter: ECRI) in its Conclusions of June 29, 2022, (follow-ups of the 2020 report on Albania)[24] stresses again the necessity of approving specific by-laws especially regarding the housing of the Roma and Egyptian community. Both recommendations are partiallyt in resulting therefore in the continuation oinhumanan living conditions for the aforementioned minorities in the respective areas.[25]

4. MINORITY RIGHTS: ALBANIAN LEGAL FRAMEWORK FOR THE PROTECTION OF MINORITY RIGHTS

The Albanian Constitution lists the normative acts that apply throughout the Republic of Albania in a hierarchical order. These acts include the Constitution, ratified international agreements, laws, and Council of Ministers normative acts.[26] Part II of the Constitution establishes human rights. [27] The above provisions of the Constitution establish political, economic, social, and cultural rights, which are applied to members of minority groups without discrimination (The Constitution of Albania, 2022).

The Constitution guarantees the principle of equality and non-discrimination. It guarantees everyone equality before the law, and prohibits unjust discrimination for reasons such as ethnicity, language, gender, race, religion, political, religious, or philosophical beliefs, educational, economic or social status, or ancestry. [28] Furthermore, the Constitution contains a special provision relating to the above principles in terms of national minority rights. It states that "national minorities exercise their human rights and freedom in full equality before the law"[29]. They have the right to freely express their ethnic, cultural, religious, and linguistic identities, without restriction or coercion. They have the right to have them protected and developed, to study and be lectured in their mother tongue, and to form organizations and associations to protect their interests and identity.

Moreover, the Constitution guarantees the freedom of assembly[30] and association[31]. As a result, everyone has the right to form a collective for any lawful purpose and the

[23] ECHR. *X and others v. Albania*. Available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-217624%22]} (29. 9. 2023).

[24] ECRI. 2020. *Report on Albania*. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rm.coe.int/report-on-albania-6th-monitoring-cycle-/16809e8241 (29. 9. 2023).

[25] ECRI. 2022. *Conclusions on the implementation of recommendations in respect of Albania*. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rm.coe.int/ecri-conclusions-on-the-implementation-of-the-recommendations-in-respe/1680a807ce (29. 9. 2023).

[26] Article 116 of the Albanian Constitution.

[27] Articles 15-63 of the Constitution.

[28] Article 18 of the Constitution.

[29] Article 20 of the Constitution.

[30] Article 46 of the Constitution.

[31] Article 47 of the Constitution.

freedom to hold and partake in peaceful gatherings without the use of weapons. With the goal of preserving and strengthening minorities' cultural identities, as well as their political, social, and cultural development, Albanian legislation assures the right to free expression and envisions access to print and electronic media in minority languages. Article 22 of the Constitution assures everyone, including minorities, the freedom of expression and the freedom of the press, broadcast, and television. It also precludes prior censorship of communication means. These rights are of the greatest importance for the restoration and deepening of minorities' identities.

Aside from constitutional guarantees, the current legislation ensures the protection and respect of the above-mentioned principles in the context of minority groups, for example:

- The Code of Administrative Procedures (Albania A. o., no. 44/2015) guarantees the principle of equal treatment in the field of relations with the public administration for minority members. [32]
- The Labor Code (Albania T. A., Nr.7961/1995), which covers the labour issues both in the public and private sectors, under Article 9, prohibits any sort of discrimination in employmenr i.e. professional life.
- The Penal Code (The Criminal Code of the Republic of Albania, Nr. 7895/1995) provides several provisions regarding the protection of persons belonging to minority groups. It states that: "The application of a premeditated plan, aiming at the complete or partial demolition of a national, ethnic, racial or religious group, targeted against group members and associated with the following acts, namely: the deliberate murdering of group members, inflicting serious physical and psychological harm on them, imposing grave living conditions causing physical harm, imposing measures intended to prevent childbirth, or forced transfer of the children of one group to another group, is subjected to imprisonment sentences no less than ten years, or life imprisonment." [33]
- Moreover: "Murders, exterminations, enslaving, instances of internment and deportation, as well as any kind of inhuman torture or violence committed on political, ideological, racial, ethnic and religious grounds are subjected to imprisonment terms of no less than fifteen years, or life imprisonment." [34]
- "A state administration of public service employee, when due to his or her duty and while is exercising his or her duty, inflicts discrimination on grounds of origin, gender, health situation, religious political convictions, involvement in trade union activity or on account of relevance to a certain ethnic group, nation, race or religion, which effects unjust privileges or the denial of a right or benefit under the law." [35]
- "Instigating racial, national or religious hatred and disputes as well as the preparation of dissemination or keeping to distribute, writings relevant to them." Article 266

[32] Article 11(1) of the Administrative Procedure Code.

[33] Article 73 of the Penal Code.

[34] Article 74 of the Penal Code.

[35] Article 253 of the Penal Code.

of the Penal Code punishes: "Risking of public peace, the calling for hatred against parts of population, by the offending or slandering against them, demanding the use of violence or arbitrary acts against them" etc.[36]

5. CONCLUSION

The Albanian Constitution is both solid and adaptive, providing specific safeguards for certain fundamental human rights and freedoms while also enabling future growth in this area. Minority rights have continued to improve since communism's collapse. Nonetheless, problems existed in 1994, particularly with the country's sizable Greek minority in the south. Minority groups, like the majority of Albanians, began to enjoy human rights after the 1990s, when the democratic system was created. The challenges have been immense, but the advancement since 1990 will be meaningless unless Albania makes more efforts to recognize special rights and necessary steps to implement the minority rights recognized by legislation thus far. To improve the protection of minorities in Albania, the government should consider implementing the following recommendations:

Anti-discrimination Legislation: The government should enact comprehensive anti-discrimination legislation that prohibits discrimination based on ethnicity, religion, language, and other factors. This legislation should be accompanied by a strong enforcement mechanism to ensure that those who discriminate are held accountable.

Political Representation: The government should ensure that minority groups are adequately represented in political decision-making processes. This can be achieved by reserving seats in parliament for minority groups, establishing quotas for minority representation in political parties, and ensuring that minorities are included in government decision-making processes.

Property Issues: The government should work to increase the level of protection regarding property rights of minorities in Albania. Despite general property issues that Albania is continuously facing after the fall of communism which affects the whole population, special care should be towards minorities as more vulnerable groups.

Language Rights: The government should ensure that minority groups have access to government services in their language. This can be achieved by enabling the right and necessary sub-legal acts in providing bilingual education, translating government documents into minority languages, and promoting language rights more broadly.

[36] Article 265 of the Penal Code.

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COVID-19 VACCINE MANDATES, INTERNATIONAL HUMAN RIGHTS LAW AND THE VOLUNTARY CONSENT CRITERION

International human rights standards and bioethical norms with regard to informed consent for all medical interventions logically apply to COVID-19 vaccines. This invasive medical procedure carries both known and unknown risks. Over the past two years, COVID-19 vaccine mandates significantly infringed on the individual's right to medical self-determination, violating Article 7 of the International Covenant on Civil and Political Rights, and Article 5 of the Oviedo Convention. The COVID-19 era practices to ostracize, spurn, pressure, mandate, pay, fraudulently induce, and shame people into getting vaccinated against their will violated key Bioethical standards and long-established International Human Rights Law norms jus cogens and obligations erga omnes. Voluntariness, like so many other notions, is not an over-simplified yes-or-no concept but a matter of degree and understanding all the relevant facts in casu. Coercion itself encompasses a broad range of permutations, from applying physical force at one end to applying subtle emotional pressure on the other. Any kind of pressure put on an individual impedes and therefore nullifies the voluntariness of his or her decision, irrespective of the degree. When Government and Corporate COVID-19 biomedical medical paternalists pressured citizens to take the COVID-19 vaccines through threats of punishment if they did not and promises of reward if they did, it failed voluntariness on all counts.

Keywords: COVID-19 vaccine mandates, Jus Cogens norms, informed consent, medical experimentation, non-derogable human rights.

1. INTRODUCTION

The European Parliamentary Assembly adopted Resolution 2361 on January 27, 2021, urging European Member States to "ensure that citizens are informed that the vaccination is not mandatory and that no one is under political, social, or other pressure

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to be vaccinated if they do not wish to do so" and "to ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated". However, in September 2021, France suspended 3,000 health workers without pay for refusing the COVID vaccine. In a call to action on December 1, 2021, the European Commission President Ursula von der Leyen said the EU's 27 Member States should consider mandatory vaccination in response to the spread of the Omicron COVID variant across Europe (Boffey and Smith, 2021). Shortly thereafter, Greek Prime Minister Kyriakos Mitsotakis announced that mandatory COVID-19 vaccination for all Greeks above 60 years of age, and those who refused to get vaccinated would have to pay a monthly fine of €100 ($114) for each month they did not get vaccinated, starting January 16, 2022 (Barnes & Allen, 2021). During 2021 and 2022, numerous governments and large multinational corporations implemented vaccine mandates and coerced citizens to get the COVID-19 vaccine that ranged from the loss of employment and inability to study or enter shops and restaurants if citizens did not get the vaccine to monetary payments, free beer, hot dogs, doughnuts and even pickled herrings and a joint of marijuana if citizens got the vaccine (Burki, 2022, p. 27; Reuters, 2021; Singh, 2021). The COVID-19 era vaccine mandates significantly infringed on the individual's right to medical self-determination in violation of both Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the Oviedo Convention that specifically determines: "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it."

Dr. Robert Malone, one of the inventors of the mRNA technology used in the COVID-19 vaccine, on June 23, 2021, advised that: "…the government is not being transparent with us about what [the] risks are…I am of the opinion that people have the right to decide whether to accept vaccines or not, especially since these are experimental vaccines" (Richard, 2021). Despite COVID-19 having an infection fatality ratio of less than 0,15% (Ioannidis, 2021, p. 10), the COVID-19 vaccine being proven to be neither effective nor safe and the World Health Organization's (WHO) data showing almost 2.5 million adverse events from the COVID-19 vaccine by November 12, 2021, mandatory vaccinations were implemented and continued unabated in numerous countries across the globe during 2021 and 2022 (World Health Organization, 2021).

Important questions that need to be addressed include whether International Human Rights Law (IHRL) guarantees the right to free and informed consent, what exactly free and informed consent entails, and whether this right was honored and protected during the COVID-19 pandemic. The contemporary conception of informed consent only skims the surface of this critical criterion. This article sets out key IHRL and Bioethical Norms relating to the voluntary consent criterion. Then it explicates the elements relating to the three essential indicators to determine whether a decision has been voluntarily made: I) Freedom from Coercion and Pressure; II) Informed and Educated Consent; and III) Healthy Psychological State (Hospers, 1980, pp. 255-265).

2. INTERNATIONAL HUMAN RIGHTS LAW

The era of modern human rights law commenced in 1945 with the birth of the United Nations and a transformative vision of human beings as ends in themselves. Individuals once considered mere objects of the sovereign were now deemed subjects of international law with positive legal claims to protection, not only from State tyranny and oppression but also from human rights abuses by non-State actors (Nowak, 2003, p. 36; van Aardt, 2004, p. 76).

IHRL, unlike classic international law, sees individuals as the main subjects of international law. It is not based on reciprocity but rather on a network of objective obligations. (van Aardt, 2021a, p. 457) This framework includes various principles bearing on the interpretation of treaties and the grundnorm of treaty law, *pacta sunt servanda*. (Tasioulas, 2015, p. 1) IHRL is based on the concept that every nation has an obligation to respect and ensure the human rights of its citizens (van Aardt, 2021b, pp. 14-16).

2.1 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR, which is a legally binding international treaty that was ratified by 173 governments worldwide, in its preamble, recognizes that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world," and that "these rights derive from the inherent dignity of the human person." Article 2(1) of the ICCPR determines that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, or other status" (such as the status of being "unvaccinated"). The obligations of the Covenant in general and Article 2(1)–(3) are binding on every State Party as a whole. It applies to all branches of government (executive, legislative and judicial) and other public or governmental authorities, including public health authorities (Orakhelashvili, 2006, pp. 50-51).

Article 5 of the ICCPR prohibits States, groups, and persons from engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms recognized in the ICCPR. Article 7 of the ICCPR explicitly determines that "no one shall be subjected without his free consent to medical or scientific experimentation." Significantly, Article 7 is specifically listed in Article 4 as an article from which no derogation may be made even in times of a public emergency that threatens the life of the nation. Medical experimentation without free and informed consent is viewed as *jus cogens* and is of a class from which no derogation is allowed. Because of their normative specificity and importance, non-derogable rights are essential human rights *jus cogens* and obligations *erga omnes*. Under legal case law and legal doctrine, *jus cogens* comprise a particular form of constitutional rules that every government must adhere to. The *jus cogens* norm, therefore, acts as a check on unbridled and unlawful State power. (Bianchi, 2008, pp. 491-508; Meron, 1986, pp. 19-20; van Aardt, 2022b, p. 65) Being compelling law, it does not give the State the right to opt-out, as is the case with other international norms

deriving from custom or treaty. Peremptory norms limit the ability or margin of appreciation of the State to craft national legislation, which would contradict *jus cogens*. Any act or health policy of the State, contrary to *jus cogens*, represents a breach of the international legal order (van Aardt, 2022a, p. 14; Lagerwall, 2015, para. 1).

The positive legal obligation to respect and ensure includes the duty of States to make adequate provision in the law for the effective protection of fundamental human rights (United Nations Office of the High Commissioner of Human Rights, 2022). This duty includes the effective enforcement of the law and taking reasonable steps of prevention by providing an effective judicial system and by conducting proper investigations, prosecuting offenders, as well as providing for adequate remedies for victims in the event of the rights being violated by private acts of violence or government abuses. State responsibility for human rights abuses in the COVID-19 era are to be approached with reference to the specific ICCPR treaty provisions. The specific undertakings regarding *inter alia* the right to life, the right to live free from medical experimentation without informed consent, and the right to security of the person are also to be read in context of the general undertakings to "respect and ensure" human rights by all appropriate means. A State complies with the general duty "to respect" a right by not interfering with its exercise or violating the right, but the obligation "to ensure" a right is substantially broader. Rights under the Covenant are "negative", in that States must not obstruct individuals' exercise of them, but also "positive", in that States must take affirmative measures to prevent violation of human rights, also from private actors (van Aardt, 2004, pp. 95-98).

The UNHRC's General Comments 3 and 31 emphasize that the obligation under the ICCPR is not confined to the respect of human rights, but State Parties have also undertaken "to ensure the full enjoyment of these human rights to all individuals under their jurisdiction." (UN Human Rights Committee, 1990 and 2004) The Committee has also linked Article 7 of the ICCPR to an obligation to provide protection through "legislative and other measures" against ill-treatment inflicted by large corporations. A State Party internationally may also not juridically point to the fact that an action incompatible with the provisions of the Covenant was carried out by a non-State actor, such as a transnational corporation, as a means of seeking to relieve the State Party from responsibility and liability for the human rights violation (van Aardt, 2004, pp. 95-105)-

2.2 The Oviedo Convention

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) is the best current example of how to promote the protection of human rights in the biomedical field at a regional level. The importance of this instrument lies in the fact that it is the first comprehensive, legally binding multilateral treaty focused on protecting human dignity, basic human rights, and freedoms through a series of rules and prohibitions against the abuse of biological and medical innovations (van Aardt, 2021a, p. 457; Adorno, 2005, p. 135). The treaty's starting point is that the dignity and identity of all human beings must be protected, and

the interests and welfare of human beings rank above the interests of society or science. It sets out a series of standards and proscriptions relating to medical research, bioethics, consent, rights to privacy and information, and public debate. (Adorno, 2005, p. 135).

The Oviedo Convention in Article 5 unambiguously determines that:

> "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time."

The Oviedo Convention is legally binding on the European Union Member States that signed the Convention and sets an authoritative juridical standard regarding the protection of human rights in the biomedical field.

2.3. The European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR)

The ECtHR has determined in its case-law that mandatory vaccination, as a compulsory medical intervention, represents an interference with the right to respect for private life within the meaning of Article 8 of the ECHR. In the case of Solomakhin v. Ukraine, the ECtHR specifically held that:

> "a person's bodily integrity concerns the most intimate aspects of one's private life, and that compulsory medical intervention… constitutes an interference with this right."

The Court further held that "Compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by Article 8 § 1." Although Article 8 § 2 of the ECHR allows for the limitation of this right if *inter alia* "in accordance with the law" and "necessary in a democratic society", the court in *Vavřička and others v. the Czech Republic* again confirmed that:

> "an interference will [only] be considered "necessary in a democratic society" for the achievement of a legitimate aim if it answers a "pressing social need" and, in particular, if the reasons adduced by the national authorities to justify it are "relevant and sufficient" and if it is proportionate to the legitimate aim pursued."

It is almost impossible to contemplate reasonable and rational arguments relating to legitimacy, a pressing social need, relevancy, sufficiency, necessity and proportionality to enforce mass mandatory vaccinations in order to combat a disease with a crude mortality rate ranging between 0.003% and 0.3% with an experimental vaccine that has proven to be ineffective and unsafe with deadly side effects (van Aardt, 2022b, pp. 89-105, 125-146).

Although some limitation on Article 8 § 1 may be justified, they would require particularly strong justifications (Alekseenko, 2022, p 88). [1] Moreover, as correctly noted by Judge Wojtycek in the Vavřička case:

> "under the existing case-law the freedom to dispose of one's own body is a fundamental value that is protected by the Convention …a person's body concerns the most intimate aspect of private life… The notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8… a principle which is invoked to narrow the margin of appreciation…"

2.4. Bioethical Norms and Standards

Bioethics can be defined as "the study of the ethical dimensions of medicine and the biological sciences". (Jecker et al, 2011, p. 3) Bioethics deals with practical ethical questions raised in everyday healthcare. International bioethical norms and human rights standards with regard to informed consent for all medical interventions logically apply to COVID-19 vaccines, an invasive medical procedure that carries both known and unknown risks (van Aardt, 2021a, p. 457).

2.4.1. The Nuremberg Code

Since its publication, the Nuremberg Code has served as a foundation for ethical biomedical practice and research. This historic document, developed in response to the atrocities of human experimentation at the hands of Nazi physicians and public health officials, focused crucial attention on the fundamental rights of medical research participants. The trials of the Nazi physicians and public health officials were held at the Palace of Justice in Nuremberg, Bavaria, Germany, from 1945 to 1946.

The Nuremberg Code *inter alia* determines that:

> "The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion, and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision…"

[1] For instance, where a vaccine has been proven to be safe and effective over the long term to prevent a fatal disease with an infection fatality ratio affecting a substantial portion of the population. It is important to note that the case of *Vavřička and others v. the Czech Republic* that is erroneously sited by some jurists (Katsoni, 2021; King, Ferraz, & Jones, 2022; Vinceti, 2021, etc.) as an endorsement of mandatory COVID-19 vaccination policies related to "the standard and routine vaccination of children against diseases that are well known to medical science" and not to novel viruses with negligible crude mortality rates nor to experimental vaccinations with no medium- and long-term safety and efficacy data proven to be ineffective and harmful.

Under the Nuremberg Code, no one may be coerced to participate in a medical experiment (van Aardt 2021a, p. 457). The COVID-19 era government-sponsored propaganda, disinformation, and misrepresentations as well as the practices to ostracize, spurn, pressure, mandate, pay, fraudulently induce, and shame people into getting vaccinated against their will is a clear violation of the Nuremberg Code (Blaylock, 2022, p. 167; Reed *et al*. pp. 1-13; Woodworth, 2021, paras. 1-20). While this right to choose relating to medical experimentation in international law sprang from the Nuremberg Code, the international right to informed consent now encompasses the right to free and informed consent for all medical decision-making (van Aardt, 2021, p. 457).

2.4.2. The Universal Declaration on Bioethics and Human Rights

The Universal Declaration on Bioethics and Human Rights (UDBHR) was adopted by UNESCO in 2005 after several years of development and multinational consultation (Macpherson, 2007, p. 588). Utilizing a human rights framework, the UDBHR established normative bioethical standards in 15 areas, including fundamental human rights, justice, equality, dignity, equity, and safeguarding future generations (Adorno, 2007, p. 150). The UDBHR confirms that the interests and welfare of the individual should have priority over the interest of science or society. The UDBHR explicitly stipulates that:

> "Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice. " (Article 6)

While the UNESCO Declaration does not establish enforceable rights, it is the first international legal instrument that comprehensively deals with the linkage between human rights and bioethics (Adorno, 2007, p. 150). Regardless of the weaknesses inherent to this kind of non-binding instrument, the very fact that virtually all states reached agreement on the various principles is in itself convincing regarding what the global bioethical norms should be and a scathing indictment of COVID-19 public health practices (van Aardt, 2021a, p. 457).

2.4.3. The World Medical Association (WMA) Declarations

Since it was founded in 1947, a central objective of the WMA, "an international and independent confederation of free professional medical associations representing more than 10 million physicians worldwide, has been to establish and promote the highest possible standards of ethical behavior and care by physicians" (World Medical Association, 1948). In the WMA's Declaration of Geneva, physicians pledge to "respect the autonomy and dignity of patients," while the WMA's Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects further confirms that:

> "Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary." (World Medical Association, 1948 and 1964)

2.4.4. The World Health Organization (WHO) Guidance for Managing Ethical Issues

The WHO's Guidance for Managing Ethical Issues is a further authoritative indication of the global ethical standard and requirements relating to prior informed consent during emergency medical interventions. Despite being one of the central actors whose declarations and advisories led to the widespread violation of fundamental human rights during the COVID-19 pandemic, according to the WHO's own "Guidance for Managing Ethical Issues in Infectious Disease Outbreaks 2016," the only bioethical basis for the justification of emergency use medical interventions emphasizes "the ethical principle of respect for patient autonomy – i.e., the right of individuals to make their own risk–benefit assessments in light of their personal values, goals and health conditions" (World Health Organization, 2016).

The WHO Guidance is also specific that: The ultimate choice of whether to receive the unproven intervention must rest with the patient if the patient is in a condition to make a choice (World Health Organization, 2016).

3. THE VOLUNTARY CONSENT CRITERION

3.1. Freedom from Coercion and Pressure

When any form or degree of coercion occurs, the decision is not voluntary. The ultimate case of coercion is one in which, for example, the State physically arrests you and medical officers forcibly inject you against your will. You resisted but without success. In that case, it is not your act at all, but the act of the person who forced you. More often, coercion consists not of overt physical action but of the threat of it or some other adverse ramification for non-compliance: If you do not take the COVID-19 vaccine you will not be able to study or if you do not take the COVID-19 vaccine you will not be able to keep your job. Unlike the first case, in threat cases, there is a choice. But it is not very much of a choice. Getting the COVID-19 vaccine to be able to provide for your family is not a choice we would have made except for the coercion. We were made to do something we would not voluntarily have done (van Aardt, 2022b, p. 253). Threats, too, are a matter of degree (Hospers, 1980, p. 262). The threat of loss of life is more serious than the threat of loss of freedom, and the threat of injury is more serious than the threat of loss of employment. Many COVID-19 paternalists are willing to call it coercion only if there is physical harm or threat of physical harm, but this is much too narrow. A threat of loss of employment may not be much of a threat if you can easily obtain another job, but if no jobs are obtainable due to a recession, the threat of job loss is extremely serious. In any event, it's not a position you would willingly have left – but for coercion. To be clear, any kind of pressure put on you interferes, impedes, and therefore nullifies the voluntariness of your decision, irrespective of the degree (Hospers, 1980, p. 262).

3.2. Informed and Educated Consent

The decision must be well-informed, based on all the pertinent facts, and purged of false and misleading information (Hospers, 1980, pp. 262-265). If a con man sells a lady what he promised to be a pink diamond when it is pink glass, and she pays the price of

a rare pink diamond, her decision to pay is not voluntary. She would not have paid that much voluntarily. At least not for a piece of worthless pink glass. It is not that she was coerced; she was defrauded; that is, she was provided with false and misleading information in making her decision. Similarly, if a public health official offers a person what he promises to be a 99.9% "effective" and "safe" vaccine that prevents infection and transmission of it, in reality, prevents neither infection nor transmission and has deadly side effects, the decision to receive the vaccine is not voluntary. Action based on this type of misinformation is not voluntary. It is indeed a textbook case of "fraud in the inducement" or *dolus dans locum in contractui* that occurs when a party tricks a counterparty into entering an agreement to their disadvantage by using fraudulent statements and misrepresentations. Since fraud invalidates the "meeting of the minds" needed for a contract (without the fraudulent inducement, the agreement would not have been executed at all), the injured party can seek damages or terminate the contract. If a vaccine manufacturer materially misrepresents (*dictim et promissa*) the efficacy and safety of their product, consent has also not been obtained given the "fault in the conclusion of the contract" (*culpa in contrahendo*) (van Aardt, 2022b, pp. 254, 255).

In addition to fraud, there are many other instances where informed consent will not be present. A gentleman is under the impression that he is drinking a glass of Chenin Blanc white wine; it was Chenin Blanc he asked for, and the host at the party brought him a glass of liquid that appeared to be white wine, only it contained poison. Even though no undue pressure was set upon him, it is not reasonable to conclude that he is voluntarily drinking poison. Drinking the poison, in this instance, is not a voluntary act; drinking white wine would have been. When a patient agrees to be injected new type of COVID-19 mRNA vaccine – the patient is not threatened, not pressured – but if some of the potentially harmful side effects have been hidden from him or her, one would not be able to argue that the patient consented voluntarily to take the novel mRNA vaccine (van Aardt, 2022b, p. 254). There must not only be uncoerced consent but there also needs to be fully informed consent with knowledge and comprehension of all relevant facts to enable the patient to make an educated judgment (Hospers, 1980, pp. 262-265). If consent is not informed, it is not voluntary.

Whether public health officials, employers, and vaccine manufacturers provided all the relevant facts and known side-effects relating to the COVID-19 vaccinations will be a factual determination (van Aardt, 2022b, p. 256).

Given the contemporary practice of allowing minors as young as 11 and 12 to receive a COVID-19 vaccine without parental consent, the principle of voluntary consent relating to children needs some explication (Dutton, 2022, paras. 1-5). It would barely be an exaggeration to maintain that the consent of children to participate in a medical experiment relating to never-before-used highly complicated mRNA gene therapy can never be voluntary, and that "voluntary consent" though it may have been acquired in such a case, could never be given. Even if the child recites all the possible "Side Effects after Getting a COVID-19 Vaccine" provided by a medical doctor, the child is not in a position to understand and comprehend the short- and long-term consequences. Children simply do not have the emotional, intellectual, and experiential fortitude to understand

the full force of a simple statement like "Severe allergic reactions after COVID-19 vaccination are rare" or to recognize the glaring factual inaccuracy of the CDC's claim that "The known risks of COVID-19 (for children) far outweigh the potential risks of having a rare adverse reaction to vaccination, including the possible risk of myocarditis or pericarditis." Children can make all kinds of confident declarations, bets, and accept challenges, not realizing what they actually mean. When the 11-year-old is offered some cocaine instead of sherbet candy with the promise that "It is harmless and will give you a marvelous high," he may accept it enthusiastically, just as a toddler might play with a loaded handgun (Hartley-Parkinson, 2011, paras. 1-4). For this reason, contrary to what some modern-day biomedical paternalists enacted, all such pseudo-medical allowances to children should be prohibited by the rule of law for the child's safety. A young person cannot provide informed consent, much less "educated consent" – and those who exploit and profit from the child's vulnerability should be prosecuted in terms of criminal law instead of leading States and parading the world stage. To contend that an 11- or 12-year-old child can give "informed consent" (without the permission of his or her parents) to medical procedures that can have fatal long-term side effects is preposterous and makes a mockery of medical ethics and the law (Hospers, 1980, p. 263).

3.3. Healthy Psychological State

An individual might not be under coercion and might be fully informed of the pertinent facts and yet may make a decision in an unsound, psychological state of mind. An individual suffering from schizophrenia may be mentally disturbed, but lacking this extreme, a person may be disorientated, demented, senile, inebriated, or in a critical state of manic depression. Generally, when a person is in such a state, he cannot be labeled as "fully informed". There may well be occasions when such an individual is not pressured, and all of the facts are clearly before him, and yet he is in no position to make a decision given his psychological State (Hospers, 1980, pp. 263-264). An individual in a state of manic depression might be quite articulate as to the facts, yet a recitation of ordinarily horrific statistics, such as his own impending death, may well not move him. When a human being is in such a psychological state, his decisions cannot be described as fully voluntary (van Aardt, 2022b, p. 257). A psychotic person in a highly hysterical phase may jump from the rooftop of a skyscraper without coercion and in full possession of the relevant facts as to the likely consequences of his action. Given the psychological State of such a person, one obviously cannot sensibly portray his actions as fully voluntary.

It is similarly the case where individuals are suffering from mass delusion or Mass Formation Psychosis (MFP) in a nation subjected to large-scale government propaganda designed to influence emotions, motives, objective reasoning, and behavior, such as what occurred in Nazi Germany. Dr. Joos Meerloo (1903-1976), renowned Dutch psychoanalyst, author, and former Professor of Psychiatry at the New York School of Psychiatry, studied the methods by which systematic mental pressure brings people to abject submission, and by which totalitarian regimes imprint their subjective "truth" on their victims' minds. According to Meerloo, "the totalitarian systems of the 20th century represent

a kind of collective psychosis" (Meerloo, 1956, pp. 193-207). Instead of opinions and beliefs that correspond to the factual reality, the victim of mass delusion becomes overrun by misconceptions that are false beliefs considered to be true despite the presence of data that proves the opposite (Meerloo, 1956, pp. 193-207). Mass delusion brought about by the crime that Meerloo coined "menticide" has been induced many times throughout history (van Aardt, 2022b, pp. 257-262). According to Meerloo, "menticide is an old crime against the human mind and spirit but systematized anew. It is an organized system of psychological intervention and judicial perversion through which a powerful dictator can imprint his own opportunistic thoughts upon the minds of those he plans to use and destroy. The terrorized victims finally find themselves compelled to express complete conformity to the tyrants wishes" (Meerloo, 1956, p. 28) He explains that:

> "In a simpler way we may say: he who dictates and formulates the words and phrases we use, he who is master of the press and radio, is master of the mind… repeat mechanically your assumptions and suggestions, diminish the opportunity for communicating dissent and opposition. This is the formula for political conditioning of the masses." (Meerloo, 1956, p. 47)

This was also the *modus operandi* of the transnational pharmaceutical industry, public health authorities, and other COVID-19 political and financial profiteers, who manipulated the public into being injected with an experimental COVID-19 injection. Never in history have such effective means existed to manipulate society into mass delusion. Television, the internet, smartphones, social media, and apps, all in conjunction with non-stop propaganda and sophisticated algorithms that censor the flow of truth and contradictory information, allow those in authority to easily assault the minds of the masses. The addictive nature of these technologies further ensures that most people willingly subject themselves to the governing elite's misinformation propaganda with astonishing frequency (van Aardt, 2022b, p. 258). Individuals subjected to such mass propaganda, that occurred widely during the COVID-19 years, cannot be seen as making voluntary decisions.

4. CONCLUSION

COVID-19 vaccines were and are still experimental, with no medium- and long-term safety and efficacy data. All individuals have the right to refuse such a vaccine for themselves and their children. The right of refusal stems from the fact that COVID-19 vaccination products are experimental in nature, and under the Nuremberg Code and other relevant international human rights conventions, prior informed consent is an essential prerequisite.

In terms of IHRL, certain fundamental rights can never be derogated under any circumstances, even in times of a public health emergency (Koji, 2011, p. 917). Because of their normative specificity and status, non-derogable rights are core human rights *jus cogens* and obligations *erga omnes*. While mounting the proverbial moral high horse, public health officials across the West were breaching their fiduciary duties to the public by blatantly disregarding international bioethical norms and standards. Over the past 80 years, there have been

numerous international instruments setting out acceptable bioethical standards and practices, many of which have tragically been totally disregarded during the COVID-19 pandemic. The issue is not that there were no IHRL norms or bioethical rules to follow or that these rules were ambiguous but rather that numerous governments, corrupt public health agencies, and multinational pharmaceutical companies, vaccine manufacturers, non-governmental organizations, and conflicted "philanthropic foundations" maliciously contravened clear bioethical rules, guidelines, and *jus cogens* norms for political and financial gain.

The interests and welfare of the individual should have priority over the interest of science or society. Any justification for emergency use medical interventions must accord with the IHRL and bioethical principle of respect for patient autonomy, which includes the right of individuals to provide free and informed consent prior to any medical intervention and to make their own risk-benefit assessments considering their personal values, goals, and health conditions.

Despite vaccine mandates being promulgated by purportedly estimable leaders of Western democracies, they are nothing other than a form of political delegitimization and illicit suspension (if not denial) of citizens' non-derogable human rights. From the perspective of IHRL, States that enforce exclusionary practices against those that insist on medical self-determination do so unlawfully. Human rights and fundamental freedoms are the birthrights of all human beings; their protection and promotion are the first responsibility of governments. Human rights are not privileges granted by public health officials subject to obedience and compliance! The COVID-19 public health argument that arbitrarily determined societal health diktats supersede all fundamental human rights and freedoms is juridically fundamentally flawed! States do not have the right to decide when people can enjoy their fundamental human rights. The government's first duty is to protect these rights. In the words of Kofi Annan: "States prove unworthy of this task, when they violate the fundamental principles laid down in the Charter of the United Nations, and when – far from being protectors of individuals – they become tormentors."

Voluntariness, like so many other notions, is not an over-simplified yes-or-no concept but a matter of degree and understanding all the relevant facts *in casu*. Coercion itself encompasses a broad range of permutations, from the application of physical force at one end to the application of subtle emotional pressure on the other. Any kind of pressure put on an individual impedes and therefore nullifies the voluntariness of his or her decision, irrespective of the degree. When Government and Corporate COVID-19 biomedical medical paternalists pressured citizens to take the experimental COVID-19 vaccines through threats of punishment if you do not and promises of reward if they did, it failed voluntariness on all counts.

There needs to be a substantive judicial reckoning with government and public health officials that violated IHRL in the aftermath of the COVID-19 era human rights infringements. Each phase of the pandemic, from government misinformation to lockdowns to mask mandates to vaccine mandates was accompanied by its own set of gross human rights breaches. If the officials in charge of these abuses are not held accountable, at some point, a repeat and escalation of these *jus cogens* violations at the expense of human rights protections are all but guaranteed.

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THE COST OF THE HUMAN RIGHTS IN THE MEXICAN JURISDICTION

The recognition and the implementation of human rights have generated that their fulfillment is in some cases at the cost of the budget. This article will analyze if public rights requested as human rights must be granted without conditions, or if, on the contrary, a mechanism must exist in order to prevent abuse concerning their enforceability and justiciability, taking for example the Mexican jurisdiction.

Keywords: Human rights, enforceability, justiciability, interpretation, social justice.

1. INTRODUCTION

Laws are the reflection of a society. They are the expression of the sovereign that ensures rights and guarantees. They undoubtedly identify and allow the destiny of a nation to be directed, in order to achieve justice, the common good, security, etc.[1] At the same time, in order to have access to goods, rights, and benefits offered by the State, their legal requirements for its operation must be known.[2]

On the other hand, as is known, Human Rights (HR) are a universal moral construction, recognized and reconstructed by various treaties, conventions, declarations, among others, which serves as the probative values to measure the legitimacy of the State.[3] Also, it should be noted that human rights are mandatory and intrinsic, and do not require adjective laws to be requested and completed. They do not need organic

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1 Ackerman, B. 1980. *Social Justice in the Liberal State*. New Haven: Yale University Press p. 164.

2 Ojesto Martínez Porcayo, J. F. 2003. Poder, derecho y jueces: la jurisdicción como participación política. In: Martínez Porcayo, O. & Fernando, J. (eds.). *Testimonios sobre el desempeño del TEPJF* México, D.F.: Tribunal Electoral del Poder Judicial de la Federación, p. 469.

3 See SCJN. 2011. *Los derechos humanos y su protección por el PJF,*. SCJN, México,.

legislation for their operation, nor they consider the economic capacity or infrastructure of the State to implement them.

Fundamental rights are political triumphs of society and human rights[4] which come from recognizing the individuals with certain minimal prerogatives so that they can live with dignity and freely develop their lives.[5] There is a space in which both spheres converge in their identity and objectives, but not in the form of their fulfillment. However, fundamental rights are provided to the population through a law that guarantees the rights, obligations, requirements, operation, and execution of these rights. Unlike human rights, its main asset is its intrinsic value, which serves as a guideline and a brake on the actions of the authorities.[6]

So, it is necessary to ask if human rights must have more recognition than fundamental rights in a given country or, in other words, if a person demands the fulfillment of human rights, must it be granted to him/her and consummated without preconditions, unlike any citizen, without considering the positive laws?[7]

This work will try to propose some requirements for granting some human rights, which would be the same for everyone, and how their enforceability could be considered in a jurisdictional system, without depriving them or demeaning the fundamental rights of other citizens.[8]

It will begin by stating that they are the benefits and then diverse fears that come from Human Rights such as their recognition and protection and whether their fulfillment must be absolute and unconditional. The *pro personae* and progressive principles that extend the implementation of human rights will also be presented. In order to achieve the foregoing, some cases of State entitlements (health, education, water supply, electricity minimum living energy), the legal elements for their application will be analyzed, as well as the institutional requirements for them to be effective and to find out what the limits are to be enforceable in Mexico. This will be done through the study of the jurisprudence issued by the Mexican Supreme Court of Justice (SCJN).

This research makes an exposition and dissertation, considering whether a human right should be protected and implemented unconditionally, or whether there should be requirements for its enforceability and justiciability, a policy of automatic concession without restrictions and at no cost, based on human rights.[9]

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[4] Ronald Dworkin believes that legal principles are not extralegal standards and are binding on the judge. Dworkin, R. 1995. *Los derechos en serio*. Barcelona: Ariel, pp. 19-22.

[5] Lara Sáenz, L. 2003. Derechos Humanos. *Colección de cuadernos de Divulgación sobre aspectos doctrinarios de la Justicia Electoral*, 4, pp. 39-40.

[6] Bix, B. 2004. *Jurisprudence*. Carolina: Carolina Academic Press, p. 87.

[7] Sundara Rajan, M. 2011. *Moral Rights*. Oxford: Oxford University Press, p. 94.

[8] Williams, M. & Waldron, J. 2008. *Toleration and Its Limits*. New York: New York University Press, p. 371.

[9] Contradicción de Tesis 293/2011 of the Court Supreme of Mexico (SCJN).

2. BENEFIT RIGHTS

The public service is described as a service provided either by an authority or, as the case may be, a contractor, who serves or requests another.[10] That is one of the most publicized terms generated in relation to social benefits.

The State or a private company is obliged to provide public services through its employees and to guarantee goods or services to improve the quality of life, such as health care. The State must meet the basic needs of society, especially that of population at risk and not on an equal footing.

The State redistributes wealth, and at the same time provides public services, the aim of which is achievement of a decent life. The fulfillment of the social role of the State must have an adequate infrastructure assistance and must allocate sufficient resources for the programs that sustain and support it.[11]

As a general rule, benefit entitlements are programmatic entitlements, because entitlements require a budgetary and logistical effort on the part of the State, which can only be realized with due planning and resource choice through the procedure established by the Constitution and the organic laws.[12] Gradually, benefit entitlements are given conditions of effectiveness, which makes it possible for a subjective right to emerge. Therefore, at the theoretical level, in fact, the initial status of a benefit right is its programmatic condition, which then tends to become a subjective right.[13]

In certain situations, the benefit policy gives rise to a subjective right. This means that the right holder can demand its enforcement through judicial channels. On other occasions, the rights to benefit have programmatic content, that is, their effectiveness cannot be demanded through judicial mechanisms. In the latter case, in fact, rather than rights, they are guiding principles of the civil service. Entitlements with programmatic content have such an entity because they are just a program of State action, an institutional intention.[14]

3. HUMAN RIGHTS

The content of human rights lies in the expectations of an action on the part of the authorities, so that people must have the means to guarantee the reality of such aspirations. To that end, guarantees of the protection of human rights are techniques and

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[10] Wade, H. W. 1971. *Estudio del derecho administrativo*. Madrid: Instituto de Estudios Políticos, p. 18.

[11] Nino, C. S. 1996. *The Constitution of Deliberative Democracy*. Yale: Yale University Press, pp. 1-5.

[12] Randy Barnett believes that the legitimacy of the rules is obtained by the process of drafting them; therefore, when the legislators more conform to the legislative procedure and respect it, more legitimate will be the rules produced. See Barnett, R. 2004. *Restoring the Lost Constitution*. Princeton: Princeton University Press.

[13] Sentence of the Colombian Constitutional Court T 207/95.

[14] Cossío Díaz, J. R. 1999. Problemas de la Justicia Constitucional. In: *Sistemas de Justicia electoral: Evaluación y perspectivas*. México: IFE, p. 397. See Carbonell, M. 2007. *Corte, jueces y política*. México: Fontamara, p. 23.

means of achieving their effectiveness; in their absence, the enjoyment of the rights recognized by the constitutional order cannot be realized in individuals.[15]

Human dignity serves as a legal principle that permeates the whole order, but also as a fundamental right that must be respected in any case, whose importance stands out as the basis and condition for the enjoyment of other rights and the integral development of the personality.[16] Thus, human dignity is not merely an ethical declaration, but a legal norm that enshrines a fundamental right in favor of the individual and by which the constitutional mandate is established for all authorities (including private) to respect and protect the dignity of every individual, understood at its most essential core as the inherent interest of every person, by the mere fact of being so, to be treated as such and not as an object, not to be humiliated, degraded, or objectified.[17]

Accompanied by dignity, it is indispensable that the free development of personality is enjoyed,[18] this means the recognition by the State of the natural ability of every person to be individual as he or she wishes to be, without coercion or unjustified controls, in order to meet the goals or objectives you have set yourself, in accordance with your values, ideas, expectations, etc.[19]

All authorities, within the scope of their competencies, have an obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity, which consist of the following:[20] i) universality: they are inherent to all and concern the international community as a whole; to this extent, they are inviolable competence, which does not mean that they are absolute, but that they are protected because human dignity cannot be infringed because it is reasonable to think that they are appropriate to the circumstances; therefore, because of this flexibility, they are universal, since their nature allows it. When adapting to contingencies, always be with the person. ii) interdependence and indivisibility: that they are interrelated, that is, no separation can be made and no one can think that they are more important than others, that they should be interpreted and taken as a whole and not as an isolated element.[21]

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15 Derechos humanos. Naturaleza del concepto "garantías de protección". SCJN.

16 Carmona, E. 2006. Los derechos sociales de prestación y el derecho a un mínimo vital. *Anuario multidisciplinar para la modernización de las administraciones públicas*, 2, p. 185.

17 Human dignity. It is a legal norm that enshrines a fundamental right in favour of individuals and not a mere ethical declaration.

18 See SCJN. 2013. *Dignidad humana.* PJF, México.

19 Derecho al libre desarrollo de la personalidad. Aspectos que comprende. SCJN.

20 Alexy, R. 2010. *La construcción de los derechos fundamentales.* Buenos Aires: Ad hoc, pp. 24 and 44.

21 Principios de universalidad, interdependencia, indivisibilidad y progresividad de los derechos humanos. SCJN.

4. PRINCIPLES *PRO PERSONAE* AND PROGRESSIVITY[22]

In the event that the same fundamental right is recognized in the two supreme sources of the legal system, namely, the Constitution and international treaties, the choice of the rule that will be applicable - in the field of human rights - will meet the one that favors the people or what has been called the principle *pro personae*. According to this interpretative criterion, if there is a difference between the scope or protection recognized in the rules of these different sources, the one that represents the greatest protection for the person or implies a lesser restriction should prevail.[23]

In this logic, the catalog of fundamental rights is not limited to what is prescribed in the constitutional text, but also includes all those rights contained in international treaties ratified by the State.

In this context, from the doctrinal field, it has been considered that the aforementioned principle *pro personae* has two variants: a) Guideline of interpretative preference, by which one must seek the interpretation that optimizes a constitutional right. This variant, in turn, is composed of: 1) *Favor libertatis* principle, which postulates the need to understand the normative precept in the sense most conducive to freedom in trial, and includes a double aspect: i) Limitations on human rights by law should not be interpreted extensively but restrictively; and, ii) the rule should be interpreted in a manner that optimizes its exercise; 2) Principle of protection of victims (or principle favoring weaknesses); concerning the interpretation of situations which compromise conflicting rights, it is necessary to consider especially the party placed at a disadvantage, when the parties are not on an equal footing; and, 3) Rule Preference Guideline, which provides that the judge shall apply the rule most favorable to the person, irrespective of the formal hierarchy of the person; which compromises conflicting rights, it is necessary to consider especially when the party is placed at a disadvantage, when the parties are not on an equal footing; and, 4) Rule Preference Guideline, which provides that the judge shall apply the rule most favorable to the person, irrespective of the formal hierarchy of the person.[24]

The principle of progressivity was originally linked to economic, social and cultural rights (ESCR) because they were deemed to be imposed upon States as positive obligations to act that involved the provision of economic resources and that their full realization was conditioned by the economic, political and legal circumstances of each country.[25] Thus, in the first international instruments that recognized these rights, the principle of progressivity was included in order to make it clear that these rights do not constitute mere "programmatic objectives", but genuine Human Rights that impose immediate compliance obligations upon States, such as guaranteeing minimum levels in the enjoyment of those rights, guaranteeing their exercise without discrimination and the obligation to take deliberate, concrete and satisfaction-oriented measures; as well as

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[22] *See* Medellín, X. 2013. *Principio Pro persona*. México: SCJN.

[23] Principio pro personae. Criterio de selección de la norma de derecho fundamental aplicable. SCJN.

[24] Principio pro homine. Variantes que lo componen. SCJN.

[25] Arango, R. 2002. *Jurisprudencia constitucional sobre el derecho mínimo vital*. Los Andes: Facultad de Derecho, Universidad de los Andes, p. 16.

medium-term performance obligations that must be undertaken progressively according to the specific circumstances of each State.[26]

In this way, progressivity constitutes the commitment of States to adopt measures, both at the domestic level and through international cooperation, especially economic and technical, to achieve progressively the full realization of the rights deriving from economic, social, and educational standards, science and culture, a principle which cannot be understood as meaning that governments do not have an immediate obligation to strive for the full realization of those rights, but as the possibility of progressing gradually and steadily towards its fullest realization, according to its material resources; thus, this principle requires that as the level of development of a State improves, so improves the level of commitment to ensuring economic rights, social and cultural.[27]

The State has a constitutional mandate to carry out all the necessary changes and transformations in the economic, social, political and cultural structure of the country, so as to guarantee that all people can enjoy their human rights.[28] Consequently, the principle of progressivity requires all State authorities, within their sphere of competence, to increase the degree of protection in the promotion, respect, protection, and guarantee of human rights and also to prevent violation of them, by virtue of their expression of non-regressivity. The State shall not adopt measures that, without full constitutional justification, reduce the level of protection for the human rights of those who submit to the legal order of the Nation.[29]

5. RECOGNITION

Human rights have two characteristics, a moral, and the normative one. As for the first, the person is recognized by the simple fact of being human; he/she possesses a set of inalienable, indivisible, imprescriptible, and universal rights that do not need to be included in any adjective or substantive norm for their fulfillment.[30] The other system known as positivism gives its value to human rights from being incorporated into a national legal body. These legal systems are adapted and adopted on the basis of treaties, conventions, declarations, and other international human rights instruments ratified by that State.

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[26] Principio de progresividad. Es aplicable a todos los derechos humanos y no sólo a los llamados económicos, sociales y culturales. SCJN.

[27] Article 1 of the Federal Constitution of Mexico.

[28] Salet, W. I. *Mínimo existencial y justicia constitucional,* p. 623. Available at https://archivos.juridicas.unam.mx/www/bjv/libros/8/3977/29.pdf (3. 9.2022).

[29] Principio de progresividad de los derechos humanos. Su naturaleza y función en el Estado mexicano. SCJN.

[30] *Ibid.,* p. 630.

6. GUARDIANSHIP AND PROTECTION

One of the elements that refine the rules is that they are protected through the action of the State.[31] This means that the rules will be effective when they are fully guaranteed to the population, and thus their effectiveness will be safeguarded. In the case of human rights, guardianship is a consequence of their recognition, which causes the authority to take care of the exercise and performance of these.[32]

Guardianship serves as a guide or protection for individuals when they request that their rights be protected against the actions of public or private agents. Protection is the defence that puts a limit on the action of the State, so that they are not violated, and if necessary, the violations or omissions are investigated, and such conduct is punished.[33]

Both are complementary, the guardianship gives us a directive of action and the protection is carried out in two ways.[34] In the first, as a preventive function to ensure that human rights are not infringed, and in the second, if some of these prerogatives have been infringed, their rights will be restored, and set to rights, and the offending party brought to trial and held accountable for its actions.[35]

7. ENFORCEABILITY AND JUSTICIABILITY OF HUMAN RIGHTS

Enforceability is a request to the authority to perform an act that protects or respects a right.[36] Enforcement is an act by which the authority is ordered to act and by which it is evident that a human right is being violated. If this happens, the legal operator shall examine the substance of the claim.[37] Given this, a decision will be issued that validates the use and enjoyment of the human right.

This enforceability, as noted, is accompanied by justiciability, so it is effective.[38] This implies the action of the public authority to determine if there is a violation of the rights set forth by the complainant, or to disqualify it, because it does not have elements of form or substance of the exposed petition. Between the elements for granting it, without prior study of the merits, there could be the irreparability for the damage caused, which

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[31] Ackerman, B. 1991. *We the people. Foundations*. Cambridge: Harvard University Press, p. 224.

[32] Silva Henao, J. F. 2012. Evolución y origen del concepto de 'Estado Social' incorporado en la Constitución Política colombiana de 1991. *Ratio Juris*, 7(14), pp. 141-158.

[33] Villar Borda, L. 2007. Estado de derecho y Estado social de derecho. *Revista Derecho del Estado*, 20, pp. 73-96.

[34] Gómez, Y. 2014. Estado Constitucional y protección internacional. In: Pérez Marcos, R. M. & Gómez Sánchez, Y (eds.). *Presente, pasado y futuro de los DDHH.* Madrid: Comisión Nacional de los Derechos Humanos : UNED - Universidad Nacional de Educación a Distancia, pp. 231-280.

[35] Picard de Orsini, M. & Useche, J. 2006. Una nueva dimensión del Estado de Derecho: El Estado Social de Derecho. *Provincia*, número especial, pp. 189-218.

[36] Kojéve, A. 2005. *La noción de autoridad.* Buenos Aires: Nueva visión, p. 36.

[37] Carmona, E. 2006. Los derechos sociales de prestación y el derecho a un mínimo vital. *Anuario multidisciplinar para la modernización de las administraciones públicas*, 2, p. 187.

[38] Linz, J. J. 1996. *Problems of Democratic Transition and Consolidation*. Baltimore: The Johns Hopkins University Press, p. 7.

gives effect to a precautionary measure, a suspension of the act or temporary protection, while the merits of the case are resolved.[39]

It should also be noted that the enforceability and justiciability of human rights do not imply gratuitousness without restriction. Although human rights are recognized and protected, it cannot be a factor in obtaining goods or services at no cost. This implies that the recognition of human rights should not mean a door for abuse of the rights provided by the State (as could be issues in health, education, water, among others), in which the population, as recipients of a service, recognises its obligation to make a financial contribution for the goods supplied, whether they come from a public or private undertaking.[40]

The possibility of getting services or rights free of charge on the basis of human rights could be or appear to be an act to gain advantage or abuse of the normative system. So each request must be considered, and resolved under the circumstances and the context in which it is made.[41]

It is necessary to understand and reason why the borrowed rights demanded as human rights are not a blank check. To the contrary, they must be weighed, as the case may be, by applying a test to consider their enforceability and recognize their justiciability and grant themselves this right. For this process, a control is proposed that will qualify whether the State should give, deliver or perform an act to protect some human rights. This would safeguard and build a just, pristine and impartial legal system.[42]

We must point out that the limitation in the fulfilment of a human right is not necessarily synonymous with violation, because in order to determine if a measure respects it, it is necessary to analyze if: (I) The essential purpose of this reduction is to increase the level of protection of a human right; and (II) to create a reasonable balance between the fundamental rights at stake, without unduly affecting the effectiveness of any of them. In this sense, to determine whether the limitation to the exercise of a right violates the principle of progressivity of human rights, the legal operator must carry out a joint analysis of the individual affectation of a right in relation to the collective implications of the measure, in order to establish whether it is justified.[43]

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[39] STA 175, Rel. Min. Gildar Mendes, enjuiciada el 17.03.2010, Federal Court of Brasil.

[40] Salet, W. I. *Mínimo existencial y justicia constitucional*, p. 629. Available at https://archivos.juridicas.unam.mx/www/bjv/libros/8/3977/29.pdf (3. 9. 2022). These so-called "triumphs" are coined by Ronald Dworkin, who warns that the rights obtained are triumphs of social or political movements. Dworkin, R. 1996.

[41] Waldron, J. *Law and Disagreement.* Oxford: Oxford University Press, pp. 5, 21-48.

[42] The same interpretation is reiterated in the SSTC 134/1989 and 140/1989, both of 20 July. In the case law of the German Federal Constitutional Court, we can also find a tacit recognition of the right to a minimum of life, in the opinion of Robert Alexy, if two sentences of 1975 and 1951 are considered (BverfGE 1, 97 y BverfGE 40, 121). See Alexy, R. 2007. Teoría de los derechos fundamentales. Madrid: Centro de estudios constitucionales, pp. 422-423.

[43] Principio de progresividad de los derechos humanos. Criterios para determinar si la limitación al ejercicio de un derecho humano deriva en la violación de dicho principio. SCJN.

8. UNCONDITIONAL, INTRINSIC AND ABSOLUTE FULFILMENT OF HUMAN RIGHTS

The first thing to consider is to place a context for human rights, to determine them within a normative system.[44] Human rights are seen as a guiding axis of the State, but they could surpass the rest of the national order. This gives rise to two assumptions: that they are granted almost automatically for their moral weight, even if they demerit or diminish some fundamental right, which has a regulation to make it effective.[45] Or to consider whether the requested protection collides with substantive or adjective rights, noting that such a determination will create an administrative and/or jurisdictional precedent.[46]

But is it more important to protect human rights than the Constitution itself?[47] Everything depends on two factors, the legal operator (administrative personal or judiciary) and the context in which the act is performed. In the first case, the conduct of the legal operator may be that of a guarantor who maximizes the rights of individuals and restricts the action of the State, guaranteeing human rights, automatically, imprint and indubitable. The mere enforceability ensures its justiciability in this model, which we will call a positive reaction. In the other model, certain elements will be taken into consideration such as: graduality; if there is a danger of life; if some freedom is restricted; if it is *sine qua non* to be able to develop as a person; if the denial violates his/her dignity, etc.

9. CASE STUDIES

In the following section, various cases will be presented in which applicants demanded constitutional protection of their human rights so that they could access several goods or services provided by the State or private companies, at no cost, and be able to live a dignified life or freely realize his/her personality.[48] In addition, the most relevant legal cases and jurisprudential criteria on each of the topics presented are attached, to explain their interpretation of each Human Right, and how they decided that these should be protected.[49]

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[44] In the case of Mexico, they are an integral part of the legal framework, and are under the national constitution. Human rights are contained in the Constitution and international treaties. They constitute the parameter for the control of constitutional regularity, but when there is an express restriction on the exercise of these rights in the constitution, it must be in accordance with the provisions of the Constitution.

[45] Hart, H.L.A. 1988. *The Concept of Law.* London: Clarendon, pp. 7, 14.

[46] Vanossi, J. R. 1987. *El Estado de derecho en el constitucionalismo social*. Argentina: EUDEBA, p. 146.

[47] Bickel, A. M. 1986. *The Least Dangerous Branch*. Yale: Yale University Press, pp. 23-33, 58-59,199.

[48] Elster, J. 2007. *Explaining Social Behavior.* Cambridge: Cambridge University Press, p. 179 *et seq*.

[49] Picard de Orsini, M. & Useche, J. 2006. Una nueva dimensión del Estado de Derecho: El Estado Social de Derecho. *Provincia*, número especial, pp. 189-218.

10. RIGHT TO HEALTH WITHOUT COST TO THE PATIENT

The first case happened when some elements belonging to the Secretary of Navy (SEMAR) were fired because it was known that they had an infection of the human immunodeficiency virus (HIV). The Social Security Institute for the Mexican Armed Forces (ISSFAM) Act of that time was the means to resolve this situation.

It should now be pointed out that, as part of the main functions of the ISSFAM, they must provide social, economic, and health benefits to retired military personnel, their dependents, pensioners, and beneficiaries.

But when the condition of the Navy elements became known, they were separated from their duties, and then discharged without justified cause. They also determined that they should not take care of their right to health, because it is not a disease acquired by the development of their work. In the development of the topic, the Supreme Court of Justice of the Nation (SCJN) analyzed the content and scope of the guarantees of equality, non-discrimination and access to health for the specific case.

The Court also considered it appropriate to refer to the scope of the guarantee of discrimination in the sense that the Constitution establishes that all men are equal before the law without any discrimination on grounds of nationality, race, sex, religion or any other personal or social condition or circumstance, so that the public authorities must take into account that individuals in the same situation must be treated equally, without privilege or favour. Thus, the principle of equality provides that this is one of the higher values of the legal order, which means that it must serve as a basic criterion for the normative production and its subsequent interpretation and application.

It was felt, however, that it should be borne in mind that not every inequality of treatment or exclusion resulted in a discriminatory act, while it was necessary that such acts affected the dignity of persons or resulted in the restriction or nullification of their rights and freedoms.

In addition to the foregoing, account was taken of the fact that, by recognizing in international treaties the possibility of expanding the catalogue of fundamental rights, particularly, in the case of those relating to persons suffering from a physical, mental or sensory impairment, and in that understanding the contents of the international norms on the subject were taken up and a special protection for this group of people was established.

It was considered that any violation of human dignity would be in contravention of the right to health protection or the mandate of non-discrimination, but not, as in the cases exposed, for the existence or non-existence of major or minor requirements in the law for granting the right to receive assistance provision of medicinal products, especially if they were objectively justified requirements.

In this case, the distinction made with regard to the number of years required under each social security scheme was linked to the differentiation made in the Constitution, referring to the social security laws applicable to the open population, which delt with those who belonged to the army. This purpose was therefore considered constitutionally admissible.

The Social Health Protection System must be provided for persons who are not beneficiaries of social security institutions or who do not have any other social health insurance mechanism; it shall be financed in solidarity by the Federation, the States, Mexico City, and the beneficiaries themselves, except when the "inability of the family" to cover the relative quota exists, in the sense that it will not prevent the sick from joining and being subject to the benefits deriving from the Social Health Protection System. From the foregoing, it was concluded in the respective judgment that the guarantee of access to health places the responsibility of the State to establish the necessary mechanisms for all Mexicans to have access to health services, in which we find medical care and the supply of medicines.

As an argument in the case, the power to require a certain institution to provide health services was not directly derived from the constitutional mandate but requires the necessary existence of a law enabling the exercise of this right, the creation of which is assigned to the ordinary legislator. In this way, the Supreme Court resolved a matter of great importance with regard to the guarantees of equality, non-discrimination, and the right to health provided for in the Constitution. The Supreme Court has also produced a number of jurisprudential theses in which it recognizes the importance and value of the right to health. It is assumed that, although in a democratic constitutional State the ordinary legislator and government authorities and administrative bodies have a very wide margin to translate their vision of the Constitution and, in particular, to implement in one direction or another the public policies and regulations that must give substance to the effective guarantee of rights, the Constitutional Judge may contrast his/her work with the standards contained in the Supreme Law itself and in the Human Rights Treaties that form part of the regulations and bind all state authorities.

The Court has stated that the right to health protection provided for in the mentioned constitutional provision has, among other purposes, the purpose of guaranteeing the enjoyment of health services and social assistance that meet the needs of the population, and that health services means actions aimed at protecting, promoting and restoring the health of the individual and of the community. Thus, the foregoing is compatible with a number of international human rights instruments, including Article 25, paragraph 1, of the Universal Declaration of Human Rights, which states that everyone has the right to an adequate standard of living to which he or she is entitled, and their families, health and welfare and especially food, clothing, housing, medical care and necessary social services; Article 12 of the International Covenant on Economic, Social and Cultural Rights, which refers to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and states that States must take measures to ensure the full realization of this right; and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", according to which everyone has the right to health, understood as the enjoyment of the highest standard of physical, mental and social well-being. In this regard, and consistent with the United Nations Committee on Economic, Social, and Cultural Rights, the right to health should be understood as a

fundamental and indispensable guarantee for the exercise of other human rights and not just the right to be healthy.[50]

Furthermore, the protection of the right to health includes, *inter alia,* obligations to adopt laws or other measures to ensure equal access to health care and related services; monitor that the privatization of the health sector does not pose a threat to the availability, accessibility, acceptability, and quality of services;[51] monitor the marketing of medical equipment and medicines by third parties, and to ensure that medical practitioners and other health professionals are provided with the necessary conditions of education and experience; hence the right to health should be understood as a right to the enjoyment of a range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health.

The Social Health Protection System provides for persons who are not beneficiaries of social security institutions or who do not have any other social health insurance mechanism, which will be financed jointly by the Federation, the States and the beneficiaries themselves by means of family contributions to be determined on the basis of the socio-economic conditions of each family, without the level of income or lack thereof being a limitation for access to such a system.

The foregoing makes it clear that the right to health protection translates into the obligation of the State to establish the necessary mechanisms to ensure that all persons have access to health services and that this is a shared responsibility of the state, the society and the interested parties, the financing of the respective services is not exclusively the charge of the State, since also, *provision is made for the establishment of recovery quotas by users of public health services and the health social protection system, which are determined on the basis of the cost of services and the socio-economic conditions of users. Thus, health is a responsibility that is indissolubly shared by the State, society, and stakeholders, based on criteria of contributory capacity and income redistribution.*

The Supreme Court has also pointed out that Article 2 of the International Covenant on Economic, Social, and Cultural Rights establishes obligations of content and result; the latter, immediately, refers to the fact that rights are exercised without discrimination and that the State adopts within a short period of time deliberate, concrete and targeted measures aimed at satisfying treaty obligations, while those of result or measure are related to the principle of progressivity,[52] which must be analyzed in the light of a flexibility mechanism that reflects the realities of the world and the difficulties that imply for each country to ensure the full effectiveness of ESC rights.

In this business, bearing in mind the right of everyone to the enjoyment of the highest attainable standard of physical and mental health contained in Article 12 of the Covenant, the State is under an immediate obligation to ensure that individuals enjoy the highest attainable standard of physical and mental health, at least one essential level of

[50] See: Cervantes, M. 2014. ¿*Hay justicia para los DESC*? México: UNAM.

[51] Salazar, P. 2007. Justicia constitucional y democracia. In: en Vázquez, R. (ed). *Corte, jueves y política*. México: Fontamara, p. 39.

[52] Derecho a la salud. Su regulación en el artículo 4º de la Constitución política de los Estados Unidos Mexicanos y su complementariedad con los Tratados Internacionales en materia de Derechos Humanos. SCJN.

the right to health and, on the other hand, one of progressive fulfillment, consisting in achieving its full realization by all appropriate means, to the maximum of the resources available to it. Hence, a direct violation of the obligations of the Covenant will arise when, *inter alia*, the State does not take appropriate legislative, administrative, budgetary, judicial or other measures to give full effect to the right indicated.[53]

The Court has also extended the protection of health as a fundamental right that the State is obliged to guarantee; and which is protected by the Constitution, Article 25th of the Universal Declaration of Human Rights, 12 of the International Covenant on Economic, Social and Cultural Rights and 10 of the Additional Protocol to the American Convention on Human Rights[54] in the Field of Economic, Social and Cultural Rights, of which it is noted that basic health services consist, among other aspects, in the availability of medicines and other essential health inputs, for which there will be a basic table and catalog of health sector inputs.[55]

However, it *should not be understood as an impediment or restriction to the beneficiaries of the units and entities providing the health protection service, the fact that any medicine is not included in that basic plan.* Mindful, therefore, of the progressive approach to assessing the fundamental rights of the governed, such units and entities, including the provision of such medicines to their beneficiaries, even if they are not in that basic framework, provided that there is a medical prescription to support it.[56]

11. FREE EDUCATION

Education is one of the goals of the 2030 United Nations development agenda. It is a key element for the sustainable progress of nations. Education seeks to achieve the full development of individuals, at each and every stage of their lives, so that it does not end with the completion of basic studies, and has a progressive and permanent scope in women and men in order to perfect their abilities, and skills, to reach their maximum development.

This idea is reflected in international treaties signed and ratified by the State, such as the Universal Declaration of Human Rights (Art. XII), the American Declaration of the Rights and Duties of Man (Art. 12), the International Covenant on Economic, Social and Cultural Rights (Art. 13), the American Convention on Human Rights (Art. 26), the Convention on the Rights of the Child (Art. 28), the Convention on the Rights of Persons with Disabilities (Art. 24) or Convention 169 of the International Labour Organization on the Rights of Indigenous and Tribal Peoples (arts. 26, 27 and 29).[57]

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[53] Derecho a la salud. Su naturaleza normativa. SCJN.

[54] Cervantes, M. 2014. ¿*Hay justicia para los DESC*? México: UNAM.

[55] Salud. Derecho al nivel más alto posible. Éste puede comprender obligaciones inmediatas, como de cumplimiento progresivo. SCJN.

[56] El Instituto Mexicano del Seguro Social debe suministrar a sus beneficiarios los medicamentos que se les prescriban, aun cuando no estén incluidos en el cuadro básico y catálogo de insumos del sector salud. SCJN.

[57] The scope of the right to education has now been broadened with new judicial interpretations. This highlights the cases in which it was determined that a private institution can be considered as a responsible

On several occasions,[58] the SCJN has issued resolutions against private educational institutions; recently, in the state of Chiapas,[59] a judgment was issued, that determined that a private university can be considered a responsible authority. It was pointed out that constitutional protection against individuals was appropriate when they created, modified, or extinguished legal situations unilaterally and compulsorily, on the basis of a concession granted by the State to exercise that function, in such a way that it is assimilated to the service that would be provided instead by the public body, without it being necessary for it to form part of a State body.

The Court established that education should have the following characteristics: availability, accessibility, acceptability, and adaptability. In other words, the Court found that the right to education is a complex structure for authorities with imposed obligations that must be fulfilled.

The decisions of the judiciary have set precedents that have opened the way for a review of public policies or the functioning of education systems and have generated transformations in the implementation of the right to education.

In another landmark, a student of the Michoacan University of San Nicolás Hidalgo (UMSNH), obtained the constitutional protection from the Supreme Court of Justice of the Nation that guaranteed free education of her until the completion of her degree.[60]

The citizen challenged the constitutionality of the Agreement of the University Council that determined that from the 2014 school year students of higher secondary education should cover enrolment fees or re-registration in their respective schools and faculties.

However, the student resorted to constitutional protection against the agreement, considering that it violates the Human Right to Education and the principle of progressivity. It was based on Article 138 of the Constitution of Michoacán de Ocampo, which establishes that higher education provided by the entity shall be free, and on Article 1 of the Federal Constitution, which stipulates the duty to respect human rights in conformity, among others, with the principle of progressivity.

Thus, the student was granted protection in order to divest her legal sphere of the obligation to cover the fees in subsequent school cycles. However, the rector and the treasurer of the University filed a review of the constitutional protection.

In ruling on the appeal, the Court upheld the judgment under appeal and protected the student by finding that the actions claimed: "*violated their Human Right to Education as provided for in Article 3 of the Federal Constitution and developed by Article 138th of the Constitution of the State of Michoacán*".

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authority for the purposes of constitutional protection; on the obligation of educational institutions to avoid situations of violence and discrimination; with respect to the commitments made by the State to ensure education for individuals; and with respect to the right of indigenous persons to bilingual or multilingual education. Amparo en revisión (AR) 35/2014.

58 AR 78/2014, AR 323/2014, Incidente de suspensión 87/2015, Queja 213/2015, AR 261/2015.

59 Amparo 902/2016.

60 AR 1374/2015.

It also found that the principle of progressivity was violated, because the responsible authorities did not demonstrate conclusively the lack of financial resources to guarantee free higher education provided by the state of Michoacán, nor that they would have made every effort to obtain them.

The judges of the Supreme Court pointed out that university autonomy does not exempt the University from respecting the right to free higher education recognized by the local Constitution, since this figure constitutes an institutional guarantee of the right to education for the purpose of maximizing, not restricting, the right to education.

In addition, the Court indicated that, under the principle of progressivity, once that entity has extended free education to higher education, it is prohibited to adopt regressive measures.[61]

When granting constitutional protection to the student, the state government shall be obliged to transfer to the Michoacana University the necessary resources to guarantee the free education that the complainant receives up to the bachelor level, which includes at least the resources needed to cover the registration fees. Meanwhile, the University and its authorities must refrain from violating the free higher education received by the student, that is to say, avoid, as a minimum, charging her the registration fees during her higher education.

The Supreme Court has established in Article 3 of the Constitution a minimum content of the right to education which the Mexican State is obliged to guarantee with immediate effect; this content can and should be gradually extended by the imperative of the principle of progressivity.

In fact, free education can be established by virtue of the principle of progressivity; and, in addition, it must respect other principles such as access on the basis of abilities and non-discrimination in access, permanence and completion, among others.

Article 1 of the Mexican Constitution states that the main sources of recognition of human rights are the Constitution itself and international treaties. The human right to education is recognized both in articles 3 and 4 of the Constitution and in various international instruments, including articles XII of the American Declaration of the Rights and Duties of Man; 13 of the International Covenant on Economic, Social and Cultural Rights; 13 of the Additional Protocol to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights, "Protocol of San Salvador" and 28 of the Convention on the Rights of the Child.

The above-mentioned rules are essentially consistent, inter alia, with the fact that the right to education belongs to everyone; where the content of basic education should be geared towards enabling the autonomy of its holders and empowering them as members of a democratic society; where basic education should be accessible to all without discrimination, on a compulsory basis, universal and free, and the State must guarantee it; and that parents have the right to choose the education to be given to their children and individuals, provided that they respect the minimum content of that right.[62]

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[61] Derecho a la educación. Su configuración mínima es la prevista en el artículo 3º Constitucional. SCJN.

[62] Derecho fundamental a la educación. Su referente normativo en el sistema jurídico mexicano. SCJN.

Now, while the minimum configuration of the right to higher public education, as provided for in the Federal Constitution, does not require the State to provide for higher education free of charge, but only to promote it in order to achieve the various collective objectives necessary for the development of the nation, the fact is that the State assumed the duty to extend free education also to higher education, in accordance with the principle of progressivity provided for in Article 1 of the Constitution and in the various international standards, as well as in the undertaking given in Article 13, paragraph 2, subparagraph c) of the International Covenant on Economic, Social and Cultural Rights, and Article 13, paragraph 2 c), of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights, (Protocol of San Salvador), which establish that free higher education should be progressively introduced.

12. FREE WATER SUPPLY

In 2017, in the state of Tamaulipas, a person requested a free drinking water supply. In this case, the supply of the vital liquid was canceled because of the lack of payment of the service. The appellant defended herself against the act of authority for omitting access to drinking water, which in her view violated her human rights. The judgment notes that the right to water includes the guarantee of access to the vital liquid, which is why several mechanisms have been established so that all people can count on it.[63]

The United Nations adopted its fifteenth general comment on the right to water, in which it defined it as follows: "The human right to water is indispensable for a dignified human life." The observation also conceptualized the right to adequate, healthy, acceptable, physically accessible and affordable water for personal and domestic use.

Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights establish the fundamental right to a dignified life for individuals and their families, which includes food, clothing and the continuous improvement of their living conditions. In its fifteenth general comment, the ESCR Committee clarified the scope and content of the right to water, explaining that it means to have sufficient, healthy, acceptable, physically accessible and affordable water for personal and domestic use, and which include consumption, laundry, food preparation and personal and domestic hygiene. The declaration of water as a right derives from the idea of water as a social and cultural asset, and not as an economic asset.

The right also implies the possibility of unwavering access and, with it, a constant transition to systems of supply in equal opportunities for the whole community, without forgetting that paradoxically. The biggest problem is the lack of access to safe drinking water.

In order to be able to exercise the right to water, it varies according to different conditions, therefore, in the aforementioned general comment number fifteen the factors to be applied in all circumstances were specified, namely: a) Availability; b) Quality, and c) Accessibility. For the SCJN, the right to water is precisely one of the implicit rights of the right to a dignified life, that is, to the very dignity of the person as a human being in the

[63] Amparo 374/2017-b. SCJN.

sense that the State cannot absolutely or totally deny access to or supply of a vital minimum for non-payment.

In this regard, the Court has noted that Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights establishes the right of everyone to adequate housing, as well as the obligation of States parties to take appropriate measures to ensure its effectiveness. However, the fundamental right to decent and dignified housing has the following characteristics: (a) it must be guaranteed to all persons; (b) it must not be interpreted in a restrictive sense; (c) for a dwelling to be considered "adequate" it requires the elements to ensure a minimum level of well-being for those who inhabit it, essentially an adequate basic infrastructure, which protects against moisture, rain, wind and structural hazards, with sanitary and toilet facilities, an adequate space for rest, adequate lighting and ventilation, access to drinking water, electricity, and drainage.[64]

Ratifying the above approach, the SCJN considered that the United Nations Committee on Economic, Social and Cultural Rights, the World Health Organization, the United Nations General Assembly, the International Covenant on Economic, Social and Cultural Rights (Article 11), recognize the right to water. While the Constitution warns that the right to drinking water is fundamental and indispensable for the realization, enjoyment and enjoyment of other human rights, the preservation of which in quantity, quality and sustainability is the fundamental task of both the State and society, as such a right is based on the premise of access to the well-being of the entire population, underpinned by the principles of equality and non-discrimination, independently of the social, gender, political, economic or cultural circumstances of the community in which it operates.

In this regard, the State shall ensure that the right to water is safe, acceptable, accessible and affordable for both personal and domestic use, establishing itself as a collective benefit that must be based on criteria of solidarity, mutual cooperation, equity and decent conditions, therefore the preference for urban public and domestic use in relation to any other use has been proclaimed as a priority and as a matter of national security, reasons which exclude the possibility that it can be conceived in terms of the interests of particular or minority groups. If that were the case, a system of water use without a human and social vision would prevail, thereby undermining human dignity.[65]

Also, the Court interpreted that in order to obtain the drinking water service, the feasibility opinion for the connection to the general drinking water and sanitary drainage network must be submitted to the operator;[66] and, satisfied with the feasibility requirements, the competent authorities must construct the installations and connections for drinking water and sanitary drainage in accordance with the approved project, as well as any infrastructure works required. However, petitioners of the service must not, in order to enjoy the human right to health, as provided for in the Constitution, wait for the

[64] Derecho fundamental a una vivienda digna y decorosa. Su contenido a la luz de los Tratados Internacionales. SCJN.

[65] Agua potable. Como Derecho Humano, la preferencia de su uso doméstico y público urbano es una cuestión de seguridad nacional. SCJN.

[66] Fractions I and XXII of Article 14º Bis 5 of the National Waters Law of Mexico.

establishment of the infrastructure referred to in the aforementioned article, because in the absence of networks and the established need for water service, the State has a double obligation: the first, provided for in Article 12 of the International Covenant on Economic, Social and Cultural Rights, which requires the State party to give immediate attention to the right to health at the highest possible level; and the second, provided for in paragraph 2 of the Covenant, which requires States to take all appropriate measures to the maximum of their available resources.[67] In these terms, in the absence of a network or infrastructure to provide the water service, the authorities are obliged to provide immediately the vital liquid for which, as long as adequate distribution networks are built to ensure the supply.[68]

The Supreme Court established the Human Right of Access to Water for Personal and Domestic Consumption and establishes that such access must be sufficient, safe, acceptable and affordable. The State must guarantee this and the law shall define the bases, support, and procedures for it. The Court also constituted the broad and favorable interpretation of the above-mentioned right.[69]

13. CONCLUSIONS

- This has led to various cases of abuse by the appellants, so it is necessary to have limits for its granting, but not for its recognition.[70]
- This research proposes that there should be no administrative or judicial bias *per se*, when a person claims an HR. Human rights have a moral foundation; however, the rights provided by a State are based on a binomial right/obligation that must be fulfilled by the entire population. Now, the justification for granting a Human Right at the expense of the Budget must depend on the specific case and under certain controls, because it could impoverish the Constitution.
- The recognition and granting of a right to benefit requested as a human right must be weighed against certain standards or parameters so that it does not undermine the fundamental rights of the population, which has met the substantive and adjective requirements for receiving that right.

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67 Article 34 the Water Supply and Sanitation Law for the State of Nuevo León.

68 Human right to drinking water supply. The obligation to provide is an obligation of the State which must be carried out immediately, even if there is no general network and no feasibility assessment has been made. The judicial authority may provisionally indicate methods generally used for this purpose, such as the installation of a raised mother tank connected to a reservoir with a hydropneumatic pump, supplying the community with water in quantity and quality. Thus, the judiciary itself, with the support of Article 1 of the Constitution, guarantees and protects the right to water supply and health, as a basic and subsistence measure needed by the human being, until the drinking water and sewerage network is installed.

69 Derecho humano de acceso al agua. Está reconocido constitucional y convencionalmente tanto para el consumo personal y doméstico, como para el uso agrícola o para el funcionamiento de otras áreas productivas del sector primario. SCJN.

70 See Nino, C. S. 1989. El principio de autonomía de la persona. In: Nino, C. S. (ed.). *Ética y Derechos Humanos*. Buenos Aires: Astrea, pp. 199-236.

- On several occasions, the authority has recognized and fulfilled a service right as a Human Right free of payment. This allows another person to demand that same service, and who has seen the opportunity to use that good or public service. One of the problems is that the special situations in the case are not considered and that the appellant may not require State assistance.
- The judiciary power must propose a test like a mechanism that focuses on human rights. In this way, the judges do not accumulate petitions in Pandora's box. At the same time, their granting must be based on the weight of the legal operator, believing that not every demand based on human rights should be resolved or unconditionally released in favor of the applicant, therefore it must review each case, protecting and caring and staring both human rights and the fundamental rights of the population.

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THE CJEU RULING ON CASES *GAVANOZOV I* AND *GAVANOZOV II*

This article analyses the two judgments of the Court of Justice of the European Union in the Gavanozov case, which deals with judicial protection against European Investigation Orders in Bulgaria. Questions for a preliminary ruling were referred twice to the Court of Justice of the European Union by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria). In the second judgment of 11 November 2021 (Gavanozov II), the Court of Justice of the European Union ruled that European Investigation Orders cannot be issued by a Member State whose national legislation does not provide for any legal remedy against it. Against this background, the article examines the impact of these rulings on the level and scope of protection of human rights and fundamental freedoms in the European Union in the context of judicial cooperation in criminal matters between the Member States.

Keywords: European Investigation Order, Court of Justice of the European Union, preliminary rulings, judicial cooperation in criminal matters, legal remedy.

1. INTRODUCTION

It took more than four years for the Court of Justice of the European Union (hereinafter: CJEU) to answer *in meritum* to crucial and practical questions concerning the interpretation of Article 14 of Directive 2014/41 of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (hereinafter: Directive 2014/41). The question of legal remedies available against the substantive reasons for the investigative measures indicated in the European Investigation Order (hereinafter: EIO) was subject of CJEU ruling twice. It is interesting that both judgments apply to the same case: criminal proceedings against Ivan Gavanozov in Bulgaria. Thanks only to the persistence and perseverance of the Bulgarian judiciary,

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today we have a decision of the CJEU (*Gavanozov II,* Case C-852/19) which shows weak points of cross-border criminal proceedings in implementation of EIO. Furthermore, it raises questions of rebuttal of the presumption of mutual trust between Member States when it comes to compliance of a Member State's legal order with European union law (hereinafter: EU law), specifically, with fundamental rights. The judgment in *Gavanozov II* (Case C-852/19, para. 57) underlines the preclusion from participating in the system established by Directive 2014/41 for those Member States, which have not ensured compliance with the minimum standards required by the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) and the European Convention on Human Rights (hereinafter: ECHR). Even though it seems logical to expect from Member States to comply with minimum standards laid down in the Charter and ECHR, since this is *condicio sine qua non* of mutual trust and mutual recognition, the case of Ivan Gavanozov confutes it. It is worth noting the shrewdness of Bulgarian judiciary in detecting the problem in its own national legislation which can hamper cross-border criminal proceeding and taking this case before CJEU. Surely, the result of this action will have vast effects on national legislations of other Member States in the context of judicial cooperation in criminal matters.

The article deals with two CJEU judgments regarding the same case, Ivan Gavanozov, by answering following questions:

– Has the first judgment of CJEU (*Gavanozov I*, Case C-324/17) in any way contributed to the effectiveness of the EIO mechanism?
– Given that the second reference for a preliminary ruling addressed almost the same questions, which were subject of the first preliminary ruling, what has been the impact of the second CJEU judgment (*Gavanozov II*, Case C-852/19) on the EIO mechanism?

Before delving into an in-depth analysis of CJEU judgments related to the same case of Ivan Gavanozov, it is crucial to provide an overview of mutual trust as an irrefutable or rebuttable presumption in EU law. In particular, the essential conclusions reached by the CJEU concerning the implementation of EAW in alignment with the fundamental human rights safeguarded by the Charter will be emphasized. These findings can, *mutatis mutandis*, be applied to the implementation of EIO.

2. MUTUAL TRUST: AN IRREFUTABLE OR REBUTTABLE PRESUMPTION IN EU LAW

The principle of mutual trust between Member States has been recognized as a "principle of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained" (CJEU, Opinion 2/13, para. 191), even though it is not explicitly mentioned in the Treaties. Likewise, this principle requires Member States, aside from exceptional circumstances, "to consider all the other Member States as complying with EU law and particularly with the fundamental rights recognized by EU law"

(CJEU, Opinion 2/13, para. 191). Its scope and content are not always clear (Herlin-Karnell, 2014), but the jurisprudence of the CJEU has established mutual trust among Member States as the central principle in EU criminal law (Auke, 2020, p. 79).

CJEU took a firm position as a defender of principle of mutual trust among Member States as an irrefutable presumption in cases *Advocaten voor de Wereld*, *Radu i Melloni* (Ostropolski, 2015, pp. 171-176). The reasoning of CJEU in these cases, which dealt with exclusion of verification of the double criminality for 32 categories of offences (*Advocaten voor de Wereld,* Case C-303/05), grounds for refusing execution of EAW (other than those listed in Framework Decision on EAW) due to potential breach of fundamental rights in the issuing Member state (*Radu*, Case C-396/11), and providing higher constitutional standard of protection of human rights than the Charter (*Melloni*, Case C-399/11), can be summed up as it follows:

- *The Council, guided by the principle of mutual recognition and considering the strong trust and solidarity among Member States, determined that the 32 selected categories of offenses listed in Framework Decision on EAW are inherently serious or carry a minimum punishment of at least three years. Consequently, the Council deemed it appropriate to forgo the need for verifying double criminality for these offenses, as they have the potential to significantly impact public order and public safety (Advocaten voor de Wereld,* para. 57)
- *Framework Decision on EAW aims to replace the multilateral extradition system among Member States with a system of surrender between judicial authorities. This system is based on the principle of mutual recognition and allows for the enforcement of judgments or the prosecution of convicted individuals or suspects. (Radu,* para. 33*)*
- *Allowing a Member State to utilize Article 53 of the Charter as a condition for surrendering a person convicted in absentia, requiring the conviction to be open to review in the issuing Member State, which is not provided for in Framework Decision on EAW, in order to protect the right to a fair trial and the rights of the defense guaranteed by the executing Member State's constitution, would cast doubt on the consistency of fundamental rights protection outlined in the framework decision. This would undermine the principles of mutual trust and recognition that the decision aims to uphold, ultimately compromising the effectiveness of the framework decision itself. (Melloni,* para. 63*).*

All three judgments place a strong emphasis on the principle of mutual recognition, which is itself based on the mutual trust between Member States (*LM*, Case C-216/18 PPU, para. 36), as a key driver of efficiency, simplification, and expeditious judicial cooperation in criminal matters within the European Union. However, the CJEU has faced criticism from certain authors who claim that it places greater emphasis on these aspects, guided by the principle of mutual trust, and prioritizes them over the protection of human rights and individual safeguards (Armada & Weyembergh, 2017, p. 117; Ventrella, 2013, p. 307; Besselink, 2014, pp. 551-552).

An irrefutable presumption of mutual trust among Member States creates a fiction that all Member States comply with the Charter, as primary EU law, and underpins

implementation of mutual recognition. By doing so, it ensures the uniform application of secondary EU law, such as EAW or EIO, and reaffirms its supremacy. But the question of actual level of human rights protection in each Member State is set aside, save in exceptional circumstances (Prechal, 2017, pp. 81-82; Materljan & Materljan, 2019, p. 525).

The turning point in jurisprudence of CJEU occurred with the judgment delivered in the joint cases of *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU). For the first time CJEU favoured protection of human rights over the smooth functioning of cooperation in criminal matters based on principle of mutual recognition, marking a notable shift in its approach. The right at issue was the prohibition of inhuman or degrading treatment, as guaranteed by Article 4 of the Charter/Article 3 of the ECHR. CJEU ruled that executing Member State can bring the surrender procedure to an end if there is 'a real risk' of inhuman or degrading treatment of requested person in issuing Member State of EAW. The obligation of executing Member State, prior to making the final decision on surrender of requested person, is to assess whether there are substantial grounds to believe that the person subject to EAW would face a real risk of inhuman or degrading treatment in the issuing Member State's detention conditions, as defined in Article 4 of the Charter. The 'real risk' of breach of this right must be based on objective, reliable, specific, and properly updated information with respect to detention conditions in the issuing Member State. This information should demonstrate any systemic or generalised deficiencies, affecting specific groups of people or certain places of detention. Such information can be obtained from international court judgments, including those of the ECtHR, domestic court judgments, as well as decisions, reports, and documents produced by Council of Europe bodies or under the supervision of the United Nations (Joined Cases C-404/15 and C-659/15 PPU, para. 89). Moreover, the executing judicial authority must request additional information from the issuing judicial authority which is obliged to provide this information within the specified time frame. Only after conducting this thorough assessment of 'a real risk' and if the risk cannot be ruled out within a reasonable time by issuing Member State, the executing judicial authority can decide to bring the surrender procedure to an end (Joined Cases C-404/15 and C-659/15 PPU, paras. 95-104). Building upon the reasoning in the *Aranyosi and Căldăraru* cases, the CJEU applied resembling test to the risk of a violation of the right to a fair trial, as guaranteed by Article 47 (2) of the Charter, in LM judgment. It is worth noting that CJEU in LM judgment gave possibility to executing Member State to refrain from giving effect to EAW, not only in case when there is a real risk of breach of non-derogable right, such as prohibition of inhuman or degrading treatment, but also when that risk exists in regard to right of the individual to an independent tribunal and a fair trial as enshrined in Article 47(2) of the Charter. CJEU elucidated this reasoning by placing emphasis on the crucial role of judicial independence as an inherent component of the fundamental right to a fair trial. The right to a fair trial holds immense significance as it guarantees the safeguarding of all rights derived from EU law and upholds the shared values of Member States, including the paramount value of the rule of law, as outlined in Article 2 of TEU (*LM*, Case C-216/18 PPU, paras. 48-52).

This brief overview of the evolution of mutual trust, which serves as a prerequisite for the implementation of the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters (Tampere European Council 1999, Presidency conclusions, para. 33), transitioning from an irrefutable presumption to a rebuttable one, was necessary for two reasons: firstly, all analyzed judgments of the CJEU make reference to the EAW as a legal instrument of secondary EU law, just like the EIO; and secondly, they all address the level of protection of human rights guaranteed by primary EU law, namely the Charter. Taking the aforementioned into consideration, the CJEU's ruling in the *Gavanozov I* case is both surprising and a missed opportunity to address the unresolved issues concerning the scope of human rights protection in cases involving the EIO, in particular the right to an effective remedy. This aspect will be further elaborated in the following section.

3. THE CASE GAVANOZOV I

Case of Ivan Gavanozov was the first one to invite the CJEU to interpret Directive 2014/41 (Case C-324/17). Specialised Criminal Court, Bulgaria, submitted request for preliminary ruling only one day after the expiry of the time limit for implementing Directive 2014/41 in Member States. It could be argued that request for preliminary ruling came too soon, since the implementation of the new instrument – EIO was just to begin. Member States were obliged to take the necessary measures to comply with this Directive by 22 May 2017 (Art. 36). The request for preliminary ruling was submitted on 23 May 2017. Usually, time and practice show shortcomings in the implementation of a new instrument, and the CJEU rulings are designed to resolve problems noted in practice with the aim to ensure effectiveness of the instrument in Member States. Nevertheless, if you encounter a problem when using for the first time the new legal instrument, it would be wrong to wait and see how things would unfold in order to react. By reacting immediately, potential problems in practice can be anticipated. Unfortunately, even though the CJEU delivered its first judgment by interpreting Directive 2014/41, questions asked in request for preliminary ruling were left unanswered.

In case at the issue, the Bulgarian judicial authorities accused Mr. Gavanozov of leading a criminal gang formed for the purpose of committing tax offences. Among other allegations, Mr. Gavanozov was accused of using shell companies to import sugar into Bulgaria (through an intra-Community acquisition) from other Member States, including, from supplier X in the Czech Republic, represented by Mr. Y. Specialised Criminal Court decided to gather new evidences by issuing the EIO, in addition to the existing ones, by ordering a search and seizure at the office of company X and home of Mr. Y (both located in the Czech Republic), as well as examination of Mr. Y as a witness through videoconferencing, since he refused to appear for an examination in Bulgaria. In the opinion of Specialised Criminal Court these investigative measures were necessary for establishing the nature of relationship between Mr. Gavanozov and Mr. Y, and were relevant for the criminal proceedings. Naturally, the EIO seemed to be the best instrument for carrying out

mentioned investigative measures. After Specialised Criminal Court decided to issue an EIO and request from Czech authorities to carry out searches and seizures both at office of the company established in the Czech Republic and home of Mr. Y, and to examine Mr. Y as a witness through video conferencing, it faced difficulties in completing Section J of the EIO in the form set out in Annex A to Directive 2014/41, which deals with legal remedies. Section J of the EIO in point 1 requests information whether a legal remedy has already been sought against the issuing of an EIO, followed by further details (description of the legal remedy, including necessary steps to take and deadlines). The dilemma of Specialised Criminal Court how to answer this question originated from the fact that Bulgarian law does not provide for any legal remedy against decisions ordering a search, a seizure or the hearing of witnesses, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages. That being the case, the Specialised Criminal Court, Bulgaria decided to stay the proceedings and to refer several questions to the CJEU for a preliminary ruling concerning the interpretation of Article 1(4), Article 6(1)(a), and Article 14 of Directive 2014/41:

1) Does the interpretation of Article 14 of Directive 2014/41 preclude the issuance of an EIO by a Member State if its legislation does not provide for a legal remedy against the substantive reasons for an investigative measure indicated in an EIO?
2) Does Directive 2014/41 grant, in a direct and immediate manner, to a concerned party the right to challenge a court decision issuing an EIO, even if such procedural step is not provided for by national law (this refers to Mr. Gavanozov and Mr. Y in the concrete case)?
3) Is a person against whom a criminal charge was brought considered a concerned party, within the meaning of Directive 2014/41, in a situation in which the measures for collection of evidence are directed at a third party (this refers to Mr. Gavanozov and Mr. Y in the concrete case)?
4) Could the person, who occupies or uses the property in which the search and seizure was carried out, or the person who will be examined as a witness, be considered as a concerned party within the meaning of Directive 2014/41 (this refers to Mr. Y in concrete case)?

The first question aimed at establishing eliminatory criteria for determining whether a Member State can be part of the EIO mechanism as such, if its legislation does not provide any legal remedy against the substantive reasons for an investigative measure as indicated in an EIO. The third and fourth question envisaged a clarification of the meaning of the concepts of "concerned party" and "third party" and have impacts on all Member States which are applying Directive 2014/41.

Instead of giving answers to all these crucial questions, CJEU decided to reformulate the questions (para. 23) and reduce them to a mere formal question: "How to fill the Section J of the form set out in Annex A to Directive 2014/41?".

In the end, the CJEU ruled that Article 5(1) of Directive 2014/41, read in conjunction with Section J of the form set out in Annex A to the Directive, *"must be interpreted as mean-*

ing that the judicial authority of a Member State does not, when issuing a European Investigation Order, have to include in that section a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order." (Case C-324/17, para. 39). In its judgment CJEU does not drop a word on the EIO provisions that guarantee fundamental rights (first, the rights of the suspected or accused person, including the rights of the defense, and second, the right of concerned parties to exercise effective legal remedies equivalent to those available in a similar domestic case), as dealt with in Articles 1(4), 6(1)(a), and 14(2) and (4) of Directive 2014/41. What is more striking is that the CJEU completely disregarded the Advocate General's Bot Opinion delivered on 11 April 2019 replied to all questions posed by the Bulgarian court in a substantive way. An intriguing fact is the starkly contrasting opinion of Advocate General Bot in the joint cases *Aranyosi and Căldăraru*. In this opinion, he asserted that any grounds for refusing the execution of EAW not explicitly listed in the Framework Decision would run counter to the EAW scheme and its comprehensive list of refusal grounds. Such deviation would significantly undermine the mutual trust among Member States (Opinion of Advocate General Bot, 2016, paras. 78-93). Nevertheless, it is obvious that Advocate General Bot followed established jurisprudence of CJEU and recommended to answer to questions in *Gavanozov I* as it follows:

1) Article 14 of Directive 2014/41 must be interpreted as precluding the legislation of a Member State, such as the Bulgarian legislation, which does not provide for a legal remedy against the substantive reasons for an investigative measure indicated in an EIO, and the issuance of an EIO by the authorities of that Member State; (paras. 50-90, 90).
2) Article 14 of Directive 2014/41 cannot be relied on by an individual before a national court to challenge the substantive reasons for issuing an EIO if remedies are not available under national law in a similar domestic case (paras. 91-100, 100).
3) The concept of 'party concerned' within the meaning of Directive 2014/41 includes a witness, subject to the investigative measures requested in an EIO, and the person against whom a criminal charge has been brought, but who is not subject to the investigative measures indicated in an EIO (answers to third and fourth question, paras. 101-107, 107).

The judgment of CJEU, in this case, has been criticized by legal professionals and scholars as disappointing in terms of protection of defence rights, since it is supporting the Bulgarian legislation, which does not foresee any legal remedy against the issuance of EIO – to the detriment of the accused's rights (Wahl, 2020, para. 2; Materljan & Materljan, 2020, p. 767). Also, the judgment is scant and does not contain elements that would be expected in a judgment of this type, and it supports the *non-inquiry principle* of mutual trust among Member States (Materljan & Materljan, 2020, p.765-766). The critics agree that the CJEU missed the first opportunity to give a reply to fundamental issues, which could have enhanced cooperation in criminal matters by the new instrument of the EIO (Simonato, 2020).

Has the first judgment in Gavanozov contributed in any way to the effectiveness of the EIO mechanism? The answer is no. The only benefit of this judgment is the literal interpretation of point 1 of Section J of the EIO form: a description of legal remedy must be included only if a legal remedy has been sought against an EIO.

4. THE CASE GAVANOZOV II

The Specialised Criminal Court, Bulgaria, reacted immediately, and only few weeks after the first CJEU judgment, it submitted a new request for preliminary ruling in the same criminal case. Instead of asking four separate questions regarding interpretation of Articles 14, 6(1)(a) and 1(4) of Directive 2014/41, the Bulgarian court limited itself to the following two questions:

1) Is national legislation, which does not provide for any legal remedy against the issuing of an EIO for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41 and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?
2) Can an EIO be issued under those circumstances?

What brings special attention to the second request for ruling is the fact that Specialised Criminal Court, Bulgaria decided not to ask strictly for interpretation of mentioned articles of Directive 2014/41. Instead, even though it is only one question, on whose answer depends answer to second question – whether the Member State can be a part of EIO mechanism, by referring to Articles 47 and 7 of the Charter and Articles 13 and 8 of the ECHR – the Specialised Criminal Court Bulgaria managed to give a rise to crucial questions regarding the protection of fundamental rights in procedure of using EIO. By formulating question on the compatibility of national legislation and bringing into play the fundamental rights enshrined in Articles 47 and 7 of the Charter and Articles 13 and 8 of the ECHR, the Specialised Criminal Court, Bulgaria was able to direct the CJEU to the substantive and unresolved issues on the fundamental rights protection in the EIO procedure.

Prior to analysis of CJEU's ruling in this case, it should be underlined that the Recital of the Charter "reaffirms the rights as they result, in particular, from […] the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and the case-law […] of the European Court of Human Rights" (Kargopoulos, 2015, p. 96). This is highlighted in Article 52(3) and Article 53 of Charter, which deal with scope and interpretation of rights and principles and level of their protection. Article 52 (3) stipulates that rights contained in Charter correspond to rights guaranteed by the ECHR and their meaning and scope are the same or more extensive, as those laid down by ECHR (Explanations Relating to the Charter of Fundamental Rights, Explanations on arts. 47, 52, p. 29, 30, 33, 34). The Article 53 prohibits interpretation of the Charter in restricting or adverse manner, affecting human rights and fundamental freedoms as recognised, *inter alia*, by ECHR. Regarding the first paragraph of Article 47, right to an effective remedy before tribunal, it is based on Article 13 of ECHR. The CJEU enshrined this right for the first time in *Johnston* judgment on 15th of May 1986 (Case 222/84) as a general principle of EU law (Explanations Relating to the Charter of Fundamental Rights, Explanations on Art. 47, p. 30). The CJEU reaffirmed the right to an effective remedy as general principle in two other judgments *Heylens* (Case 222/86) and *Borelli* (Case

C-97/91). As stated by CJEU this general principle of EU law also applies to the Member States when they are implementing EU law (Explanations Relating to the Charter of Fundamental Rights, Explanations on Art. 47, p. 30). This brief review of the relation between the Charter and ECHR concerning the right to an effective remedy before tribunal is particularly important if taken into account the fact that Bulgaria has repeatedly been held liable for breaching Article 13 of ECHR due to the lack of legal remedies against search and seizure orders (see e.g. *Posevini v. Bulgaria*, paras. 83-87; *Peev v. Bulgaria*, par. 70; *Ilya Stefanov v. Bulgaria*, para. 59; *Gutsanovi v. Bulgaria*, paras. 234-235, *Prezhdarovi v. Bulgaria*, paras. 26-28, 30-31, and 49-52).

4.1. The CJEU's Judgment

4.1.1. Ruling on the First Question

In its first question the Specialised Criminal Court Bulgaria sought an answer from CJEU whether Article 1(4) and Article 14(1) to (4) of Directive 2014/41, read in the light of recitals 18 and 22 of Directive 2014/41[1], and Articles 7 and 47 of the Charter, read in conjunction with Articles 8 and 13 ECHR, must be interpreted as precluding legislation of a Member State, which had issued an EIO that did not provide for any legal remedy against the EIO that was issued for the purpose of carrying out searches and seizures and the hearing of a witness by videoconference. Thorough analysis of mentioned articles and recitals of Directive 2014/41, articles of the Charter and ECHR, leads to one conclusion – they all deal with level and scope of protection of human rights and fundamental freedoms, in *Gavanozov II* case with the right to effective legal remedy. However, their separate interpretations give no results in practice. Therefore, CJEU judgment gives in depth understanding of mentioned articles, read in conjunction, regarding the right to effective legal remedy which is crucial for function of the EIO mechanism.

In its judgment, CJEU starts with Article 14(1) of Directive 2014/41, under which Member States must ensure legal remedies equivalent to those available in a similar domestic case that is applicable to the investigative measures indicated in the EIO. Since Bulgarian law does not provide for any legal remedy against decisions ordering a search, a seizure or the hearing of witnesses in domestic cases, consequently no legal remedy is available against the EIO either.

Passing to the Article 14(2) of Directive 2014/41, read in conjunction with recital 22 of Directive 2014/41, CJEU concludes that while there is a general obligation of Member States to ensure applicable legal remedies that are at least equivalent to those available in a similar domestic case regarding the investigative measures indicated in the EIO,

[1] In recital 18 of Directive 2014/41 it is stated that "Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (TEU) and the Charter. In order to make this clear, a specific provision is inserted in the text." Also, the recital 22 underlines that "Legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned. In accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies."

there was no obligation for Member States to provide additional legal remedies to those that already existed in a similar domestic case (Case C-852/19, para. 26). CJEU underlines that such a requirement was not apparent from the wording of the article. However, since the procedure for issuing and executing an EIO is governed by Directive 2014/41, by its nature, the directive is an implementation of EU law within the meaning of Article 51(1) of the Charter (Case C-852/19, para. 29). Consequently, Member States are required to ensure compliance with the right to an effective legal remedy enshrined in the first paragraph of Article 47 of the Charter. In other words, Article 47 of the Charter, which guarantees the right to an effective remedy before a tribunal and in compliance with the conditions laid down in the article itself, can be applied in this case in question. Having in mind the purpose of EIO in this concrete case, which was carrying out of searches and seizures, CJEU notes those measures constituted interferences with the right of every person to respect for his or her private and family life, home and communications, guaranteed by Article 7 of the Charter, as well as possible infringements to Article 17(1) of the Charter, which recognises the right of every person to own, use, dispose of and bequeath his or her lawfully acquired possessions (Case C-852/19, para. 31). In order to exercise these rights, persons concerned affected by searches and seizures investigative measures from EIO, must have appropriate legal remedy/ies enabling them two possibilities. First, to contest the need for the measures and their lawfulness. Second, to request appropriate redress if those measures have been unlawfully ordered or carried out (Case C-852/19, para. 33). It is obligation of Member States to enable in their national legislation the legal remedies necessary for this purpose. Once again Bulgarian national law does not provide any of the two possibilities, which results in breach of Article 47 of the Charter and Article 13 ECHR. In its judgment CJEU concludes that persons concerned by the execution of an EIO, with purpose of carrying out of searches and seizures, issued or validated by a judicial authority of the Member State must be enabled to effectively exercise their right guaranteed by Article 47 of the Charter in the same Member state (Case C-852/19, par. 41). Thus, the obligation of the Member State is to ensure that concerned persons have available legal remedy to be exercised before its own national court. This will enable concerned persons to contest the need and lawfulness of EIO, regarding the substantive reasons for issuing such an EIO, as foreseen by provision of Article 14 (2) of Directive 2014/41. When it comes to issuing of an EIO for the purpose of witness hearing by videoconference, CJEU's judgment points out that Article 24(1) already regulated scenario in which a person is in the territory of the executing Member State and has to be heard as a witness or expert by the competent authorities of the issuing Member State. The issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audiovisual transmission in accordance with Article 24 (5) to (7) of Directive 2014/41 (Case C-852/19, par. 42). In accordance with Article 24 (7) of Directive 2014/41 each Member State shall take necessary measures to ensure that in a situation where a person needs to be questioned within its territory and in accordance with this Article, and that person refuses to testify, even though it is under an obligation to testify, or falsely testifies, executing Member State national law applies in the same way as if the hearing took place in its national procedure. Thereby, the refusal to testify and

false testimony, in the context of the execution of an EIO - hearing of a witness by videoconference, is likely to have significant consequences for the person concerned because of the rules laid down for that purpose in the law of the executing Member State. These consequences could be reflected in obligation to appear at the hearing and to be obliged to answer questions for the purpose of execution of EIO. Failing to fulfill these obligations can result in penalties. Executing Member State does not have jurisdiction, in accordance with Article 14(2) of Directive 2014/41, to examine the substantive reasons of an EIO for the purpose of hearing of a witness by videoconference. It is an obligation of issuing Member State to ensure that any person who has an obligation to present itself for the purpose of being heard as a witness or to answer questions during such hearing, in the context of the execution of an EIO, has remedy available before a court of issuing Member State that allows to challenge EIO, at the very least, the substantive reasons for issuing such an EIO (Case C-852/19, par. 49). Only then, the issuing Member State will comply with the law of the Union, in specific with the Article 47 of the Charter.

The CJEU's final ruling on the first question is that Article 14 of Directive 2014/41, read in conjunction with Article 24(7) of the same directive and Article 47 of the Charter, must be interpreted as precluding legislation of a Member State, which issued an EIO for carrying out searches and seizures, and hearing of a witness by videoconference, and its national law does not provide any legal remedy against the issued EIO (Case C-852/19, para. 50).

4.1.2. Ruling on the Second Question

The answer to the second question is negative – an EIO cannot be issued by Member State whose national legislation does not provide any legal remedies against the same EIO issued for the purpose of carrying out searches and seizures and hearing of witnesses by videoconferences. Even though, the answer to the second question is logical, CJEU's argumentation is particularly noteworthy when having in mind the answer to the first question. First of all, two conditions have to be fulfilled simultaneously as stipulated by Article 6(1) of the Directive 2014/41: 1) issuing of an EIO must be necessary and proportionate to purpose of the procedures, which are referred to in Article 4 of Directive, taking into account the rights of the suspected or accused person and 2) the investigative measure(s) indicated in the EIO must be capable of being ordered under the same conditions in a similar domestic case. CJEU underlines the fact that the Article 6(1) a) only takes into account the rights of suspected or accused person (Case C-852/19, para. 53). However, persons concerned by investigations measures, e.g. witness, victim etc, cannot seek protection of their rights under this provision of Directive 2014/41. Since EIO is an instrument of judicial cooperation based on the principle of mutual recognition of judgments and judicial decisions, principle known as "the cornerstone of judicial cooperation in criminal matters within the Union" (Tampere European Council 1999, Presidency conclusions, para. 33), EIO is based on the rebuttable presumption that issuing Member States complies with EU law, and, in particular, with fundamental rights (Case C-852/19, para. 54). As the result, failure of issuing Member State to provide legal

remedy against investigative measures, indicated in the EIO, leads to an infringement of the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter. The Article 11(1) (f) of Directive 2014/41 allows executing Member State to refuse execution of an EIO, exceptionally, on a case-by-case basis, where there are substantial grounds to believe that the execution of investigative measures indicated in the EIO would be incompatible with the executing Member State's obligations in accordance with Article 6 of TEU and the Charter. At the same time, the principles of mutual trust and sincere cooperation, on which the Directive 2014/41 is based, entail obligations for both issuing and executing Member States to comply with EU law. As correctly pointed out in the Opinion of Advocate General Bobek in this case (29 April 2021, para. 84), it would be unfair to shift all responsibility from issuing Member State on executing Member State by application of the Article 11(1) (f). In the case in question, this would mean allowing Member State, in which legislation does not comply with EU law, to issue an EIO and then expect from executing Member State to apply Article 11(1) (f) in order to protect fundamental rights. If this was allowed, it would establish the principle of mutual distrust between Member States and undermine the purpose of EIO. Fortunately, in contrast to its first judgment, CJEU took in the consideration the Opinion of Advocate General (29 April 2021, paras. 81-84) and ruled that Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter and Article 4(3) of TEU, must be interpreted as precluding the issuing, by the competent authority of a Member State, of an EIO for carrying out of searches and seizures and hearing of a witness by videoconference, where the legislation of issuing Member State does not provide any legal remedy against the issuing of such an EIO (Case C-852/19, para. 63).

5. FINAL REMARKS

The second CJEU judgment in the Gavanozov case from November 2021 provided valuable guidelines for the implementation of EIO, specifically regarding the level and scope of fundamental rights. Nevertheless, the judgment did not provide a definition who is to be considered "a concerned party" entitled to file legal remedies against an EIO – a question which was raised in the first preliminary ruling procedure in the case. However, it should be obvious from the case facts that the notion of "concerned party" includes suspected or accused person, witness and legal person affected by investigative measures of search and seizure or the video hearing of the witness. Moreover, the CJEU underlined that every person who enjoys protection conferred on him or her by Arts. 7 and 17(1) of the Charter, must have the right to an effective remedy in EIO proceedings as guaranteed by Article 47 of the Charter (Case C-852/19, para. 32).

It should also be stressed that the judgment confirmed systematic failures of Member State – Bulgaria to comply with minimum standards of EU law, in particular with the right to an effective remedy. It is therefore a logical consequence to prevent Member States, which do not comply with these standards, from being part of the EIO mechanism – a cooperation mechanism that is based on the principles of mutual recognition and mutual trust. The impact of CJEU's ruling in case *Gavanozov II* is far-reaching. The ruling should be a trigger

for corrective measures not only for Bulgaria, but also for all other Member States to revise their national legislation (see Knytel, 2020, pp. 66, 88-89, regarding the issuing of an EIO by French Public Prosecutor during an *"enquête"*) if they want to reap benefits from judicial cooperation in criminal matters by using the EIO instrument.

It is unfortunate that it took more than four years for the CJEU to rule on one of the crucial questions, which were already asked in the initial request for a preliminary ruling in 2017. The CJEU missed the first opportunity to timely guide Member States through necessary changes in their national legislation, which would surely have enhanced cooperation and mutual trust in implementing the EIO. Nevertheless, the judgments of CJEU have limited scope, as the suspension of mutual trust among Member States is within the competence of the European Council, which can act based on Article 7(2) of the Treaty on European Union and prevent a Member State that violates fundamental rights from using legal instruments such as the EIO (*LM,* Case C-216/18 PPU, par. 72; Auke, 2020, p. 106). The second judgment in the case of *Gavanozov* is more specific as it explicitly states that Bulgaria is currently unable to issue EIOs due to a lack of legal remedies. Still, the significance of CJEU judgments is undeniable, as they demonstrate the determination of the CJEU to emphasize the need for a revaluation of the previously unquestioned presumption of mutual trust among Member States. On one hand, these judgments can be seen as opening Pandora's box by the Court of Justice, considering that the very essence of Union's law relies on the unchallengeable presumption of mutual trust. On the other hand, they can be regarded as a corrective measure aimed at discouraging other Member States from violating the fundamental values of the European Union, including respect for human rights.

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POTENTIAL OF THE EU DRAFT DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE TO CONTRIBUTE TO A COHERENT FRAMEWORK OF CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS*****

Currently, the field of business and human rights is at a crossroads in terms of normative development, as two major legislative instruments are being negotiated at the regional and international levels. The first instrument is a proposal for a directive aimed at ensuring business responsibility for the respect of human rights and the environment within the European Union, or in other words a proposal for a Directive on Corporate Sustainability Due Diligence. The second one is a proposal of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, commonly referred to as the Third Revised Draft Treaty on Business and Human Rights, which is being developed by the open-ended intergovernmental working group established by the Human Rights Council in 2014. Given such parallel developments, it would seem prudent for the ongoing efforts to be interlinked so as to contribute to creating consistent legal solutions governing corporate accountability for human rights violations at international and supranational fora. This is particularly relevant in the context of rapid globalization, where transnational corporations can exploit legal and regulatory loopholes at the cost of human rights and the

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environment. This paper analyses the two legislative drafts with the aim of determining to what extent those two draft hard law instruments reflect the applicable international soft law standards and contribute to the creation of a complementary and mutually reinforcing regulatory framework. The analysis shows the differences in the scope and approaches utilized in the two instruments and identifies gaps and shortcomings in the proposed solutions from the standpoint of effective protection of the victims' rights. The analysis shows that the two proposed legislative texts are for the most part mutually complementary and it points to the ways in which their norms can be read together so as to enable a coherent and consistent legal framework and ensure legal certainty. The authors also argue that the two legislators should utilize the drafting process to address the identified discrepancies in the existing normative framework in order to achieve the best results.

Keywords: corporate accountability for human rights violations, human rights due diligence, draft CSDDD, draft LBI, transnational corporations.

1. INTRODUCTION

Over the last decades, the field of business and human rights has attracted widespread attention in both academia and practice (Letnar Černič & Michalakea, 2023, p. 3). Currently, the field is at a crossroads in terms of normative development, since two major legislative instruments are being negotiated at the regional and international levels (Bernaz *et al*., 2022, p. 3). The first instrument is a proposal for a directive aimed at ensuring business responsibility for the respect of human rights and the environment within the European Union (hereinafter: the EU) named a proposal for the Directive on Corporate Sustainability Due Diligence (hereinafter: draft CSDDD). More specifically, on 1 June 2023, the European Parliament (hereinafter: EP) adopted its proposed amendments to the text proposed by the European Commission (hereinafter: EC). They constitute the EP's position in the "trilogue" negotiations with the Council of the EU and the EC that were scheduled to start on 8 June 2023.[1] At the time of writing, it is estimated that a final agreement on the CSDDD will not be reached until early 2024, given the number of contentious issues to be resolved (Williams *et al*., 2023).[2] The debate taking place through the trilogue is additionally relevant given that, for the time being, there are no hard law instruments governing corporate accountability for human rights violations on either the United Nations (hereinafter: UN) or EU level that could be used as a model. That being said, it is important not to overlook other relevant provisions of the EU *acquis* that might be applicable to corporate accountability scenarios, which therefore will be elaborated later on in the paper.

[1] Trilogue is one of the tools commonly used today to ensure the effectiveness of the legislative process. It is defined as "informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council, and the Commission". As there is no explicit reference in the treaties, trilogues started on a very informal basis in the early 1990s and evolved over time (Del Monte & Smialowski, 2021, p. 1).

[2] These issues concern primarily the coverage of the CSDDD vis-à-vis human rights due diligence and corporate civil liability for human rights violations.

The second instrument relevant to the ongoing business and human rights debate is a proposal of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, commonly referred to as the Third Revised Draft Treaty on Business and Human Rights (hereinafter: draft LBI). The draft treaty is being developed by the open-ended intergovernmental working group (hereinafter: OEIGWG) established by the Human Rights Council at the UN level in 2014. Recently, intercessional consultations among states were held under the auspices of the UN, which took into account the work of the OEIGWG to date and, in particular, the existing text of the draft LBI and related substantive written inputs of the stakeholders regarding Articles 1-14 (Vinasithamby, 2023, p. 2).

Given such parallel developments, it would seem prudent to link the ongoing efforts to enable their greater contribution to the creation of consistent legal solutions governing corporate accountability for human rights violations in international and supranational fora. The need for convergence is particularly relevant in the light of the fact that, while the two mentioned draft instruments are different in nature, they both take inspiration from the due diligence provisions of the 2011 UN Guiding Principles on Business and Human Rights (hereinafter: UNGPs), a major soft law instrument on corporate accountability for human rights violations existing so far (Ćorić & Knežević Bojović, 2018, p. 26.). Consequently, the two instruments being currently developed should ideally offer a consistent interpretation of the UNGPs norms. In a similar vein, in order to minimize fragmentation and foster convergence, other international soft law instruments governing corporate accountability for human rights violations, such as those developed by the Organization for Economic Cooperation and Development (hereinafter: OECD) and the International Labour Organization (hereinafter: ILO), should be taken into account.

The need for an alignment, specifically of the draft CSDDD, with international standards is further strengthened by the fact that it would enable the draft directive to meet its stated objectives. Namely, some of the draft CSDDD's specific aims underline the importance of avoiding fragmentation of due diligence requirements in the single market, as well as ensuring coherence for companies across existing and proposed EU initiatives on responsible business conduct, while also improving access to remedy for those harmed (Shift's analysis, 2022, p. 3). Furthermore, it is of critical importance that the draft CSDDD be firmly grounded in the key international standards on sustainability due diligence adopted by the UN and the OECD since they complement one another, in order to create a more coherent and secure legal framework capable of effectively preventing corporate abuse and improving access to justice for victims. This is particularly relevant in the context of rapid globalization, where transnational corporations operating in and through complex webs often exploit legal and regulatory loopholes at the cost of human rights and the environment (Bernaz *et al.*, 2022, p. 7).

High-quality, mutually reinforcing, and complementary EU and UN rules would be opportune for Southeast European countries (both the EU member states and accession candidates), given that the respective national governments, with the exception of Slovenia, so far have lacked a coherent engagement with the implications of corporate activities

on human rights and the rule of law. This is demonstrated by the absence of National Action Plans on Business and Human Rights, other comprehensive policies, or specific regulations on corporate accountability in Serbia, Montenegro, Croatia, BiH, North Macedonia, Greece, Turkey, and Albania (Letnar Černič & Michalakea, 2023, p. 5).

The paper primarily examines the complementarity of the draft CSDDD with the draft LBI, as well as determines to what extent those two draft hard law instruments reflect the applicable international soft law standards. Complementarity, for the purpose of this paper, is understood as relating to the substance of the given instruments. The authors posit that complementarity cannot be considered a synonym for alignment since complementarity can be achieved even in cases where a certain amount of non-alignment is identified. As long as certain gaps or shortcomings of one hard law instrument can be addressed in the other instrument without creating any confusion for right holders and therefore being partly overcome by them, complementarity will not be endangered.

Before reviewing the corporate civil liability solutions covered by the draft CSDDD from the perspective of their complementarity with the draft LBI and examining, to the extent relevant, their alignment with applicable international soft law standards on corporate accountability for human rights violations, the authors will provide a brief historical background of the development of international instruments applicable to corporate accountability for human rights violations in international law.

2. ESTABLISHING CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL AND EUROPEAN LAW: A HISTORICAL OVERVIEW

The role of transnational corporations and other business enterprises in violations of human rights has been at the heart of international debates for decades (Khoury, 2018, p. 503). More specifically, it was argued that it has been through the "development of human rights law that the role of transnational corporations began to receive additional international attention" (Green, 2016, p. 447). That resulted in efforts to draw up relevant international instruments.

Although during the 1970s attempts were made by the UN by Global South Nations (known as the G-77) to establish internationally-binding mechanisms to address corporate violations of human rights, ultimately those attempts were watered down into "codes of conduct" (Khoury, 2018, p. 509).[3] Namely, from 1977 to 1990, the UN Commission on Transnational Corporations (hereinafter: UNCTAC), as an advisory body of the UN, developed a code of conduct for multinational corporations, but the final draft prepared in 1990 was never adopted (Green, 2016, p. 447).

Several studies investigating cases of human rights violations in the United States of America, England, France, and Australia against multilateral corporations and corporate officers corroborate the need to push for corporate human rights accountability at

[3] For instance, in 1972, the UN Economic and Social Council ordered a study of the impact of transnational corporations on the development process and international relations. See: Nartey, 2021, p. 3.

the international level (Joseph, 2004, p. 16). Consequently, the UN continued to develop standards for businesses and their officers since the initiatives commenced in the late 1970s did not bear fruit. In 2002, the Sub-Commission on Promotion and Protection of Human Rights of the UN Commission on Human Rights drafted a set of principles that directly bound businesses and endorsed corporate officers' responsibility (Nartey, 2021, p. 5). However, these standards were met with strong opposition and were obstructed by the UN Commission (Weissbrodt & Kruger, 2003, p. 922).

When it comes to voluntary mechanisms currently available at the international level, the UNGPs, which were unanimously endorsed by the Human Rights Council in June 2011, seem the most relevant. UNGPs envisage all three relevant dimensions: that potential human rights impacts should be addressed through prevention or mitigation, and that actual impacts should be subject to remediation. In other words, the UNGPs were the first to couple the concept of human rights due diligence with the rule that human rights impacts should be subject to remediation (Andersson, 2020, pp. 13-14). Despite their importance, some authors claim that the UNGPs, along with other soft law mechanisms, arguably have not helped victims gain access to justice and effective remedies (Nartey, 2021, p. 6). According to Vogel, these initiatives have in fact contributed to ongoing human rights violations in the international arena by allowing corporations to choose the methods and processes whereby they only purport to respect human rights and the environment (Vogel, 2010, p. 68). Other authors claim that, while voluntary regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both the national and the international level. This is unsurprising, as the relevance of rights under international law and human rights law is questionable if victims had no legal capacity and clear guarantees to enforce their rights before either a national or international court once they claimed to be victims of human rights violations. Although the right to a remedy and reparation is imperative for the effective protection of human rights, the theory of international law and the applicable voluntary regulation do not provide an effective remedy for state failure to address corporate violations of human rights (Nartey, 2021, p. 7).

Similar arguments can be made regarding the effectiveness of soft law instruments developed by the OECD and the ILO. The OECD Guidelines for Multinational Enterprises (hereinafter: OECD Guidelines) are aligned with the UNGPs and, in a similar vein as the draft CSDDD, cover both human rights and environmental topics. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy reinforces these expectations, specifically in relation to due diligence regarding labour rights. Both the draft CSDDD and the draft LBI explicitly make reference to the said ILO instrument. The presented limitations, which are attributable to the soft law character of the existing instruments, shed light on the importance of the current work of the OEIGWG for the elaboration of the LBI. Before getting into the analysis of the quality of the current draft CSDDD, it is valuable to provide a birds-eye view of the key EU provisions relevant to addressing corporate accountability for human rights violations.

In January 2023, the Corporate Sustainability Reporting Directive (hereinafter: CSRD) amending the Non-Financial Reporting Directive (hereinafter: NFRD) entered into force.[4] The NFRD had defined a common standard for non-financial reporting for certain corporations, which has to be transposed into the domestic law of the member states. Member states also have to envisage penalties applicable to infringements of the national provisions adopted under the NFRD (Andersson, 2020, p. 19). However, critics rightly argued that the said directive was framed in a manner that creates overall uncertainty over the effectiveness of reporting as a means to materialize human rights due diligence. Namely, the way the requirements relating to human rights are laid out in the NFRD reduces its potential to generate a practice of effective reporting, especially given its divergence from the UNGPs and other related problems (Martin-Ortega & Hoekstra, 2019, p. 622).

The adopted CSRD was set to amend the NFRD of 2014 by extending the scope of reporting requirements to additional companies, such as all large companies (listed or not) and listed SMEs; by aligning the reporting requirements with the mandatory EU sustainability reporting standards; and by introducing an EU-wide audit assurance of the sustainability information reported (Smith-Roberts, 2022). The scope of the CSRD is even broader than that of the draft CSDDD, given that any "large company" in the EU must report. Moreover, companies not incorporated in the EU but with securities in EU-regulated markets are also covered by the reporting directive. A central critique of the CSRD is that, while the European-based firms will be subject to additional financial sustainability reporting obligations, those in external jurisdictions, for example, those based in Asia or the Americas will not. This means that investors, asset managers, and others will continue to lack crucial sustainability data for a wide range of entities (Smith-Roberts, 2022).

It is worth noting that the CSRD directive will not be subject to isolated transposition but is meant to be applied in tandem with the CSDDD by corporate entities. Both proposals reference the UNGPs and the OECD Guidelines as foundational international due diligence frameworks. Moreover, both directives are stark examples of the movement leading to the "soft law" on business and human rights being translated into hard law, meaning the development of mandatory corporate obligations that are legally enforceable and may result in penalties if violations are found (Smith-Roberts, 2022).

It is expected that all those pieces of EU legislation will significantly impact how companies manage and report on their efforts related to mandatory due diligence obligations regarding human rights, environmental impacts, and associated corporate governance reforms. The two aforementioned EU directives are meant to work through synergy and be applied in parallel by corporate entities: the first (the CSDDD) as a framework for *what* due diligence obligations certain corporations will bear, and the second (the CSRD) as a framework for *how* companies will be required to report on these obligations. Therefore, it is important to coherently apply not only identified European and international legal instruments but also to secure their mutual coherence through an adequate interpretation and application of the different pieces of the EU *acquis*.

[4] The CRSD's rules will start applying between 2024 and 2028.

3. COMPLEMENTARITY OF THE DRAFT CSDDD WITH THE DRAFT LBI AND APPLICABLE SOFT LAW INTERNATIONAL STANDARDS

Within this section, the authors will provide an analysis of complementarity between the identified international and European instruments concerning corporate due diligence obligations, while placing a special focus on the draft CSDDD and the draft LBI. Subsequent to it, the authors will look in-depth into questions of corporate civil liability and other redress-related issues. The analysis assesses the drafts in their current forms.

3.1. The compatibility with regard to corporate due diligence obligations

The analysis of complementarity between the draft CSDDD, draft LBI, and identified international soft law instruments concerning corporate due diligence obligations includes the following aspects: company and material scope of application, due diligence process, and elements of due diligence.

The scope of application of the draft CSDDD and the draft LBI diverges considerably concerning corporate due diligence obligations, given that the draft CSDDD establishes strict size and turnover limits for business enterprises subject to such obligations, while the draft LBI aims to apply to all business enterprises, including business activities of a transnational character (Bernaz *et al.,* 2022, p. 18). This key difference between the two texts is, to an extent, mitigated by the fact that the current Article 3.2 of the draft LBI allows for the possibility for the member states to "differentiate between business enterprises according to their size, sector, operational context, or the severity of impacts on human rights" or rather, allows to the member states to envision different modalities for discharging these obligations for different types of business enterprises. In a similar vein, Article 6.3 of the draft LBI envisages that business enterprises should be required to undertake human rights due diligence, proportionate to their size, risk of human rights abuse, or the nature and context of their business activities and relationships.

The amendments to the draft CSDDD that were recently proposed by the EP also contribute to reducing divergences between the two draft instruments. Namely, the proposed amendments lower some of the size and turnover thresholds and switch the concept of "established business relationship", to the concept of "business relationship" thus ensuring that a uniform terminology is being used in that respect in the draft CSDDD and the draft LBI (amendments proposed by the EP to the CSDDD, 2023). This intervention is not merely a terminological one, and its implications will be elaborated further in the paper. The concept of "business relationship" is also used in the two applicable soft law instruments: UNGPs and OECD guidelines. Furthermore, both the draft LBI and the proposed EP's amendments to the draft CSDDD include definitions of the notion of business relationships, although these do not fully coincide.[5] Nevertheless, the

[5] According to Article 1.5. draft LBI, a business relationship is "any relationship between natural or legal persons including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means". On the other hand, the EP's draft amendments to Article

slight differences in determining the notion of business relationships do not necessarily lead to serious incompatibilities.

Let us recall that the initial draft CSDDD deployed a novel and untested concept of "established business relationships" to reduce the scope of due diligence obligations. The recourse to such a limited scope of companies that were subject to due diligence was based on the need to enable an easier identification of risks by the businesses and was explained by the fact that helping the businesses to identify risks would provide greater leverage in building strategic relationships for protection of human rights. More specifically, the initial version of the draft CSDDD explained that limiting the scope of due diligence to "established business relationships" was necessary to "allow companies to properly identify the adverse impacts in their value chain and to *make it possible for them to exercise appropriate leverage*" (Shift analysis, 2022, p. 4). However, during the development of the UNGPs, Professor Ruggie already argued that the extent of leverage was not an adequate basis for determining the scope of due diligence, and that the concept of prioritization based on severity should instead be applied (Ruggie, 2008).

Following this line of reasoning, the UNGPs intentionally did not limit the scope of due diligence to a particular set of closely related business relationships, such as "established business relationships", as that would have led companies to look for risks and impacts primarily among their strategic suppliers and in other proximate relationships and ignore impacts in more remote parts of the value chain where they are often more severe. The narrow scope, initially introduced by the draft CSSSD, also based the responsibility for due diligence on the concept that is prone to be abused through legal or tactical decisions to manage value chain relationships in ways that avoid them falling within the given scope. This could have created a clear risk whereby, in practice, the focus of due diligence would be defined not by where the most severe risks and impacts occur in a company's value chain but by whether or not a business relationship can be characterized as "established" in line with the various novel tests introduced in the draft (Shift's analysis, 2022, pp. 4-5).

The last decade of implementation of international standards demonstrates that the concept of prioritization based on severity (hence, different from the one initially proposed in the draft CSSSD) is the key factor in making due diligence manageable for business, as well as ensuring it tackles the most salient risks to people. Therefore, the proposed amendments of the EP to the draft CSSSD constitute a positive step in the right direction. Moreover, their criterion of "business relationship" can be equated with the criterion envisaged by the UNGPs, the OECD guidelines, and the draft LBI. By doing so, it contributes to aligning the material scopes of these instruments.

Nevertheless, the due diligence requirements set forth in the draft CSSSD are still applicable to a more limited set of companies compared to the respective scopes of application of international standards contained in the UN's and the OECD's instruments. Namely, the proposed EP's amendments retain size and turnover limits, although slightly lowering them (Brown, 2023).

3 paragraph 1 of the draft CSDDD define the business relationship in the following way: "a *direct or indirect* relationship *of a company* with a contractor, subcontractor, or other entities *in its value chain*".

When it comes to the material scope, the draft CSDDD is broader than the draft LBI, as it includes the concept of adverse environmental impact. It is noteworthy that climate is not explicitly included in the due diligence process but rather in a separate and more general provision.[6] However, the material scope of the draft CSSSD is still broader than the LBI's due to its dual focus on human rights and environmental issues. It remains ambiguous how realistic it would be to push for the broadening scope of the draft LBI to include environmental and climate issues, given that the OEIGWG's current mandate is focused on human rights, but is still amenable to change. Such an initiative could significantly contribute to the development of a coherent legal framework governing corporate accountability for human rights violations worldwide.

Then again, Bernaz *et al.* (2022, pp. 12-16) rightly argue that the two texts can be considered complementary, regardless of the identified divergences with regard to company and material scope. If both instruments (the draft LBI and the draft CSDDD) were to be adopted in their current form, they would indeed complement each other, as the CSDDD can be considered an instrument implementing only certain aspects of the draft LBI (Williams *et al.*, 2023).

When it comes to the due diligence process, the draft CSDDD primarily focuses on corporate due diligence, while the draft LBI is more victim-centred and focuses on respect for human rights, and redress, covering areas other than the due diligence process. Hence, the UN instruments, on the one hand, and the draft EU directive, on the other, are based on different approaches. More concretely, the LBI, as a human rights instrument, underlines that the activities of business enterprises, including their obligation to undertake human rights due diligence, have to be regulated by states for the purpose of ensuring that business enterprises "respect internally recognized human rights and prevent and mitigate human rights abuses". The draft CSDDD aims at establishing common rules for corporate due diligence in the EU and is hence more an instrument of corporate law than a human rights instrument. The states' obligations under the draft CSDDD are to adopt legislation to transpose the due diligence rules envisaged by the directive.

When it comes to elements of due diligence, the draft CSDDD in general is more detailed than the draft LBI. Firstly, there is an unambiguous requirement in the draft CSDDD to integrate due diligence into company policy, and there is no similarly clear requirement on this in the draft LBI (Bernaz *et al.*, 2022, p. 13). Both texts are similar with regard to identifying human rights risks but still have important differences. One of them is of mere terminological nature: while the draft CSDDD deals with identifying adverse impacts, the draft LBI governs identifying human rights abuse. That terminological difference carries symbolic value, but it apparently does not have important practical consequences in terms of how the process should be conducted.

The difference with regard to the process of identification was mitigated in the recent amendments to the draft CSSSD that were proposed by the EP. The draft CSSSD initially highlighted that "companies are entitled to make use of appropriate resources,

[6] See Article 15 of the draft CSDDD.

including independent reports and information gathered through the specified complaints procedure" and that "where relevant" they were to "also carry out consultations with potentially affected groups, including workers and other relevant stakeholders, to gather information on actual or potential adverse impacts". By contrast, the draft LBI uses stronger language from the standpoint of rights holders, trying to give affected stakeholders a clearer and stronger role. According to the LBI, the process must include: undertaking impact assessments, integrating a gender perspective, conducting meaningful consultations that will give special attention to marginalized groups, acting in accordance with the principle of free, prior, and informed consent of indigenous peoples, and paying particular attention to conflict areas or areas under occupation.

While the initial EC's proposal of the draft CSDDD underplayed the important role that affected stakeholders should have in informing risk assessment by including the "where relevant" criterion, the EP's proposed amendment, which almost aligns with the draft LBI, contains a more appropriate solution, providing that companies shall also carry out *meaningful engagement* with potentially affected *stakeholders,* including workers and other relevant stakeholders, to gather information in the context of the identification process to gather information on actual or potential adverse impacts. It was argued that the omission of the EC's proposal of the CSSSD can be explained by the fact that the draft does not emphasize the concept of severity as the central criterion in making difficult decisions about what to prioritize (Shift analysis, 2022, p. 8). The EP's proposed amendments constitute a more adequate solution since, without positioning the engagement with affected stakeholders as a central feature of due diligence, the company cannot be certain that it has appropriately assessed the severity of impacts to inform its prioritization of risks, nor can it be sure whether its approaches are having their intended effects in practice.

There are also important differences with regard to avoiding, preventing, and mitigating adverse human rights impacts. Firstly, the draft CSDDD is clearer about when the company is expected to mitigate adverse human rights impacts, whereas the draft LBI fails to explain when mitigation is acceptable. Secondly, pursuant to the draft LBI, the company only needs to worry about the abuses they have identified, whereas, under the draft CSDDD, companies are also required to act regarding impacts they should have identified but did not.

The draft CSDDD is more specific in terms of how to act. The draft LBI envisages "reasonable and appropriate measures", including "integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate". Similar to the draft LBI, the draft CSDDD includes "appropriate measures" to verify compliance with contracts that integrate human rights due diligence requirements. However, the draft CSDDD, in general, provides much more detail about what such measures could be, and therefore it could serve as a basis to strengthen the LBI.

The draft CSDDD is also stronger than the draft LBI with regard to providing a clear requirement to bring adverse impacts to an end, while there is no clear requirement on this in the draft LBI. Finally, the draft CSDDD is also more detailed than the draft LBI on the

point of how to effectively monitor due diligence, as well as the compliance and enforcement of due diligence obligations, while the opposite applies to the obligation to communicate.

In a nutshell, the text of the draft CSDDD and the draft LBI follow different approaches. This does not necessarily make them incompatible but merely reveals their different starting points in terms of due diligence obligations. As elaborated above, many elements of the draft LBI seem generally more in line with the UNGP than is the case with the draft CSDDD. Conversely, the draft CSSSD follows a more detailed approach that is supposed to enable such a kind of legislative instrument to operate in practice. When it comes to the material scope of the draft CSDDD, it is broader than the respective scope of the draft LBI since, like the OECD guidelines, it also covers environmental issues. The identified differences mainly highlight the complementarity between the texts, with the draft CSDDD being more technical and detailed and the draft LBI being focused on setting broader orientations and principles.

3.2. The compatibility with regard to corporate civil liability and redress for victims

Victims of alleged human rights abuses and environmental harm caused by companies encounter a broad variety of difficulties when seeking justice. Some of them are attributable to the transitional nature of business and human rights litigation, the power imbalance between the parties, complex private international rules, and the complexity of corporate groups and value chain activities (Višekruna, 2017, p. 114 and Bernaz *et al*., pp. 4-19). It seems, however, that the main difficulty comes from the absence of coherence in legal liability rules for corporate violations of human rights. Therefore, firstly, the analysis of complementarity between international and European instruments within this section will deal with the inadequacy of the existing and proposed rules on corporate civil liability regimes under the two drafts. Subsequent to that, other relevant challenges will be analyzed and compared in order to better understand the level of complementarity.

3.2.1. Examining the extent of compatibility concerning corporate civil liability

The analysis of complementarity between international and European instruments concerning corporate civil liability includes the following aspects: general principles of corporate civil liability, liability in corporate groups and in the supply chain, and procedural and practical difficulties that undermine victims' redress for damages caused by human rights violations and environmental harm.

The draft LBI and the draft CSDDD approaches to corporate liability differ in numerous respects. A significant difference between the LBI and the CSDDD is that the draft LBI provides for the liability of both legal and natural persons that are conducting business activities (Article 8.6. of the OEIGWG Chairmanship Third Revised Draft LBI, 2021), while the CSDDD only refers to the liability of companies while giving no mention to the liability of natural persons (Article 22(1) of the draft CSDDD). The EC's draft CSDDD makes a reference to the directors' duty of care in Article 25, but still, there is no provision envisaging directors' civil liability when they fail to uphold the duty of care.

This difference between the two draft instruments perhaps may to some extent be mitigated by the fact that recently proposed amendments to the draft CSDDD stipulate that asset managers and institutional investors should also be covered by this duty under certain circumstances. Nevertheless, the said proposal does not envisage their civil liability in the case where the specified measures to avoid adverse impacts were not taken by them (Williams *et al.*). On the other hand, the draft LBI emphasizes that the liability of natural persons, such as decision-makers within a corporation, shall not be a substitute for the liability of the entity itself. It does so by specifying in its Article 8.2 that "State Parties shall ensure that their domestic liability regime provides for liability of legal persons without prejudice to the liability of natural persons […]" (OEIGWG Chairmanship Third Revised Draft LBI, 2021, p. 10).

Another important difference concerns the link between a breach of the company's due diligence obligations and established corporate civil liability under the two drafts. The initial draft of the CSDDD only provides for corporate civil liability in the case when a company breaches a limited number of due diligence obligations, more specifically when it fails to prevent potential adverse impacts or mitigate actual adverse impacts (Article 22 (1)). This means that civil liability cannot be invoked when a company fails to comply with other due diligence obligations, such as the identification of actual or potential adverse impacts, and monitoring the effectiveness of due diligence policies and measures. In that respect, provisions contained in the draft LBI are more advanced. Namely, the draft LBI provides that proper compliance with human rights due diligence obligations shall not automatically absolve a company from liability for the harm caused, thus setting a liability regime that applies beyond due diligence obligations as an effort requirement. The draft LBI also explicitly distinguishes between the fulfilment of due diligence obligations and liability for broader human rights abuses and environmental harm.

The initial CSDDD's approach of not establishing corporate liability for human rights violations, including environmental harm, when there was no identified failure vis-à-vis the compliance with due diligence obligations may be explained by the objective of the CSDDD. Namely, the initial draft CSDDD is primarily directed towards imposing due diligence obligations on specific corporations, while its aim has almost nothing to do with addressing corporate responsibility for committed human rights violations, including environmental harm in general (Bernaz *et al.*, 2022, p. 18).

Some degree of convergence between the draft CSDDD and the draft LBI was attempted by the recent amendments to the draft CSDDD, which created room for holding the company liable for human rights violations, including environmental harm made outside of the due diligence non-compliance scenario. Firstly, the EP proposed in its amendments to the draft CSDDD to delete the provision that indicates an obligation of means stipulating that "for damages occurring at the level of established indirect business relationships […] the company should not be liable for damage if it carried out specific due diligence measures." In a similar vein, the proposed amendment to Article 22 of the draft CSDDD stipulates that specified companies can be held liable for damages even when they support the implementation of specific aspects of their due diligence obligations. It remains to be seen whether the EP's proposals will be incorporated into

the final version of the draft CSDDD. If adopted, both proposed amendments would lead toward breaking the link between a breach of the company's due diligence obligations and the established corporate civil liability, thus creating convergence between the draft CSDDD and the draft LBI in that respect.

However, it should be kept in mind that the EP's proposed amendments to the draft CSDDD do not get into the set requirement envisaging that a company's liability can be established only if there is a direct causal link between the company's failure to comply with its due diligence obligations and the damage. Due to the lack of specific provisions addressing the burden of proof and the possibility of disclosure mechanisms, victims are likely to struggle to establish such a causal link.[7] Such an approach creates the risk that the CSDDD's liability regime will remain a dead letter, due to the lack of strong procedural safeguards to ensure that victims, who are usually the weaker parties in such disputes, can effectively sue companies. This means that it will be up to the member states to decide on their own whether to address the procedural obstacles that victims face. Admittedly, the EP's proposed amendments to the draft CSDDD provide for limited improvements, among others, in terms of reducing litigation costs through the provision of access to legal aid and developing the ability of civil society organizations and other relevant actors acting in the public interest to bring actions before a court on behalf of a victim or group of victims (Recital 59a (new) of the EP's proposed amendments to the CSDDD). The draft LBI is more advanced in that regard, as it expressly addresses the majority of procedural and practical obstacles that victims face in human rights and environmental harm-related lawsuits against companies. For instance, the draft LBI attempts to reduce the asymmetry of power that typically exists between victims and corporate defendants, and in doing so, it provides victims with legal aid guarantees and allows judges to reverse the burden of proof in specified cases in order to fulfil the victims' right to access to remedy (Bernaz *et al*., 2022, pp. 30-31).

Both draft instruments subject to the present analysis successfully address complex situations where multiple legal entities are involved in causing harm. Those entities include but are not limited to a parent or lead company, along with a subsidiary or business partner. To put it differently, corporate liability in corporate groups or in supply chains for human rights abuses can be established under those draft instruments. Since the draft CSDDD does not include a possibility of holding the subsidiary and the entities with which the company has business relationships liable, the company's liability for damage arising under the draft CSDDD does not preclude its subsidiaries or any of its direct and indirect business partners in the value chain from being held civilly liable under the EU and national law (Article 22, paragraph 2a (new) of the EP's proposed amendments to the CSDDD).

To sum up, it is apparent that, compared to the draft LBI, the draft CSDDD does not contain sufficient rules to address the procedural and practical barriers that have prevented victims of business-related human rights violations and environmental harms

[7] Although the EP's position is not perfect, it is more aligned with the OECD guidelines and UNGPs and, as such, offers a higher likelihood of practical effectiveness (Solidaridad, European Parliament Vote on CSDDD: Significant Improvements for Rights of Smallholder Farmers, 2023).

from seeking justice thus far. Given that the majority of these aspects are within the competence of the member states, it is unlikely that they will be included in the final CSDDD, but will rather be regulated by national law. This, in turn, implies a varying degree of ease of access to justice for the victims, depending on *lex fori*. To mitigate this disparity, the LBI, which contains more provisions on the mentioned procedural aspects, could serve to fill the gaps and play a complementary role for the EU member states by imposing more specific obligations on state parties.

3.2.2. Examining the extent of compatibility concerning redress for victims

Due to cross-border corporate operations and multiple entities within a corporate group or a supply chain, plaintiffs usually encounter a multitude of legal barriers when trying to bring a legal suit in a case of corporate civil liability for violations of human rights.

Issues of private international law pertaining to jurisdictional and applicable law relevant to such cases could be detrimental to the viability of related legal claims and therefore will be briefly examined within this section. So far, the rules of private international law have been criticized and considered inefficient in addressing claims for corporate accountability arising out of cross-border activities due to the cumulative effect, which makes it difficult to bring such complex companies to account (Watt, 2014, p. 45). It was rightly argued that the draft LBI and the draft CSDDD should include private international law provisions to enable victims of business-related human rights abuse to gain access to justice. Furthermore, those provisions should be complementary in order to strengthen the coherence of corporate civil liability issues worldwide and provide legal certainty for the rights holders in the area of cross-border claims for corporate liability and damages.

However, the complementarity between the provisions of two draft instruments pertaining to jurisdictional law has not been achieved. On the one hand, the draft LBI attempts to facilitate joint litigation against parent and subsidiary companies arising out of cross-border harm, which is very important given that victims have limited resources to resort to multiple jurisdictions. The approach taken in the draft LBI further seeks to facilitate access to a forum when the victim is not able to utilize the courts of the home country (so-called forum of domicile) or alternatively, the host country. Such an approach to jurisdiction is unsurprisingly well-tailored given that the primary objective of the LBI is to ensure access to justice and remedy for victims of corporate human rights violations (Bernaz *et al*., 2022, pp. 25-26).

On the other hand, the draft CSDDD contains no provisions governing jurisdiction when a civil claim for damages based on the company's failure to comply with the due diligence obligations raises cross-border elements. That gap should be overcome by the respective applicability of the provisions of the Recast Brussels I Regulation. However, the said regulation, interpreted in conjunction with the draft CSDDD, does not contain sufficient provisions addressing jurisdictional issues that arise in cross-border business and human cases. More specifically, under the general rule of the Recast Brussels I Regulation, victims of human rights abuse and environmental harm resulting from a company's failure to comply with the CSDDD's obligations would be entitled to sue

the company in the member state where it is domiciled. The situation becomes more complicated when a company subject to due diligence obligations in the sense of the draft CSDDD is not domiciled in an EU member state. That hurdle should be addressed through the ongoing efforts to amend the Recast Brussels I Regulation. In that respect, for instance, the recommendations found in the EP's Committee on Legal Affairs report on the due diligence directive in 2020 (Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) proposing amendments to the Recast Brussels I Regulation should be considered. If the given amendments are adopted, the future CSDDD would have full effect and foster a coherent concept of corporate accountability in international and European law. To further this aim, it would be important that the process of amending the Recast Brussels I Regulation takes into account the provisions for determining jurisdiction in cross-border cases in the current draft LBI. By doing so, the LBI could complement the CSDDD on this point and contribute to the development of accountability for human rights violations.

When it comes to provisions on applicable law in cross-border civil lawsuits, the draft LBI and the draft CSDDD again follow different approaches. The draft LBI includes a choice of law provision in favour of victims, leaving a wide margin for the victims to influence which substantive law should be applied to cross-border business and human rights cases. Conversely, the draft CSDDD does not allow the claimants to choose the applicable law through choice-of-law provisions. Instead, it contains the overriding mandatory provisions requiring the application of corporate civil liability under proposed Article 22 (5).

It seems that the applicable law provisions of the two draft instruments demonstrate an acute lack of complementarity. In the event that two instruments become adopted in their current forms, their provisions on applicable law will give rise to conflicting rules in the context of civil proceedings relating to corporate due diligence obligations and, as such, undermine legal certainty. It would therefore be of critical importance for the respective legislators to attempt their further alignment.

4. CONCLUSION

The International Law Commission (hereinafter: ILC), in its report pertaining to the fragmentation of international law, elaborates on this phenomenon, in particular, in the context of EU law. According to the ILC, the full coherence, realistically speaking, is not achievable within any regional system, including the European system of human rights. However, each legal system has to aim to achieve the highest possible level of coherence as that contributes to predictability, legal security, and legal equality.[8] More concretely, the ILC mentions in its report that a lack of coherence leads to the emergence of conflicting jurisprudence, forum shopping, conflicting rules, and overlapping legal regimes. All these result in the loss of legal security.[9] For all these reasons, the elimination of the existing or

[8] For more on the work of the ILC Study Group on the fragmentation of international law see: Zdravković (2019, p. 158).

[9] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law

anticipated incoherence is highly recommendable and mutually beneficial (Ćorić, 2019, p. 251). This is particularly relevant in the context of rapid globalization, where transnational corporations operating through complex webs are often able to take advantage of legal loopholes at the cost of human rights and the environment (Bernaz *et al.*, 2022, p. 7).

On the path to establishing a coherent framework governing corporate accountability for human rights violations in European and international fora, it is critical that the ongoing drafting of two major legislative instruments in this field does not take place in a vacuum but rather that these instruments complement each other at regional and international level. The explicit reference made in the draft instruments to the UNGPs and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy constitutes a step in the right direction. Unlike the draft LBI, the draft CSDDD also invokes the OECD Guidelines. More importantly, only the draft CSDDD clearly covers corporate liability arising out of environmental harm.

The negotiation processes for the adoption of both hard law instruments are interlinked given the fact that the draft LBI will have to be concluded as a so-called "mixed agreement" (Bernaz *et al*. 2022, p. 9). That means that the LBI will have to be negotiated, signed, and ratified by the EU and all of its member states, or alternatively the EU member states could also mandate the EC to negotiate on their behalf in addition to negotiating on behalf of the EU. Such an institutional connection between negotiation and the legislative process will apparently strengthen points of convergence between the two draft instruments.

The conducted analysis shows that while the texts of the current drafts of the CSDDD and the LBI reveal a considerably high level of complementarity, full alignment is not achieved. On a positive note, most of the identified shortcomings of one instrument are addressed at the same time in the other instrument, which partly mitigates such gaps.

When it comes to the compatibility of corporate due diligence obligations in the draft CSDDD and draft LBI, the two texts can be considered complementary, regardless of the identified divergences with regard to company and material scope and different approaches in terms of due diligence obligations. If both instruments were to be adopted in their current form, they would indeed complement each other, as the CSDDD can be considered an instrument implementing only certain aspects of the draft LBI.

With regard to the corporate civil liability regime, it may be concluded that the draft CSDDD does not contain sufficient rules to address the procedural and practical barriers that have prevented victims of business-related human rights violations and environmental harms from seeking justice thus far. Given that the majority of these aspects are within the competence of the EU member states, it seems unlikely that they will be included in the final CSDDD. To mitigate this disparity between the two draft instruments, the LBI, which contains more provisions on these procedural aspects, could serve to fill the gaps and play a complementary role for the EU member states by imposing specific obligations on state parties.

When it comes to the issues of redress for victims, it is important to understand that jurisdictional and applicable law relevant to such cases could be detrimental to the viability of related legal claims and therefore should be carefully tailored. Due to that, it is

Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, paras. 9, 15, 140, 186, 191.

particularly important that the draft LBI and the draft CSDDD include private international law provisions to enable alleged victims of business-related human rights abuse to gain access to justice.

The complementarity between the provisions of two draft instruments pertaining to jurisdictional and applicable law has not been achieved. In order to achieve complementarity with regard to jurisdictional law, it would be important for the process of amending the Recast Brussels I Regulation to take into account the provisions for determining jurisdiction in cross-border cases of the current draft LBI. By doing so, the LBI could complement the CSDDD on this point and contribute to the development of accountability for human rights violations. It appears from the analysis that the applicable law provisions of the two draft instruments also demonstrate an acute lack of complementarity. Therefore, if two instruments were adopted in their current forms, their provisions on applicable law would give rise to a conflict of laws in the context of civil proceedings relating to corporate due diligence obligations and, as such, would undermine legal certainty. It would therefore be of critical importance for the respective legislators to attempt their further alignment, taking advantage of the interlinkage of the two normative developments. Through the complementarity of two draft instruments, the coherence of the corporate civil liability regime along with due diligence obligations could be achieved worldwide, providing legal certainty for the rights holders with regard to cross-border claims for corporate liability and damages.

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COMPARATIVE ANALYSIS OF THE LEGAL STATUS OF MINISTRIES OF DEFENCE STAFF IN SELECTED EUROPEAN COUNTRIES[****]

The objective of the paper is to examine key aspects of human resources management of different categories of personnel in ministries of defence, i.e. civil servants, military officials and other staff categories in Serbia, Croatia and Slovenia. The paper analyses the legal rights and responsibilities of all categories of staff, with a special focus on the recruitment and selection process and remuneration and assesses whether they are in line with international standards. The findings of the analysis demonstrate important exceptions to the principle of merit and public competition rules in the defence sector in all three countries, which poses a serious risk for the application of the merit principle. In all analysed countries there are also separate remuneration legal regimes, which enables the employees in the defence sector to have higher levels of salaries in comparison to their colleagues in the civil service. Although the desire to increase the level of salaries may be understandable in order to increase the motivation of MoD's staff, this comes with the risk of undermining the unity of the civil service. In order to overcome these issues, it is important to ensure the observance of the merit principle with regard to recruitment and selection of the MoD's staff based on an open competition. Furthermore, it is recommended that a careful job benchmarking exercise be carried out which

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would compare the complexity and responsibility of jobs in the civil service and armed forces and align their salary levels in a fair and acceptable manner.

Keywords: legal status, human resources management, Ministry of Defence, Serbia, Croatia, Slovenia.

1. INTRODUCTION

Professionalism in the Ministry of Defence (hereinafter: MoD) is crucial for the capability of any country to prepare and implement its defence policy. Therefore, an arrangement of the legal status of staff in any state institution, including the MoD, should always be based on the need to achieve professionalism. One of the key pillars to achieving professionalism is to establish an effective human resources management (hereinafter: HRM) system which is based on merit (CIDS, 2015). 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).

HRM in the ministries of defence is more complex in comparison to the general civil service, as it includes both civil servants and military personnel. While the issues with regard to the legal status of civil servants 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; Vranješ & Đurić, 2018; Meyer-Sahling *et al.,* 2019; Meyer-Sahling *et al.,* 2021), the comparative literature on the legal aspect of HRM in the defence sector has been much scarcer and more modest (Sofat, 2016; Cardona, 2022). In South East Europe, issues of HRM in the defence sector are usually discussed at the national level (Šegvić, 2004; Kunić, 2008; Cvijan & Reljanović 2007; Ignjatijević, 2020; Đokić & Ignjatijević, 2020; Lembolovska, 2020; Barjamspahić, 2020) and more rarely from the comparative perspective (Milošević, 2013; Rabrenović, Hadžić & Misailović, 2022).

At the beginning of this discussion, it is also important to emphasize that international standards regarding HRM in the civil service are also applicable to military personnel. The most detailed international standards in the area of HRM are certainly those developed by SIGMA/OECD, who 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). The Principles are applicable not only to the civil service positions but also to other public service positions, which include those of the security and defence sector (SIGMA/OECD, 2017, p. 39). Key SIGMA/OECD principles in the area of HRM are the requirement that recruitment and selection of public servants is based on merit and equal treatment (including the public competition process) and the existence of a fair and transparent remuneration system.

The objective of the paper is to analyse key aspects of HRM of different categories of personnel in ministries of defence, such as general principles, rights and responsibilities, with a special emphasis on recruitment and selection and the right to remuneration in Serbia, Croatia and Slovenia. The analysis includes Serbia and two European Union

(hereinafter: EU) and the North Atlantic Treaty Organization (hereinafter: NATO) member states: Croatia and Slovenia. Croatia and Slovenia were chosen as they are both members of the EU and NATO, and because they, similarly to Serbia, constituted parts of former Yugoslavia and hence share similar traditions of state organisation and HRM.

The areas of recruitment, selection and remuneration were selected due to their importance for achieving a merit-based HRM system and the existence of potential exceptions to the general rules in these areas in the defence sector. Namely, recent research undertaken in some countries in the region has shown that there are exceptions to the general recruitment and selection rules in the defence sector (Rabrenović, Hadžić & Misailović, 2022). In addition, the remuneration aspect has been analysed due to a common complaint in ministries of defence in the Balkan region that civil servants and military officials have different levels of pay although they are doing the same type of job in ministries of defence. For this reason, there appears to be a tendency to assign special benefits to all employees in the ministries of defence, which, however, comes with the risk of undermining the unity of the public administration system as a whole. In order to overcome this issue, at the end of the analysis, some concluding remarks will be provided on how to improve the legal status of staff of ministries of defence and equality of officials with different status while securing the principle of merit and professionalism.

2. LEGAL STATUS OF MINISTRY OF DEFENCE STAFF IN SERBIA

2.1. Introduction

Key legal competencies and legal status of the staff of the Serbian MoD are regulated by several pieces of legislation. The competencies of the MoD are prescribed by the Law on Ministries[1], Law on Defence[2] and the Defence Strategy of the Republic of Serbia.[3] The legal status of the MoD staff is regulated by two key pieces of legislation - Civil Service Law[4] and the Law on the Serbian Armed Forces.[5]

The internal organisation of the MoD and the Serbian Armed Forces is governed by the Rulebook on Internal Organisation and Systematisation, which has been classified as "confidential". This, perhaps, should not be surprising as military organisation constitutes an integral part of this document. Nevertheless, it is not clear why the internal organisation and systematisation of the Serbian MoD have not been arranged as a separate, public document, as it is a practice in other neighbouring countries, such as for example, Slovenia, Croatia and Montenegro.

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1 *Official Gazette of the Republic of Serbia* nos. 128/2020, 116/2022.

2 *Official Gazette of the Republic of Serbia* nos. 116/2007, 88/2009, 88/2009,104/2009, 10/2015, 36/2018.

3 *Official Gazette of the Republic of Serbia* nos. 94/2019.

4 *Official Gazette of the Republic of Serbia*, nos. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020 and 142/2022.

5 *Official Gazette of the Republic of Serbia*, nos. 116/2007, 88/2009, 101/2010, 10/2015, 88/2015, 36/2018, 94/2019, 74/2021.

The key source of information on the legal status of staff in the MoD is an Information Booklet with information of public importance, which is published on the website of the MoD and regularly updated.[6] The Booklet contains details about different categories of staff in the MoD together with the average level of their salaries. In accordance with the information in the Booklet, we can classify the Serbian MoD staff into the following categories:

1) Civil servants;
2) Professional military personnel;
3) Military servants, as civilian staff of the Army of Serbia;[7] and
4) Military employees, as civilian staff of the Army of Serbia.

2.2. Civil Servants

The legal status of civil servants is governed by the Civil Service Law, which defines the concept of a civil servant on the basis of the tasks performed. Hence, according to the Law, a civil servant is a person who carries out jobs which are within the competence of the civil service bodies and other state bodies[8] or related general legal, IT, material-financial, accounting and administrative tasks.[9]

The Civil Service Law also regulates the principles of action of civil servants, their rights and responsibilities, types of civil servants' jobs (the difference is made between *position* and *executive jobs*), conditions and method of employment (including internal and public competition), evaluation of work performance and advancement of civil servants, transfer of civil officers, professional development and training, disciplinary responsibility and responsibility for damage, as well as termination of employment.

Although the Civil Service Law prescribes that recruitment and selection should be carried out on the basis of the principle of merit, which is to be secured by mandatory public competition, there is an exception of public competition for fixed-term employment (*zaposleni na određeno vreme*) in case of temporary workload increases. The amendments of the Civil Service Law adopted in 2018 abolished this exception, envisaging that open competitions are also mandatory for fixed-term employment. However, entering into force of the provisions on open competitions in this case was postponed to 2023 through amendments to the Civil Service Law adopted in 2020.[10] In its

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[6] Information Booklet of the Ministry of Defence of Serbia, updated on the 1st of June, 2023. Ministry of Defence of the Republic of Serbia.

[7] Their status is regulated by the Law on the Armed Forces, *Official Gazette of the Republic of Serbia* nos. 116/2007, 88/2009, 101/2010, 10/2015, 88/2015, 36/2018, 94/2019, 74/2021.

[8] Courts, public prosecutor's offices, the State Attorney's Office, the services of the National Assembly, the President of the Republic, the Government, the Constitutional Court and the services of bodies whose members are elected by the National Assembly.

[9] Law also explicitly states that civil servants are not parliamentarians, the President of the Republic, judges of the Constitutional Court, members of the Government, judges, public prosecutors, deputy public prosecutors and other persons elected to office by the National Assembly or appointed by the Government and persons who, according to special regulations, have the position of officials.

[10] Amendments to the Civil Service Law, *Official Gazette of the Republic of Serbia* no. 157/2020.

latest monitoring report, SIGMA/OECD notes that the percentage of total fixed-term employment, where recruitments have been carried out without competition, is significant, amounting to 11.7% of total civil service employment at the end of 2020[11] (SIGMA, 2021), which shows the seriousness of this problem in the Serbian civil service.

Remuneration system of civil servants is governed by law and based on job classification, regulated by the Law on Civil Service Salaries adopted in 2006.[12] The principle of equal pay for equal work, which assumes the existence of job evaluation methodology, has been established by the legal framework. The job evaluation methodology is governed by the Decree on Job Classification and Criteria for Job Descriptions of Civil Servants, which was adopted in 2005 and amended in early 2019 to allow for the introduction of competencies in the job descriptions[13] and is in line with the intranational standards.

2.3. Professional Military personnel

The legal status of professional military personnel is regulated by the Law on Armed Forces and their recruitment and selection is based upon completion of specific military education or training. In compliance with the Law on Armed Forces professional military personnel are professional members of the Serbian Armed Forces and they are ranked as follows: officer, non-commissioned officer and professional soldier. Their recruitment is based upon completion of high school education and training (for non-commissioned officers) or military university education (in case of commissioned officers).[14]

Salaries of military personnel are based on the rank in the army which rests upon a career system. As the details of the regulation of civilian and military staff are left to the Minister of Defense in the form of tertiary legislation (Rulebook), they are not publicly accessible and available, while the data on the total (summary) amount of salaries and other income of managers and employees at MoD is available in the Information Booklet.[15]

2.4. Military Servants and Military Employees

Civilians serving in the Serbian Army may have the status of a military servant or a military employee. The Law on Armed Forces makes a distinction between these two categories on the basis of the performed tasks. Hence, a military servant is a person whose workplace consists of tasks within the jurisdiction of the Serbian Armed Forces or general legal, IT, material-financial, accounting and administrative tasks related to them, while a military employee is a person whose job consists of supporting technical tasks in the Serbian Armed Forces.[16]

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[11] 2 160 fixed-term employees out of a total of 18 442 employees.

[12] *Official Gazette of the Republic of Serbia* nos. 62/2006, 63/2006, 115/2006, 101/2007, 99/2010, 108/2013, 99/2014 and 95/2018.

[13] *Official Gazette of the Republic of Serbia* nos. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017, 16/2018, 2/2019 and 4/2019.

[14] Article 40 of the Law on Armed Forces.

[15] Article 95 of the Law on the Armed Forces.

[16] Article 10 of the Law on the Armed Forces.

There are, however, important exceptions to the open competition rule when it comes to civilians (military servants and employees) in the Serbian armed forces. The Law on Armed Forces explicitly allows that civilians serving in the Serbian Armed Forces may be admitted to service without public competition, by a transfer from another state body, public institution or other public service institution and a candidate is a scholarship holder,[17] which is not in line with international standards.

As civilians serving in the Army are employed in the MoD and not only in the Armed Forces,[18] it may be argued that the MoDe can, without any legitimate obstacle, hire any person who already works anywhere in the area in the public sector without a competitive procedure. In addition, the MoD keeps a record of persons interested in employment in the MoD and the Serbian Armed Forces for the purpose of recruiting civilians to serve in the Serbian Armed Forces without public competition.[19] However, as there is no competition procedure, there is significant room for discretion in deciding on who will be admitted in the defence system.

The salaries of civilians in the military are regulated in a similar manner as the salaries of professional military personnel.[20] They are governed by secondary and tertiary legislation and amounts of average basic salaries available in the Information Booklet.[21]

2.5. Additional rights of the Serbian MoD personnel determined by the Law on Defence

The Law on Defence grants additional rights to all employees of the MoD,[22] equally applicable to civil servants, military personnel and civilians in the army service. This piece of legislation is a very convenient tool to regulate issues for all MoD staff in the same manner.

Additional rights of the MoD staff (and armed forces) are related to the issue of remuneration and housing needs. Namely, the Law on Defence entitles a minister of defence to increase the level of salaries of employees and senior managerial positions of the MoD due to the special working conditions and to difficulty and nature of the tasks they carry out. The Government, on the proposal of the Minister of Defence, can increase the level salaries of the MoD staff by a special act by up to 20%.[23] A Minister of Defence is also authorised to prescribe the method and criteria for solving the housing needs of employees in the MoD and the Serbian Armed Forces with the approval of the Government.[24]

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17 Article 120 of the Law on the Armed Forces.

18 Article 120a, para. 2 of the Law on the Armed Forces.

19 Article 120a, para. 1 of the Law on the Armed Forces.

20 Article 127 of the Law on the Armed Forces.

21 Article 95 of the Law on the Armed Forces.

22 *Official Gazette of the Republic of Serbia* nos. 116/2007, 88/2009, 88/2009,104/2009, 10/2015, 36/2018.

23 Article 111, Law on Defence.

24 Article 111a, Law on Defence.

3. LEGAL STATUS OF THE MINISTRY OF DEFENCE STAFF IN SLOVENIA

3.1. Background

Principles of internal organisation of the MoD of Slovenia and other civil service institutions and judicial bodies are regulated by a single Act on Internal Organisation and Systematisation.[25] This Act is a public document.

The status of all public sector employees, including the personnel of the MoD, is governed by the Law on Public Servants (the first part of the Law on Public Servants), which establishes key principles of public employment common to all public officials. These are: the principle of equal access to employment; the principle of legality; the principle of professionalism; the principle of honourable conduct; the principle of confidentiality; the principle of protection of professional interest; the principle for responsibility for efficient execution of public tasks; the principle of good financial management and prohibition of harassment.

The Law on Public Servants also governs the legal status of civil servants, who are recognised as a special category of public servants who work in state bodies and local self-government bodies. Within this category, the Act recognizes two groups: 1) civil servants (*uradnici*) who perform administrative tasks,[26] and 2) professional-technical civil servants (*strokovno-tehnični uslužbenci*), who perform accompanying personnel and material-financial tasks.[27] This Act also regulates the relationship between civil servants and the Republic of Slovenia as an employer, equal access to all candidates in employment, conditions for professional training, protection of secret data, responsibility for work results, responsibility for the use of public funds, as well as protection of civil servants from harassment.

Salaries of all public sector employees are governed by the Law on the Salary System in the Public Sector,[28] which is a systemic law which regulates salaries of all public sector employees. The Law on the Salary System of Employees in the Public Sector includes all jobs of employees in the state administration and military personnel in category C. Employees of state administration (and judicial administration and local authorities) are categorised in subcategory C2, while military personnel are classified within subcategory C4.

The salary classes for civil servants (C2) are determined by the collective agreement for the sector, while the salaries of group C4, which refers to military personnel, are regulated

[25] Regulation on internal organization, systematization, jobs and titles in public administration bodies and judicial bodies, *Official Gazette of the Republic of Slovenia* no. 58/2003, 81/2003, 109/2003, 43/2004, 58/2004 - cor. 138/2004, 35/2005, 60/2005, 72/2005, 112/2005, 49/2006, 140/2006, 9/2007, 33/2008, 66/2008, 88/2008, 8/2009, 63 /2009, 73/2009, 11/2010, 42/2010, 82/2010, 17/2011, 14/2012, 17/2012, 23/2012, 98/2012, 16/2013, 18/2013, 36/2013 , 51/2013, 59/2013, 14/2014, 28/2014, 43/2014, 76/2014, 91/2014, 36/2015, 57/2015, 4/2016, 44/2016, 58/2016, 84/2016, 8/2017, 40/2017, 41/2017, 11/2019, 25/2019, 54/2019, 67/2019, 89/2020, 104/2020, 118/2020, 168/2020, 31/2021 , 54/2021, 203/2021, 29/2022, 80/2022, 103/2022 and 125/2022.

[26] Article 23, paras. 1 and 2 of the Law on Public Servants of Slovenia, *Official Gazette of the Republic of Slovenia*, nos. 56/02, 32/05 and 63/07.

[27] Article 23, para. 3 of the Law on Public Servants of Slovenia.

[28] *Official Gazette of the Republic of Slovenia* nos. 108/09 – updated. version, 13/10, 59/10, 85/10, 107/10, 35/11– ORZSPJS49a, 27/12 – odl. US, 40/12 – ZUJF, 46/13, 25/14 – ZFU, 50/14, 95/14 – ZUPPJS15, 82/15, 23/17– ZDOdv, 67/17, 84/18 and 204/21.

by a decree.[29] The salary levels of military personnel are regulated by the Decree on the classification of formation duties and ranks in the Slovenian army in the paid classes.[30]

In spite of well-regulated general framework on the legal status of public and civil servants, all personnel in the MoD have a special status.

3.2. Employees in the Area of Defence

In accordance with the Law on Defence, an employee in the area of defence is a military official, a civilian person who works professionally in the army or another person who professionally performs administrative and professional technical tasks in the MoD.[31] This means that all MoD staff have the status of employees in the area of defence.

The Law on Defence determines that all areas which are not regulated by this law are going to be governed by regulations applicable to public servants.[32] This means that employees of the MoD have the status of a public servant in all aspects which are not covered by the Law on Defence itself. However, it is not clear whether civil service regulations are applicable to them or not.

The jobs in the area of defence are subject to important exceptions from the general public service principles, such as the principle of equal access to public employment positions by a public competition. Thus, for example, the Law on Defence stipulates that an employment relationship in the field of defence may be concluded without public competition for the following positions:

- officials or professional technical workers who perform operational tasks of civil defence, administrative unions, informatics and telecommunications, crypto-protection and anti-electronic protection, technical protection, military, development, intelligence and counter-intelligence as well as security tasks;
- commanders of military territorial commands and their deputies, battalion commanders and other, equal or higher positions;
- ` military personnel performing operational duties in the army;
- inspectors in the defence field, who must meet the conditions set by the general regulations and the special conditions set by this law.[33]

These provisions are against the principles set out in the Law on Public Servants and are not in line with international standards and best practices.

The Law on Defence also allows the Government to increase the level of basic salaries for the defence employees, in relation to the provisions that govern conflict of interest. Namely, the Law allows that an employee in the area of defence may, in addition to his work, perform work in commercial companies or perform the same or similar work

[29] Article 13 of the Law on the Salary System in the Public Sector.

[30] Decree on the classification of formation duties and titles in the Slovenian Army into salary classes, *Official Gazette of the Republic of Slovenia* nos. 71/08, 78/08, 85/10, 46/17, 86/18 and 6/22.

[31] Article 14a of the Law on Defence.

[32] Article 88 of the Law on Defence.

[33] Article 89 of the Law on Defence.

as he performs at his workplace, at another body or organization only with the written consent of the Minister.[34] It is interesting to note that this article provides a basis for the Government to increase the basic salary for employees in the area of defence. Namely, the Law provides that „in order to evaluate the special prohibitions and restrictions from this article, the Government shall determine the percentage increase of the basic salary for employees in the area of defence in accordance with general regulations".[35]

The provision of a special legal status for all employees in the MoD in Slovenia is not in line with practices in other analysed countries and opens up a number of questions regarding their legal status. It is not clear which provisions are applicable to these personnel in certain HRM areas, such as for example, the level of their remuneration, as they do not have the status of a civil servant or any other category determined by the Law on the System of Salaries in the Public Sector. Further research in this regard would require additional analysis and interviews with the Slovenian officials in the MoD.

4. LEGAL STATUS OF STAFF OF THE MINISTRY OF DEFENCE IN CROATIA

4.1. Background

The MoD of the Republic of Croatia is responsible for defence affairs in the Republic of Croatia. The Ministry is established on the basis of the Decree on Internal organisation of the MoD.[36]

The Decree on the internal organisation of the MoD is a public document and regulates the internal organization of the MoD, the names of administrative organizations and other internal organizational units within the MoD, their scope, the way these units are managed, the way work is planned, working hours, the approximate number of civil servants, employees and active military personnel, as well as other issues of special significance for the work of the MoD. The Decree also determines that tasks within the scope of the MoD are performed by civil servants and employees and active military personnel assigned to workplaces in accordance with the regulations, depending on the type, complexity, level of education and other conditions. This act also provides for the approximate number of civil servants, employees and military personnel required to perform tasks within the scope of the MoD.

Hence, the legal status of personnel in the Croatian MoD includes four categories of personnel:

a) civil servants;
b) employees;
c) military officials; and
d) civil servants and employees in the armed forces.

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[34] Article 91, paras. 1 and 2 of the Law on Defence. It is not necessary to obtain the written consent of the Minister for workers to carry out scientific, pedagogical or journalistic work, or for workers to carry out non-professional work in cultural, artistic, sports, humanitarian and other societies and organizations.

[35] Article 91, para. 4 of the Law on Defence.

[36] *Official Gazette of the Republic of Croatia* no. 97/2020 (original title "Uredba o unutarnjem ustrojstvu Ministarstva obrane").

4.2. Civil servants and employees

Civil servants are persons who, in the MoD and other state bodies, as a regular occupation perform tasks within the scope of the MoD which are determined by the Constitution, primary legislation or other regulations. The scope of the civil service also includes persons who perform IT tasks, general and administrative tasks, planning, material-financial and accounting tasks and similar tasks.[37]

The legal position of civil servants is regulated in detail by the Civil Service Law (*Zakon o državnim službenicima*), which determines key rights and duties of civil servants and different aspects of HRM in the civil service. The Law provides unique rules that regulate admission to the civil service based on competition; classification of positions of civil servants; establishes the right professional development of civil servants; promotion in the service on the basis of merit as well as other matters of importance for the realization of rights and obligations of civil servants. It also determines the key civil service principles such as: the principle of legality and legal certainty; the principle of prohibition of discrimination; the principle of hierarchic subordination; and the principle for responsibility for results.[38] In matters which are not regulated by the Civil Service Law general labour regulations and collective agreements are applicable.

Salaries of civil servants are determined by an obsolete provision of the Civil Service Law (Articles 108-112)[39] and a Government Decree[40] which determines the value of a job by a coefficient for each single post in the civil service. A coefficient is multiplied by a coefficient value which is determined by the Government.

Employees are persons who work on auxiliary technical tasks and other tasks, the performance of which is necessary for the timely and high-quality performance of tasks within the scope of government bodies.[41] Their rights and responsibilities are governed by the section XIV of the Civil Service law. In this section, it has been envisaged that the rules on most HRM functions of civil servants (recruitment and selection; performance appraisal; disciplinary responsibility) are also applicable to employees, with some exceptions.

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[37] Article 3, para. 2 of the Civil Service Law (Zakon o državnim službenicima), *Official Gazette of the Republic of Croatia* no. 92/05, 140/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 1/15, 138/15, 61/17, 70/19 and 98/19.

[38] Articles 5-8 of the Civil Service Law.

[39] *Official Gazette of the Republic of Croatia* no. 27/01.

[40] Decree on Names of Job Posts and Coefficients for Complexity of Work in the Civil Service, *Official Gazette of the Republic of Croatia* nos. 37/01, 38/01 – ispravak, 71/01, 89/01, 112/01, 7/02 – ispravak, 17/03, 197/03, 21/04, 25/04. – ispravak, 66/05, 131/05, 11/07, 47/07, 109/07, 58/08, 32/09, 140/09, 21/10, 38/10, 77/10, 113/10, 22/11, 142/11, 31/12, 49/12, 60/12, 78/12, 82/12, 100/12, 124/12, 140/12, 16/13, 25/13, 52/13, 96/13, 126/13, 2/14, 94/14, 140/14, 151/14, 76/15, 100/15, 71/18, 73/19 and 63/21.

[41] Article 3, para. 4 of the Civil Service Law.

4.3. Military officials and civil servants and employees in the armed forces

The legal status of military officials is governed by the Law on Armed Forces.[42] The Law on Service in the Armed Forces of the Republic of Croatia regulates service in the armed forces, recruitment, assignment, ranks, promotion to ranks, rights, obligations and responsibilities as well as termination of service of members of the armed forces. Members of the armed forces are military personnel, civil servants and employees of the armed forces.

The Law on Armed Forces makes a distinction between the categories of civil servants and employees in the armed forces. A civil servant in the armed forces is a person who performs tasks within the scope of the armed forces, which include the performance of scientific activities and higher education, as well as IT tasks, general and administrative, planning, material financial, accounting and similar tasks.[43] An employee is a person who works in the armed forces in auxiliary technical and other tasks, the performance of which is necessary for the timely and quality performance of the Armed Forces.

Although public competition is recognised as one of the key instruments in filling the vacancies of both military personnel, civil servants and employees in the armed forces, there are important exceptions to this rule. Namely, Article 27 of the Law on Armed Forces envisages that for tasks which are of special importance for defence, a Minister of Defence can exceptionally admit a person in the status of a military personnel, servant or civilian in the armed forces.[44] This is not in line with international standards and best practices and provides a wide discretion of a Minister of Defence in selecting personnel for the MoD and armed forces.

4.4. Additional rights and responsibilities of MoD personnel in Croatia determined by the Law on Defence

Similarly to the Serbian and Slovenian cases, an additional legal act that regulates the status of civil servants and personnel of the armed forces is the Law on Defence.[45] This Law gives the right to the Minister of Defence to specifically regulate several areas for employees of the MoD: salary supplements for civil servants and employees, as well as salary supplements for civil servants and employees in the armed forces and severance pay in case of termination of employment. In addition, the Law provides the Government of Croatia the authority to regulate the criteria for sending personnel of the MoD to work in an international organization or national representative office, or in EU structures, as well as to regulate their salaries.

On the basis of the Law on Defence, the Minister of Defence of the Republic of Croatia issued a Decision on Basic Salary Supplements in the MoD and the Armed Forces of the Republic of Croatia in 2018.[46] The Decision establishes that civil servants and employees

[42] *Official Gazette of the Republic of Croatia* nos. 73/13, 75/15, 50/16, 30/18 and 125/19.

[43] Article 6 of the Law on the Armed Forces.

[44] Article 27, para. 2 of the Law on Armed Forces.

[45] Law on Defence, *Official Gazette of the Republic of Croatia* no. 73/13, 75/15, 27/16, 110/17, 30/18, 70/19.

[46] Decision on Basic Salary Supplements in the Ministry of Defence and the Armed Forces of the Republic of Croatia, *Official Gazette of the Republic of Croatia* nos. 92/18 of 17/10/2018.

assigned to the MoD due to special working conditions, nature of work and responsibilities, are entitled to a supplement in the amount of 10% to the basic salary. For civil servants and employees assigned to positions in the Armed Forces of the Republic of Croatia due to special working conditions, difficulty and nature of work and responsibilities, the basic salary is also increased by 10%. Financial resources for the implementation of this Decision are provided in the state budget of the Republic of Croatia at the MoD.

In addition to this regulation, the Minister of Defence also issued a special Decision on the amount of severance pay for civil servants and employees of the MoD and the Armed Forces, and the Government of the Republic of Croatia issued a Regulation on the salary standards and other material rights of diplomatic personnel of the MoD, military diplomats and persons assigned work in international organizations.

5. CONCLUSION

This comparative analysis has shown that the legal status of the staff working in the ministries of defence may have some specificities depending on the country in question. In most analysed countries ministries of defence staff are mainly civilians, who have a status of civil servants in accordance with the legislation that governs the legal position of civil servants or employees (who carry out auxiliary and assisting functions). In addition, it is a usual practice that ministries of defence employ military personnel, whose rights and responsibilities are governed by legislation that regulates the status of the members of armed forces.

Although there is a general rule that staff enters the MoD on the basis of public competition, all three analysed countries have important exceptions in this matter, which are not in line with international standards. In Serbia, the exceptions are related to temporary employment arrangements of civil servants (usually up to 6 months), which are carried out without a competition procedure. Furthermore, civilian personnel in the Serbian armed forces can be admitted from other public institutions without a competitive procedure and later transferred to the MoD. Slovenia has provided a special status to all of its personnel in the MoD and excluded them from general civil service/armed forces legislation with regard to open competition for several important positions/jobs in the MoD and armed forces. Croatian legislation also explicitly allows exceptions to public competition for both military and civilian personnel in the army, who can be later appointed to a position in the MoD. These provisions are not in line with the principle of merit and provide a risk for discretion and arbitrariness in entering the defence system in all three countries.

In all three analysed countries, a law which regulates issues of defence policy (e.g. Law on Defence) has been used to increase the level of salaries of all staff in the MoD and Armed Forces and provide them with some additional benefits (e.g. higher levels of severance pay, special housing arrangements etc). Although the desire to increase the level of salaries may be understandable in order to increase the motivation of MoD's staff, it may also have a negative consequence for the unity of the civil service remuneration system and may bring about inequalities in the status of civil servants and military officials in general.

In order to overcome the often-cited problem of large differences in pay levels between civil servants and military personnel who carry out the same jobs in ministries of defence in the countries of former Yugoslavia, it is recommended to carry out a careful job benchmarking exercise which would compare the complexity and responsibility of jobs in the civil service and armed forces and align their salary levels in a fair and acceptable manner. In the mid to long term, it would be also recommended to consider providing more flexibility in HRM in individual civil service institutions (such as for example the case in Germany and France), which would satisfy the need for more independence in managing human and financial resources in individual ministries, but with ensuring that these procedures and practices are based on merit.

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APPLYING THE PRINCIPLES OF GOOD GOVERNANCE TO THE REGULATION OF PUBLIC PROCUREMENT WITH SPECIAL REFERENCE TO CROATIA

Considering the complexity of the tasks performed by public administration, the administrative doctrines represent a very dynamic area of contemporary development of public administration. What distinguishes administrative doctrines from each other are the values implemented in each doctrine depending on the economic, political, social, and other circumstances, and these circumstances impose certain values as priorities. From the doctrine of new public administration, which emphasized political and social values as a strategic goal, an important turning point was reached with the introduction of the new public management, which aims to modernize the public sector by introducing the market and competition to involve the private sector in the provision of services. The doctrine of good governance represents a variation of the approach mentioned above. The European Commission insists on the implementation of the principles of good governance in the Member States, emphasizing the need for governance based on sustainable development and inclusion of social and environmental components in many areas of activity.

The authors attempt to answer the question of whether and in what way the principles of good governance are applied to public procurement procedures in Croatia, focusing on social and environmental objectives. Public procurement procedures are an essential part of the state's economic activity, so in this way, the state can influence market conditions and achieve sustainable (secondary) goals that go beyond the search for the most economically advantageous offer. In the research, the authors hypothesise that public tenders in Croatia do not usually include secondary selection criteria. The aim of the work is to determine whether the national normative framework for public procurement is suitable

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for sustainable goals and to offer a solution for its improvement. The research is conducted using the comparative method and the method of legal analysis.

Keywords: good governance, public procurement, social criteria, environmental criteria, public participation.

1. INTRODUCTION

In today's circumstances, public administration and public governance play a key role in servicing social needs and efficiently providing services of general (economic) interest. The governments of the world, including the Croatian one (Program Vlade za mandatno razdoblje 2011 – 2015; Nacionalni plan razvoja javne uprave za razdoblje 2022 - 2027), keep emphasizing their strategy to create a new public administration that effectively and efficiently responds to the needs of citizens. The challenge that may arise in this regard is the continuous progress of society, or rather, the changing values that individuals expect the state to satisfy in accordance with the dominant social conditions at any given moment. Therefore, the public administration must adapt to a dynamic and evolving socio-economic environment in order to efficiently perform its functions.

One of the instruments very often used by public entities to ensure the provision of services for which they are responsible is public procurement. Public procurement refers to the economic activity of any state or state-owned enterprise, which is a special procedure for the purchase of goods, works and services, with the main objective of achieving a specific public interest. A large part of the state budget is used for public procurement, which represents a significant part of state expenditures, but also of the general economic activity in each state. Public procurement thus becomes a means by which the state, as the bearer of considerable power, can influence market conditions and achieve important goals that go beyond finding the most economically advantageous offer among potential bidders.

Recently, the role of public procurement in achieving broader, sustainable goals has been highlighted. In addition to economic criteria, social and environmental criteria are increasingly being considered in public procurement. It is the influence of the current doctrine of good governance, which is based on democratic, legal, political, economic and sustainable values. At the same time, at the international and European level of governance, sustainability principles are clearly emphasized, but the question is whether Croatia is also following these trends.

Therefore, the first part of the paper shows which administrative doctrines have an impact on the organization and functioning of public administration, with a particular focus on the change of the institute of public procurement. The second part of the paper analyzes the role of public procurement in realizing the principles of good governance, which appear as a superstructure of the economic principles required by the doctrine of new public management. Finally, the impact of good governance on the regulation of sustainable public procurement in Croatia is analyzed and suggestions for its improvement are presented.

2. IMPORTANCE OF ADMINISTRATIVE DOCTRINES FOR THE DEVELOPMENT OF PUBLIC ADMINISTRATION (AND THE PUBLIC SECTOR)

The development of public administration is marked by constant turbulence, so Hegel and Marx point out that new developments that contradict stable existing structures lead to turbulent transitions towards more developed societies (Ansell, Sørensen & Torfing, 2023, p. 3). Changes in the administrative system are not accidental, but are rooted in ideological assumptions that evolve depending on the historical period. Each significant historical era carries embedded values, but also specific needs that have influenced the response of public administration during that time (Autioniemi, 2021, p. 44). It is necessary that a situation characterized by turbulence, where events and demands interact and change in an extremely discordant and unpredictable manner, receives an appropriate response from public administration and public governance. Here, it is important to emphasize that the dynamic environment of the public sector cannot be categorized as turbulence but should be considered as a change in the surroundings that was not anticipated in the regular course of development (Boyne & Meier, 2009, p. 803). One particular characteristic that distinguishes the response of administrative organizations to turbulent times is that they react with innovative approaches in ways to which they would not typically respond, leading to the adoption of sometimes contradictory strategies compared to existing ones (Ansell & Trondal, 2018, pp. 46-47). Such contradictory strategies, however, may represent a kind of progress of society in the sense mentioned above.

The answer to unexpected changes that occur in practice is found in administrative doctrines. Administrative doctrine is defined as a system of ideas about desirable courses of action and guidelines for good practices of organizing and managing, which are based on desirable values and systematized experience in governance (Koprić *et al.*, 2021, p. 11). The catalyst for the development and establishment of a particular administrative doctrine lies in the significant economic, political, and social circumstances of a specific place and time, which necessitate standardization in terms of actions that align with the values of the doctrine in question, all to reduce the preceding uncertainty. Such action inevitably leads to societal progress by regulating the newly emerging circumstances. Administrative reforms are often multidimensional and sometimes create contradictory principles that coexist within a particular administrative doctrine (Aristovnik, Murko & Ravšelj, 2022, p. 1). The principle that will take priority or be emphasized depends on the given circumstances and the specific nature of the subject of governance. According to chronological development, certain values from earlier can persist when new trends become relevant because they are still considered fundamental principles that should always be upheld regardless of the current changing circumstances.

The evolution of contemporary public administration can be traced through various administrative doctrines: Cameralism, New Public Administration, New Public Management, Good Governance, and the Neo-Weberian State. However, in the context of public procurement, the authors will pay the most attention to the doctrine of New Public Management and Good Governance.

2.1. Administrative Doctrines and Their Impact on the Institute of Public procurement

The situation that preceded the emergence of the doctrine of new public management was the oil crisis, which began in the 1970s with the first oil shock, leading to a tenfold increase in prices, resulting in serious budget deficits in most countries. In the 1980s, the public sector was forced to reduce costs while increasing efficiency (Perko-Šeparović, 2006, p. 75). The answer to the newly emerging situation was found in the principles of the private sector. New Public Management, as an administrative doctrine, aims at radical reform of public governance and the state in general by introducing the values of the private sector into the public sector, while simultaneously criticizing existing processes and organizational structures in the public sector with the goal of seeking drastic changes (Đulabić, Džinić & Toman, 2023, p. 35). Neoliberal ideas, rooted in the teachings of Adam Smith and his concept of the invisible hand, have had a significant influence in shaping this perception. According to Smith, the invisible hand seeks to establish a market free from government interventions, with the belief that the role of the state should be minimal.

In this respect, public administration should be brought as close as possible to the private sector, assuming that certain parts of the public sector would be more efficient if managed by private entities. This opens up the possibility for private entities to provide public services, with a distinction between the creation of public policies, which remains the responsibility of government entities, and the implementation of public policies in which private entities operating in the market can be involved. The emphasis is placed on result measurement in order to address current societal issues, which leads to the creation of competitive relationships among potential providers of public services. Elements of the market and competition are being introduced into public administration, fostering competition among stakeholders (Hinšt, 2021, pp. 171-177). Public policies are formulated in a way that seeks greater participation of stakeholders and reduces reliance on institutionalized coercion by the state. This opens up space for civil society and market mechanisms to operate, with the state playing a smaller role as a service provider or a supplier of goods for which there is a need.

The introduction of market elements into the public sector also opens up the possibility of private sector outsourcing (contracting out) of the provision of public functions, providing public goods or services through procurement contracts or vouchers that offer users of public services a choice among private providers (Poutvaara & Jordahl, 2020, p. 2). Due to the oil crisis and the emerging difficulties in sourcing raw materials and meeting the needs of the growing costs of materials, public procurement becomes a widely recognized procedure. Public procurement mechanisms are implemented in various forms of cooperation with the private sector, which have been established on the basis of New Public Management doctrine. Thus, the Concessions Act and the Public-Private Partnerships Act in the Croatian national legal framework refer to the application of regulations governing public procurement. Today, market competition among bidders for the purpose of entering into public procurement contracts remains one of the

main ways to achieve the ultimate goal of public procurement policy, which is to achieve the best value-for-money ratio among received offers in terms of price and quality.

However, despite the relative increase in efficiency and productivity, such a radical shift towards the market in the field of public administration has led to a paradox. While advocating for minimal state intervention, there has been a need for increased regulation to prevent the emergence of monopolistic positions in the market and to ensure competition among competitors. The perception of citizens solely as individual buyers or clients does not prioritize their needs effectively. This customer-centric view will always give preference to the wealthier segment of the population with significant financial resources, while disadvantaging the poorer part of society as they cannot respond in the same manner, thus placing them in a less favourable position (Perko Šeparović, 2006, pp. 125-126).

It is interesting to note that during the aforementioned period, there was no social awareness in the field of public procurement, which only began to gain relevance in the late 1990s and early 2000s with the development of the administrative doctrine of good governance (Barraket, Keast & Furneaux, 2016, p. 5). Thus, it can be confirmed that the development of public procurement is influenced by administrative doctrines that are relevant at a particular time and place, which means that public procurement has a strategic role in the development and promotion of the values upon which (current) public administration is based.

On the other hand, the concept of good governance retains economic values in the public sector, but at the same time seeks to reintroduce certain values into the public sector, such as citizen participation, legitimacy, and responsiveness (Đulabić, Džinić & Manojlović Toman, 2023, p. 37). The public administration strives to create a secure environment for the active participation of civil society and the private sector in administrative procedures. As previously noted, it is recognized that certain principles should maintain continuous value in the development of public administration. Therefore, the following doctrines will retain the values of the previous ones while modifying them, which has proven to be applicable in the case of the doctrine of good governance.

The administration that has evolved through good governance tends to prioritize transparency as one of its key features that allows democratic governance through active citizen participation in decision-making. This shift moves away from viewing individuals solely as customers to seeing them as subjects in decision-making processes. Management elements that can be recognized include the application of cost-benefit analysis, rationality, cost-effectiveness, contracting out certain public services to private entities, and the introduction of competition. A significant part of the principles of the New Public Management has endured due to turbulent social, political and economic relations in the world (Lozina & Klarić, 2003, pp. 155-157). Emphasis is also placed on accountability as a fundamental feature of good governance, which implies a system of mutual control between the executive and legislative branches and plays a crucial role in combating the exclusion of minority rights (Fourie, 2016, p. 36). There is also a need for the digitalization of services to achieve the fundamental principles advocated for.

After reviewing the relevant literature, we can conclude that there is neither a unified and internationally accepted definition of the doctrine of good governance, nor a closed list of principles proclaiming it, but that under the said doctrine we can subsume the principles and values necessary to achieve the goals of the development of society (e.g., rule of law, sustainability, respect for human rights, etc.). Despite the absence of such a definition, some key values are regularly raised in attempts to define good governance, namely transparency, participation, accountability, efficiency, effectiveness, sustainability, ethics, justice, and adaptability (Phillips, Cardwell & Callender, 2007, p. 2; Dobrić, 2016). In conclusion, it can be inferred that the positive impact of the doctrine of good governance would result in the alignment of political decisions made and their practical implementation (Wagner, 2012, p. 175).

The analysis of recent international and European legal documents shows the relevance of the principles of good governance in the regulation of public procurement, i.e. the increasing emphasis on social and environmental values that should be included in public tenders, which will be presented in the next chapter. The authors will highlight the importance and role of public procurement in achieving broader, sustainable community goals.

3. IMPLEMENTATION OF GOOD GOVERNANCE IN THE CONTEXT OF PUBLIC PROCUREMENT

On one hand, the state acts in public procurement as the creator of the regulatory framework by which the process will be conducted, but also as a market participant aiming to achieve the best value for its money in the procurement subject. Through this instrument, the state ensures the provision of public services, and there arises a need to procure goods, works, and services from private sector entities specialized in particular procurement subjects. The involvement of external stakeholders is required as the state does not possess sufficient production capacities and human resources to exclusively and independently carry out the procurement subject.

Classifying it as a state activity, public procurement is an institution that requires subordination to the principles of good governance in order to spend budgetary funds acquired from citizens for the purpose of conducting activities beneficial to the public.[1] If monetary resources are spent in an appropriate manner, it is considered that the principles of good governance have been achieved in this sense (Shakya, 2015, p. 1). Additionally, it is important to note that in procurement, public bodies must act in the public interest (Turudić, 2017, p. 1). As good governance proclaims principles of transparency and accountability, it was significant to involve as many stakeholders as possible in decision-making processes within public administration and to adhere to these principles

[1] Each year, more than 250,000 public entities in the European Union spend about 14% of GDP (about 2 billion euros per year) on the purchase of services, works, and goods (data from the European Commission website, available at: https://single-market -economy.ec.europa.eu/single-market/public-procurement_en). Previous analyzes of national public procurement consumption included public procurement in utilities, so the data amounted to 19% of European Union GDP. In addition, governments around the world spend an estimated $9.5 trillion on public procurement each year, equivalent to about 15-22% of GDP in many developing countries. Available at: https://www.worldbank.org/en/topic/procurement-for-development.

in their work. This approach followed the same principles when it came to officials involved in public procurement processes, as well as media, civil society actors, and so forth (Phillips, Cardwell & Callender, 2007, p. 3).

Characteristics of good governance are typically attributed to public bodies or persons to whom public powers have been delegated and who act as public or sectoral contracting authorities in public procurement procedures.[2] In Croatia, the Public Procurement Act makes a distinction between the terms "contracting authority" and "contracting entity" in several segments, such as in the value thresholds of procurement subjects used for differentiation. One of the reasons for this distinction is the level of complexity and significant investments, as well as the technical complexity of the procurement subjects for sectoral buyers. However, it is essential to note that sectoral buyers are still public buyers specialized in performing specific sectoral activities and entrusted with the same activities.

Considering that public procurement is a government activity with a scope of spent financial resources that is anything but negligible, and which directly involves cooperation with the private sector to fulfil higher public interests of citizens, the importance of public procurement has been recognized for achieving solutions that go beyond simply selecting the lowest price offer for the individual purchase of a specific item. In addition to the efficient spending of budgetary funds, which is defined as the primary goal of public procurement procedures, it increasingly serves as a mediator in achieving secondary goals of public procurement. Secondary goals include the realization of sustainable criteria, which involves the promotion of both social and green, environmental criteria. On one hand, these criteria promote socially responsible practices, and on the other, environmentally conscious business operations (Turudić & Šikić, 2017, p. 420). The World Bank emphasizes that public procurement is a key component of democratic governance, poverty reduction, and sustainable development. Furthermore, it highlights that governments can leverage public procurement to drive changes in the delivery of public services by promoting private sector growth, encouraging job creation, and creating equal opportunities for small and medium-sized enterprises. In its development guidelines, the World Bank underscores that public procurement can be an effective means of finding solutions in previously mentioned turbulent situations characterized by uncertainty, instability, and limited capacity, as these situations often require interventions that involve public spending and swift reactions.[3] For this reason, the Middle East and North Africa have

[2] Article 6(1) of the Public Procurement Act, *Official Gazette* no. 120/2016, 114/2022, contains an exhaustive list of entities that may act as contracting authorities in public procurement procedures: (1) the Republic of Croatia, i.e. the state bodies of the Republic of Croatia, (2) the units of local and regional (regional) self-government, (3) the public law entities, and (4) the associations established by one or more entities of items 1, 2 or 3 of this paragraph. Article 7, paragraph 1 of the Act further defines the sectoral contracting authorities, stating that they are: (1) contracting authorities exercising one of the sectoral activities; (2) commercial companies over which the contracting authority exercises or may exercise a predominant influence, directly or indirectly, by virtue of their ownership, financial participation or the regulations to which the company is subject, and which exercise one of the sectoral activities; and (3) other subjects exercising one of the sectoral activities by virtue of special or exclusive rights granted to them by the competent authority.

[3] World Bank - Procurement for Development 2020. Available at: https://www.worldbank.org/en/topic/procurement-for-development#2 (29. 9. 2023).

developed a toolkit entitled "Emergency Procurement for Recovery and Reconstruction" for the delivery of goods, services, and construction in situations of urgent need and capacity constraints. This toolkit prescribes general principles for public procurement actions when there is a need to restore stablility as quickly as possible and ensure the functioning of essential public services. The World Bank also advocates for gender equality in public procurement processes, particularly promoting women-owned or women-led enterprises as bidders. The United Nations thus proclaims gender-responsive procurement (GRP). It also emphasizes the importance of green procurement, which allows items procured by the public sector to have a longer lifespan, thereby causing fewer harmful environmental consequences. At the EU level, active efforts are being made to achieve the unification and proclamation of a green economy and its incorporation into European policy that would serve as a guiding principle for all member states. The means to accomplish this regularly involve values that characterize the doctrine of good governance – such as openness, participation, and efficiency. Considering that good governance does not have precisely defined values that are fixed and unchanging, but rather that proclaimed values adapt to current circumstances on a global scale, some authors believe that the doctrine of good governance in today's context can be closely tied to the challenges of globalization that require the use of green criteria.

Even the United Nations Environment Program defines a green economy as low-carbon, resource-efficient, and socially inclusive. This emphasizes the participation of the broader public in the realm of the green economy, which is a significant characteristic of good governance contributing to transparency (Rozema, p. 36-40). Furthermore, with the help of new technologies, better results can be achieved through the use of artificial intelligence and digitalization - which also contributes to transparency.

3.1. International Guidelines and Tools for Sustainable Public Procurement

At the international level, the principles of good governance play a crucial role in unifying the desirable rules for the functioning of public administrations across various countries. That is why the key role is played by several international organizations that proclaim the principles of good governance. Before the concept of good governance was developed within the framework of the European Union, the initial credit went to the United Nations (United Nations system - specialized agencies), specifically the IMF and the World Bank in the 1990s. They based their activities and relations with member states on principles that are recognized as the foundation of this doctrine.

In 1992, the World Bank adopted the Governance and Development document, in which the strategic role of good governance in creating and maintaining an environment conducive to development was recognized. It was seen as an essential complement to economic policies (Singh, Ansari & Singh, 2009, p. 1111). The current global situation is shaped by frequent crises (especially Covid-19 and post-pandemic times, corruption, global warming, and the ongoing war in Ukraine), which is why the World Bank emphasizes the necessity for active roles of public administrations in appropriately addressing these turbulences. To translate this into practical action, in 2021, the World Bank developed the Governance Global Program (GGP), which advocates for

innovative approaches to achieve better results in good governance at both national and subnational levels of the countries involved (client countries). The program highlights the need for assessing the governance of public investments as an activity used to evaluate practices used by state governments in providing public services. Factors contributing to effective governance of public investment follow the principles of good governance, particularly transparent and consistent selection of projects to be funded with public resources and efficient procurement processes, which play a strategic role (Global Governance Program, World Bank Governance Global Practice, 2021, pp. 34-35). This emphasizes the need for transparency, integrity, environmental care, addressing climate change, and social factors. The program recognizes public procurement as a strategic tool for creating a corruption-free environment.

In order to improve and strengthen effective public administration, the formation of MAPS (Methodology for Assessing Procurement Systems) is highlighted, i.e. an international and universally applicable tool for evaluating the quality of countries' public procurement systems, regardless of their level of development. When forming MAPS, the criteria taken into account are as follows: a) value for money (the procurement item should be delivered not based solely on the criterion of the lowest price but on the economically most advantageous offer, which is the most effective, economical and sustainable when compared to other bidders. This type of offer is referred to as The Most Economically Advantageous Tender or MEAT), then b) transparency, which allows for broad access to legal and institutional frameworks and relevant information, c) fairness, to ensure equal treatment of stakeholders, and finally d) good governance, with values promoted to recognize that public procurement can (and should) serve as a tool for promoting policies and other horizontal values of public procurement - for example, social and green criteria (MAPS, 2018, p. 2).

MAPS was adopted in 2004; however, the 2018 version aligns temporally and in terms of content with the adoption of the Sustainable Development Program by 2030 (Agenda 2030) at the United Nations General Assembly in 2015. This alignment was driven by the remarkable level of consensus regarding the need for implementing sustainable policies. With this, all member states committed to comply with 17 Sustainable Development Goals (SDGs) recognized as key components for sustainable economic development. Goal 12, ensuring sustainable patterns of production and consumption, is highlighted globally as a means to achieve sustainability. In the context of public procurement, criterion 12.7 becomes important, advocating for sustainable practices in public procurement in line with national policies and priorities.[4] The implementation of SSP (sustainable public procurement) by countries is measured using indicator 12.7.1. which signifies the number of countries implementing sustainable public procurement policies and action plans. This measurement is based on six factors, which are: the existence of a policy or action plan from SPP; the adequacy of the legal framework for public procurement

[4] United Nations Development Programme, Responsible Consumption and Production.

Available at: https://www.undp.org/sustainable-development-goals/responsible-consumption-and-production?gclid=Cj0KCQjw1_SkBhDwARIsANbGpFuy2-Fs-uF7NqO3IVtjGXVPkm7FgROhPUR3F-H1aFE6yvJQJb7zXi4YaAu6bEALw_wcB (29. 9. 2023).

to implement SPP; measures to support public procurement practices that follow SPP; the existence of specific criteria to support SPP; SPP monitoring mechanisms.[5] However, in the 2022 document "2020/2021 Data collection for SDG Indicator 12.7.1 Main results and conclusions from the first reporting exercise", UN underlines the awareness that it is much easier to measure the presence of green criteria in public procurement processes through contractual elements of the awarded contracts. In contrast, assessing the volume of social criteria in procurement is more challenging and requires closer specification through evaluations. Socially responsible public procurement can be proclaimed through existing legislative framework (such as human rights protection), through individual criteria for products, or by reserving a certain share of public procurement procedures for specific entities[6] (UN Environment Programme, 2022, pp. 26-27).

3.2. European Union Principles on Sustainable Public Procurement

Within the framework of the European Union, the foundation of the principles of good governance can be found in the Treaty on European Union, which serves as the foundational treaty and primary source of European law. Article 2 of the Treaty stipulates that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of minorities. The aforementioned provision can be interpreted as a basis for the proclamation of the doctrine of good governance in the public administrations of the Member States and also provides a basis for insisting on social criteria in public procurement procedures. In the document "Sustainable Europe by 2030", the European Commission recognizes that significant economic and social differences still exist among member states, but points out that the Union has made significant progress in unifying and reducing these disparities (European Commission, 2019, p. 6). The European Union, in order to regulate public procurement procedures, adopts directives, as well as guidelines and recommendations from the European Commission under the category of soft law, which technically do not have legally binding force. However, most member states take them into consideration in their procedures. The cornerstone is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, in whose preamble it is emphasized that the importance of public procurement is crucial within the framework of the Europe 2020 Strategy for smart, sustainable and inclusive growth to ensure the most efficient use of public funds.[7] The reason why many regulations adopted

[5] SDG 12 hub, Sustainable public procurement. Available at: https://sdg12hub.org/sdg-12-hub/see-progress-on-sdg-12-by-target/127-public-procurement (29. 9. 2023).

[6] The Public Procurement Act of the Republic of Croatia recognizes the institute of reserved contracts, facilitating the public procurement procedure for entities that meet certain social criteria. Pursuant to Article 51, the contracting authority may reserve the right to participate in public procurement procedures for: (1) protective workshops, (2) entities whose main objective is the social and professional integration of persons with disabilities, (3) entities whose main objective is the social and professional integration of disadvantaged persons or (4) may determine that such contracts shall be executed within the framework of protected employment programs.

[7] Recital (2) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

by the EU regarding sustainable public procurement remain non-binding can be found in recital (95) of the Directive, which highlights that it would not be appropriate to establish general binding requirements for environmental, social or innovation procurement, taking into account significant differences among individual sectors and markets of Member States. In this respect, a wide margin of discretion is granted, but also the responsibility of Member States to accept and act upon certain guidelines in accordance with the independent assessment of their national circumstances and capabilities. Furthermore, the Directive clarifies that when determining the economically most advantageous tender, the life-cycle costs may be considered in a general manner so as not to distort market competition. In addition to the typical production and transportation costs, these life-cycle costs may include costs associated with environmental impacts.[8] The latter opens up a wide range of criteria contributing to green public procurement because the selected offer no longer has to be based only on the lowest price.

The European Commission has developed a toolkit for green public procurement for contracting authorities, consisting of six independent modules and ten operational modules with accompanying guidelines. Each module addresses a separate sector in which the application of green criteria is possible with examples of best practices from Member States.[9] The Commission's website[10] also provides specific criteria for characteristic procurement items (e.g., computers, furniture, catering, etc.) that can be applied by contracting authorities to strengthen green public procurement at European level.

In 2021, the Commission also issued the second edition of "Socially conscious purchasing - a guide to social awareness in public procurement", which emphasizes that through socially responsible public procurement, public authorities can promote employment opportunities, retrain and re-skill the workforce, decent work, social inclusion, gender equality and non-discrimination, accessibility, universal design, and ethical trade, while striving for broader compliance with social standards (European Commission, 2021, Buying Socially - A Guide to Addressing Social Concerns in Public Procurement, p. 6). The manual suggests conducting a public procurement needs assessment in which citizens play an active role as users by consulting them, researching and reviewing the market to assess readiness to consider social criteria, a light regime for social and other special services, reservations and technical specifications, documentation and communication of the results of socially responsible public procurement to serve the community in the future, etc. In this way, concrete guidelines are provided to contribute to socially responsible public procurement, which is less recognized at the global level compared to green public procurement.

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[8] Recital (96) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

[9] European Commission, Green Public Procurement Toolkit. Available at: https://green-business.ec.europa.eu/green-public-procurement/gpp-training-toolkit_en

[10] European Commission, Green Public Procurement Criteria and Requirements. Available at: https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en

4. CROATIAN EXPERIENCE WITH SUSTAINABLE PUBLIC PROCUREMENT

Although national legislation provides room for the introduction of sustainable criteria in public procurement procedures by emphasizing the economically most advantageous tender, which allows the contracting authority to include the implementation of the procurement object following green and social criteria in the procurement documentation, this choice is still of an optional nature at the level of the Republic of Croatia.[11] In 2022, the United Nations Environment Program published the Sustainable Public Procurement Global Review, which shows that the Republic of Croatia has been pursuing a sustainable procurement policy since 2015.[12] In terms of performance monitoring and analysis of countries applying SPP, it should be noted that some countries issue decrees or government orders obliging them to apply SSP, which is regulated by a specific law (19 countries have such a practice, including e.g., France, Austria and Switzerland), while the Republic of Croatia does not have such a procedure. An increasing number of European countries and subnational governments are introducing mandatory green public procurement (GPP), including Norway, the Czech Republic, Cyprus, and Italy, where GPP is mandatory for all levels of government. Ireland, for example, has committed to using green criteria in all public procurement procedures from the beginning of 2023, while in some countries the use of such criteria is mandatory for certain items and service categories. Denmark, for example, is required to apply green criteria in the procurement of wood products.[13] Figure 3.13. of the aforementioned Review entitled Sustainability Targets in the Policies of Participating National Governments (SPP) is a real indicator that in Croatia there is some awareness of environmental criteria and their inclusion in public procurement processes, while social criteria are not represented and offer room for future development.

Looking at the social criteria and their representation in Croatia, it is possible to analyze the representation of companies in which women play a leading role or whose founders are women. The UN's Legal Framework for Gender Responsive Procurement from February 2023 gives an overview of the regulatory and policy measures that states have taken to improve the above criteria: the inclusion of gender criteria in procurement

[11] For example, the Public Procurement Act of the Republic of Croatia in Article 207 allows the contracting authority to decide on additional technical specifications in the procurement documentation. Furthermore, the required characteristics can also refer to a specific process or method of production, the execution of the requested works, goods, or services, or to a particular process in another phase of their lifecycle, even if these factors are not an integral part of their material content, provided that they are related to the subject of procurement and proportionate to its value and objectives. Additionally, according to Article 209 of the Act, technical specifications can be formulated as requirements that include environmental protection-related characteristics.

[12] United Nations Environment Programme (UNEP) 2022, Figure i. Adoption of SP policies among participating national governments. Available at: https://www.oneplanetnetwork.org/knowledge-centre/resources/sustainable-public-procurement-2022-global-review-parts-i-and-ii (25. 6. 2023).

[13] Advancing Green Public Procurement and Low-Carbon Procurement in Europe: Insights, 2022. Available at: https://www.iisd.org/articles/deep-dive/advancing-green-public-procurement-and-low-carbon-procurement-europe-insights (25. 6. 2023).

documentation, the introduction of mandatory criteria for bidders that touch on the above criteria, additional evaluation of bidders that take into account the stated criteria, tax benefits, the organization of training and monitoring the implementation of social criteria.[14] Based on the analysis of gender-responsive public procurement (GRPP) in 2022 conducted by the European Institute for Gender Equality (EIGE), it became clear that no existing structures were found that would promote GRPP in the Croatian national framework (Step by Step toolkit, p. 31), so there is still much room for progress in this area. The latest available research from the Finance Agency (FINA) in 2019 supports the previous thesis and also shows that the percentage of companies in Croatia with women in leadership positions is 22%, which proves that such positions are still predominantly reserved for men (OECD, 2020, Inclusive Entrepreneurship Policies, Country Assessment Notes - Croatia, p. 15).

As for green criteria, the results of the implementation of the first Action plan for the implementation of green public procurement for the period from 2017 to 2020 show that only in 10% of the contracts concluded in 2019, some forms of green public procurement were applied.[15] However, this indicates some shift in the positive sense, considering that in 2017 the available data on the share of green criteria in Croatia was less than 1%.[16] Progress is also visible through the adoption of the Decision on Green Public Procurement in Central Public Procurement Procedures. This requires the Central Public Procurement Office to apply green public procurement criteria as part of the technical specification and/or tender selection criteria in all procedures it conducts, to the extent consistent with technical suitability, the financial capabilities of the users of the central public procurement system, and a sufficient degree of market competition.[17] However, this provision of the decision leaves room for not considering green criteria in the procurement process, which depends on the expected funds of the contracting authority.

In its National Economic Recovery Plan for the period 2021-2026, the Croatian Government recognizes the need to strengthen the institutional framework of public procurement to enable the achievement of policy objectives and ensure a more efficient spending policy. Although the electronic procurement system is mandatory in Croatia, which contributes to the transparency of the process, the government emphasizes that there is room for improvement in the e-procurement system, as well as the need for further training and education of the human resources involved in the procedures.

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[14] UN Women, 2023, Legal Frameworks for Gender-Responsive Procurement, A Comparative Review Of Regulatory And Policy Measures And International And National Legal Norms, pp. 8-9. Available at: https://www.unwomen.org/sites/default/files/2023-02/Legal-frameworks-for-gender-responsive-procurement-en.pdf (26. 6. 2023).

[15] Decision of the Government of the Republic of Croatia on Green Public Procurement in the Central Public Procurement Procedures. 2022. Available at: https://www.oneplanetnetwork.org/knowledge-centre/policies/decision-government-republic-croatia-green-public-procurement-central (26. 6. 2023).

[16] European Commission, 2021, Procurement Monitoring Report Template, Republic of Croatia, p. 26

[17] Decision of the Government of the Republic of Croatia on Green Public Procurement in the Central Public Procurement Procedures from 6th of May 2021, Klasa: 022-03/21-04/141, Urbroj: 50301-05/16-21-2

5. CONCLUSION

The main research question relates to the extent of application of good management principles in public procurement procedures in Croatia, with particular emphasis on sustainability, which includes social and environmental criteria. The hypothesis that the authors tried to test is that public tenders in Croatia generally do not include social and environmental criteria. The analysis of the national legal framework and the reports of international and European institutions in the field of public procurement shows that although the selection of the economically most advantageous tender is prescribed within national framework, which gives an opportunity to include additional criteria in public procurement procedures, the Republic of Croatia does not have a widespread practice of applying sustainable criteria. In almost all cases, it is left to the decision of the contracting authority, i.e. it is optional. Only the Central Public Procurement Office is obliged to include criteria for environmentally friendly public procurement in addition to the economic criteria. In the latter case, however, the environmental criteria are applied only to the extent that they are consistent with technical suitability, the financial capabilities of the users of the central public procurement system, overall sustainability, and a sufficient level of competition in the market.

So far, social criteria are not represented in public procurement procedures, and green criteria are very rarely considered. As reasons for not using sustainable criteria in public procurement procedures, contracting authorities state that insisting on such criteria would further complicate a strictly formalized public procurement procedure and decrease transparency. Additional reason for not including social and green criteria is that their implementation is more difficult to measure than for the lowest priced bids. The authors therefore conclude that the hypothesis has been confirmed and that, in this sense, it is necessary to adapt the national legal framework for sustainable public procurement.

As a possible solution, Croatia should consider the approaches of other Member States, which are contemporary examples of best practices in the inclusion of criteria for at least green public procurement. Positive progress has been made in the Government Office for Central Public Procurement, but the possibility of insisting on green procurement criteria at all levels of public procurement in Croatia should be considered. If such a solution seems like "too big a step", Croatia could start with mandatory implementation of green criteria for certain categories of services, as is already the practice in Slovenia, Denmark, Estonia, etc. Moreover, examples of green criteria implementation should be made available to a wider public in order to raise awareness not only among the stakeholders involved, but also among citizens. In this sense, a greater degree of advertising of such examples could be considered, not only on the website of the electronic *Official Journal of Public Procurement*, in which users often find it difficult to navigate. As far as social criteria are concerned, there are no statistics that provide information on the current situation in Croatia, so not only improvements and the adoption of existing international and European guidelines, but also greater transparency are needed in this area.

In general, bidders in national frameworks lack awareness of sustainable criteria, so that the percentage of bidders who participate in tenders and meet sustainable elements is often small compared to the bidders who submit the cheapest bids. This has also prevented quality competition among bidders. There is certainly room for progress in terms of additional training on the strategic function of public procurement to promulgate sustainable principles within government boundaries, both at the level of contracting authorities and at the level of bidders. The aforementioned trainings were intended to make the subjects aware of the extent to which sustainable criteria are present in other European states, as well as the benefits that such applications bring. It was noted that in the analyzed reports on examples of good practices, Croatia was not mentioned in a single case, which shows that despite the comprehensively regulated Public Procurement Act, the segment of sustainability remains neglected in the national framework. Indeed, it is necessary that the political leaders of Croatia recognize sustainable public procurement as a means by which they can adequately respond to the existing turbulence of today's circumstances and begin to proclaim it at an appropriate, higher level.

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DISCIPLINARY LIABILITY OF PUBLIC SERVANTS – WITH PARTICULAR REFERENCE TO EMPLOYEES OF HIGHER EDUCATION SYSTEM – IN RELATION TO DISCIPLINARY LIABILITY OF CIVIL SERVANTS IN THE REPUBLIC OF CROATIA

The paper presents the legal regulation of disciplinary liability of employees of higher education institutions (public servants) and the regulation of disciplinary liability of civil servants in the Republic of Croatia, regulated by the Law on Civil Servants. At the outset, the legal nature of the public service relation is defined as an employment relation, and the concept of public servant is demarcated from civil servant, i.e. the legal definition of public and civil service within the single concept of public administration.

In terms of disciplinary liability arising from the employment relationship, the legislative framework for initiating and conducting disciplinary proceedings, disciplinary acts for which the worker can be held responsible and disciplinary sanctions are determined, with special reference to the Croatian Labour Law. Both procedures are compared: the disciplinary procedure of public officials and the disciplinary procedure of civil servants, and the legal basis is specified.

In the central part of the paper, we outline the disciplinary procedure for higher education employees in accordance with the provisions of the Law on Higher Education and Scientific Activity, including recent changes in the regulation of the disciplinary procedure in relation to the previous Law on Higher Education and Scientific Activity. The procedures of disciplinary liability, disciplinary acts and disciplinary measures determined by the general laws of four higher education institutions in the Republic of Croatia are compared. The authors conclude that the disciplinary procedure for employees of the higher

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education institution is vague and insufficiently regulated, because it is only regulated by the Law on Higher Education and Scientific Activity, which is not enough. The applicable law leaves too much autonomy to individual higher education institutions in the Republic of Croatia, which unnecessarily leads to possible different interpretations and a variety of internal regulations of the disciplinary procedure at different higher education institutions. The authors point to the need for additional (joint) legal regulation of procedures for violations of official duties, which would regulate disciplinary actions, minor and severe violations of official duties, procedures and sanctions at all higher education institutions.

Harmonization of rights of all public servants (in state and public services) is suggested, as it would facilitate legal certainty for public servants. Further, adoption of the uniform disciplinary procedure for all public servants similarly is called for, particularly as it is stipulated by the law for all civil servants in the Republic of Croatia.

Keywords: disciplinary liability, public servants, civil servants, higher education institutions.

1. INTRODUCTION

The Labour Law (hereinafter: ZOR), as a basic law governing labour relations, does not recognize the disciplinary liability of workers as a result of the violation of obligations from the employment relationship or behaviour of the worker.

In theory, we distinguish between labour and civil service law. Labour law is based on the relationship between the employer and the employee, and civil service law applies to the administrative relationship based on a unilateral administrative act, where the administrative body is the public authority.[1] It is usual to apply labour law to a certain extent to exercise the rights of public servants, but not vice versa, and the application of labour law itself does not mean that the right of public servants is part of the matter of labour law, rather, the scope of application depends on the status of the public service where labor relations are also regulated by the laws that regulate the organization and scope of individual public services.[2]

The civil service is a special type of employment relation, but it has all the elements of an employment relation, the special nature of which is manifested in the fact that civil servants in this employment relation also perform public authority tasks towards the citizens.[3] Given the legal nature of civil service, it cannot be disputed that the relationship between civil servants and the employer (the state) is a labour law relation, because it is a voluntary legal relation between the employer and the employee entered into with the aim of the employer using the employee's and paying the employee a salary for the work

[1] Ravnić, A. 2004. *Fundamentals of Labour Law - Domestic, Comparative and International*. Zagreb: Faculty of Law, University of Zagreb, p. 191.

[2] *Ibid*., p. 194.

[3] Potočnjak, Ž. 2013. *Labour Relations of Civil Servants*. Zagreb: Faculty of Law, University of Zagreb, p. 18, for which the state realizes a special interest and regulates labour relations differently than it regulates them in the economy, and certainly has a greater degree of intervention and appears in a dual role: as an employer but also as a legislator.

done.[4] As a legal relation, it is primarily subject to labour law, but it also includes numerous issues from other branches of law.[5]

In the Republic of Croatia, Disciplinary liability of employees following violations of official duties of civil and public servants is governed by special regulations and in some public services by autonomous regulations of the employer. At universities and scientific institutes it is primarily governed by regulations on work or regulations on disciplinary liability of employees. The disciplinary procedure is designed to ensure that public officials are held responsible for violations of official duty and that appropriate measures are taken to sanction and prevent similar violations of duty.

Disciplinary procedures for civil servants are regulated by the Law on Civil Servants (hereinafter: ZDS),[6] while the disciplinary liability of employees of higher education institutions and scientific institutes (public servants) is governed by the Law on Higher Education and Scientific Activity.[7]

2. INSUFFICIENT REGULATION OF LABOUR RELATIONS OF PUBLIC SERVICES IN RELATION TO CIVIL SERVICES WITHIN THE FRAMEWORK OF THE UNIFORM SYSTEM OF PUBLIC ADMINISTRATION

Public administration is a complete state system that can be divided into public services and state services that are connected by a common goal: improving conditions in society as a whole on the territory of one state, which also achieves the progress of the individual within the community. In order to compare the procedures for determining the violation of official duties of civil servants and employees of public colleges (public servants) in disciplinary proceedings, we will explain the basics of the organization of public and civil services and the regulation of labour relations, as well as the differences (and similarities) of civil and public services, that is, state and public officials.

Public institutions are established in cases stipulated by the *lex specialis* for a specific activity[8] in order to be performed as a public service, for which it is necessary to establish a public institution. In the performance of their duties, state bodies also perform

[4] *Ibid.,* p. 11.

[5] *Ibid.,* p. 19., especially administrative law because administrative matters: the rights, obligations and responsibilities of civil servants are decided in administrative proceedings (administrative acts) and judicial protection is achieved in administrative dispute.

[6] Law on Civil Servants, *Official Gazette* nos. 92/2005, 140/2005, 142/2006, 77/2007, 107/2007, 27/2008, 34/2011, 49/2011, 150/2011, 34/2012, 38/2013, 37/2013, 1/2015, 138/2015, 102/2015, 61/2017, 70/2019, 98/2019, 141/2022, which regulates labour law relations between civil servants and of the state (as an employer), Art. 1.

[7] Act on Higher Education and Scientific Activity, *Official Gazette* nos. 119/2022, entered into force on October 22, 2022.

[8] Activities of public institutions: education, science, culture, technical culture, child care, healthcare, social care, care for the disabled, or part of these activities if the law determines that they are performed as a public service. On the special legal status of public institutions, see: Borković, I. 2002. *Administrative Law.* VII. amended edition. Zagreb: Official Gazette d.d. Zagreb, pp. 23-25.

activities that, according to the nature of the work, are not performed primarily from the position of government (e.g. education, healthcare), where the focus is on professions and services. For the purpose of their performance, the state establishes special public bodies and public non-economic organizations, for example, institutions.[9] It is important to point out that the process of control and supervision over the work of public institutions is carried out according to the general rules of administrative supervision of the state administration system, therefore there is a certain equalization of public institutions and state bodies in the exercise of public powers.[10]

The concept of public service is regulated by the Law on Salaries in Public Services, and the definition of public institutions (and other legal entities) fundamentally determines the provision of funds for salaries through the state budget.[11] The Act on Higher Education and Scientific Activities defines a higher education institution and its status as an institution, as well as the purpose (activity) for which it is founded. [12]

The unique job titles of all public services established by the Law on Salaries in Public Services are regulated by the Regulation on job titles and job complexity coefficients in public services[13]. In accordance with the provisions of the ZOR, civil servants and employees establish a working relation with the employer by concluding an employment contract, for an indefinite or fixed period of time.

The aforementioned Regulation stipulates that with regard to fulfilment of the conditions for the appointment of certain categories of public servants,[14] unless otherwise stipulated by a special regulation, the regulations for civil servants and state employees apply. This approach is rooted in the similarity of public and state services, but at the same time stems from the lack of organization of the rules for the conditions that must be met by public servants for assignment to individual jobs. Consequently the application of regulations applicable to civil servants is enabled.

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[9] Ravnić, A., p. 189.

[10] Borković, I., p. 25.

[11] Law on Salaries in Public Services, *Official Gazette* nos. 27/01, 39/09, Art. 1.

[12] Law on Higher Education and Scientific Activity, Art. 6. establishes that the higher education institution is established with the purpose of carrying out activities in higher education, scientific, artistic and professional work of higher education institutions (universities, faculties, art academies and polytechnics).

[13] Regulation on job titles and job complexity coefficients in public services, *Official Gazette* nos. 25/2013, 72/2013, 151/2013, 9/2014, 40/2014, 51/2014, 77/2014, 83/2014, 87/2014, 120/2014, 147/2014, 151/2014, 11/2015, 32/2015, 38/2015, 60/2015, 83/2015, 112/2015, 122/2015, 10/2017, 39/2017, 40/2017, 74/2017, 122/2017, 9/2018, 57/2018, 59/2019, 79/2019, 119/2019, 50/2020, 128/2020, 141/2020, 17/2021, 26/2021, 78/2021, 138/2021, 9/2022, 31/2022, 72/2022, 82/2022, determines job complexity coefficients and contains unique job titles of public servants and employees in public services, as well as special job titles in individual public services (including universities and public institutes)

[14] *Ibid.,* Art. 1. paragraph 3 establishes the conditions that officials meet for assignment to type I positions, type II positions types and jobs III. types (from paragraph 1, sub-paragraphs d, e and f of the aforementioned article), the regulations for civil servants and state employees apply.

The organization and operations of the state administration are regulated by the Law on the State Administration System.[15] State administration jobs [16] are performed by state administration bodies: ministries and state administrative organizations, whose work is financed by the state budget; officials in state administration bodies are state officials and civil servants, unless otherwise determined by a separate law.

Labour law relations between civil servants and the state (as an employer) are regulated by the ZDS,[17] which also regulates disciplinary liability. Positions in the civil service are governed by the Decree on the Classification of Positions, which defines positions in the civil service within individual categories of managerial civil servants, senior civil servants and junior civil servants.[18] Civil servants are admitted to employment (civil service) by means of a decision on admission and assignment to a workplace, based on a competitive recruitment procedure, unless otherwise regulated by the law.

Regardless of the unique goal of a complete state system that should be at the service of the progress of society as a whole, there is still a significant difference in the organization of public and state services. Many rights and obligations from the employment relation, which are regulated for civil servants, are not regulated for public servants[19]. Thus, disciplinary procedure is not regulated uniformly by the law, as it is regulated by the law for all civil servants.

2.1. Legal regulation of disciplinary liability of employees of higher education institutions (public servants)

The Act on Higher Education and Scientific Activity (*Official Gazette* nos. 119/2022 - hereinafter: the new ZVOZD), introduced significant new rights and regulated many issues related to scientific activity and higher education, and also introduced numerous changes in regulating the employment status of employees. The law also regulates the disciplinary liability of employees of higher education institutions and scientific institutes in case of violation of their work obligations and damage to the reputation of the educational institution[20] and the ethical liability of teachers, scientists and associates.

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[15] Law on the State Administration System, *Official Gazette* nos. 66/19.

[16] *Ibid*., Art. 3. determines state administration affairs.

[17] ZDS regulates the rules of admission to the civil service, advancement of civil servants, professional training as well as other issues important for determining and realizing the rights and obligations of civil servants and state employees, Art. 1.

[18] Regulation on the classification of jobs in the civil service, *Official Gazette* nos. 77/07 and 81/08, elaborates in detail the positions within each category, with established standard criteria for each position (professional knowledge, necessary work experience, degree of job complexity, degree of independence, etc.).

[19] Below we list some of the inadequacies in the regulation of labour law relations of public servants: the positions and conditions that public servants must fulfil for assignment to the workplace are not regulated and classified in detail, with a single standard established for all public servants; jobs within each category are not elaborated in detail by law or regulation, with established standard criteria for each job, professional knowledge, necessary work experience, etc.; a common system for the advancement of public servants is not regulated (except for the advancement of teachers in the higher education system); evaluation of the work of public servants is not regulated.

[20] New ZVOZD, Art. 56. stipulates that the general act establishes the disciplinary procedure, disciplinary commission, disciplinary acts and sanctions, and disciplinary accountability can be established only

In relation to the earlier Act on Scientific Activity and Higher Education - hereinafter: the old ZZDVO[21] a significant novelty is that now all employees of higher education institutions and public institutes (not only teachers as per the old ZZDVO) can be held accountable. The previous law did not precisely regulate the procedure and method of determining and regulating the disciplinary procedure at higher education institutions. However, we can conclude that the above was not corrected even by the new law, and the possibility was once again left to the institutions of higher education and science in the Republic of Croatia to independently regulate issues of disciplinary and ethical liability[22] by a rulebook on disciplinary liability.

Article 5 of the new ZVOZD envisages the application of the Law on General Administrative Procedure (hereinafter: ZUP) in the procedures that regulates on the rights and obligations of teaching staff (teachers, scientists, associates), omitting to regulate the application of ZUP to the non-teaching staff, i.e. in all administrative matters when a public legal body decides on the rights of (all) employees. We are of the opinion that it should not have been determined to specify only certain categories of employees of the science and higher education system to which the provisions of the ZUP apply, given the obligation to apply it in decision-making when exercising the rights of all public servants.[23] For all employees, it is necessary to ensure (and regulate) the realization of the same rights, obligations and labour right protection in an identical procedure, in order to secure the realization of equal rights, either before an Administrative Court or before a court of general jurisdiction.[24]

2.2. Legal regulation of disciplinary liability of civil servants

ZDS, which regulates the rights, obligations and responsibilities of civil servants in state bodies, stipulates the implementation of disciplinary procedures for violations of the official duties of civil servants. It is important to emphasize that it is possible to regulate the disciplinary liability of individual groups of civil servants in a different way,

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for acts that are foreseen in the Regulation for which a sanction is determined in the disciplinary procedure, as well as that on the basis of the established disciplinary liability, the employee can get dismissed.

[21] Law on scientific activity and higher education, *Narodne novine* nos. 123/03, 198/03, 105/04, 174/04, 2/07, 46/07, 45/09, 63/ 11, 94/13, 139/13, 101/14, 60/15 and 131/17, Article 104.

[22] New ZVOZD, Art. 55, paragraph 3, establishes that even in the case of a violation of the Code of Ethics, the procedure is in accordance with the Rulebook on disciplinary liability, therefore we can conclude that the new ZVOZD has made it possible to terminate the employee's employment contract even in the case of a violation of the Code of Ethics.

[23] By literal application of the provisions of Art. 5. of the new ZZDVO, stipulating the application of ZUP only to teachers, would result in non-teaching staff being in an unequal position in the event of a disciplinary measure being imposed, because the provisions of the ZOR as a fundamental regulation in the field of labour relations in the Republic of Croatia would be exclusively applied to the exercise of their rights.

[24] The area of application of the ZUP refers to the procedures in which the disciplinary commission determines the disciplinary offence committed in advance and a certain disciplinary measure if the measure does not result in the termination of the employment contract. Here, it is important to establish the difference, because in the case of a reprimand, the employee cannot initiate proceedings before the court, while in the case of dismissal, an appeal can be sent to a court.

where certain issues are regulated differently, but also to regulate the entire stem of disciplinary liability in a different manner. In such a case, we have a separate legal regulation of disciplinary liability for civil servants of certain civil services.[25]

The law distinguishes between two types of violations: minor and severe, where severe are prescribed by the law, and the minor ones are prescribed either in the law, the Government decree or the internal Rulebook. It is important to point out that the Law establishes for both types of violations that these are also other severe or minor violations of duty stipulated by the above-mentioned legal and by-laws and that the conduct of proceedings and decision-making depends on the severity of the violation. The law prescribes penalties for violations of official duty, determination and execution of penalties, statute of limitations for execution of penalties, and conditions for cancellation of penalties.[26] We can establish that, in contrast to the disciplinary procedure for public officials (employees of higher education institutions), the disciplinary procedure for all civil servants is regulated in detail by the law, and the application of the ZUP is expressly stipulated for procedures due to violation of official duties.

3. REGULATION OF DISCIPLINARY LIABILITY OF HIGHER EDUCATION EMPLOYEES IN THE REPUBLIC OF CROATIA

The new ZVOZD establishes the disciplinary liability of employees of higher education institutions and scientific institutes for violations of work obligations and for damaging the reputation of higher education institutions and scientific institutes.[27] In this paper, we will compare the regulation of the disciplinary procedure at four public universities in the Republic of Croatia: the University of Zagreb, Rijeka, Osijek and Split, based on the general acts of higher education institutions that are based on the old ZZDVO.[28] As already pointed out, the new ZVOZD regulates the disciplinary liability of all employees (including the non-teaching staff), in contrast to the old ZZDVO, which regulated the disciplinary liability of teachers and associates only.

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[25] Juras, D. 2013. Judicial protection of the rights of civil servants in disciplinary proceedings, *Hrvatska i komparativna javna uprava : časopis za teoriju i praksu javne uprave*, 13(2), p. 542. Special laws governing disciplinary liability: Customs Service Law, *Narodne novine* nos. 83/09, 49/11; Law on Execution of Prison Sentences, *Official Gazette* nos. 28/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 190/03 - consolidated text, 76/07, 27/08, 83/09, 18/11, 48/11; Law on Police, *Official Gazette* nos. 34/11, 130/12; Law on the Security Intelligence System of the Republic of Croatia, *Narodne novine* nos. 79/06, 105/06; Law on service in the armed forces, *Official Gazette* nos. 33/02, 58/02, 175/03, 136/04, 76/07, 88/09, 124/09; Law on Foreign Affairs, *Official Gazette* nos. 48/96.

[26] ZDS stipulating the types of punishments for minor and severe violations of official duty, for example, a fine in the amount of up to 10% of the employee's salary paid in the month when the punishment was pronounced for a minor violation; transfer to another workplace of lower complexity of tasks of the same level of education, provided that there is a vacancy for a more serious breach of official duty, Art. 110.

[27] See Art. 56 of the Act on Higher Education and Scientific Activity

[28] *Ibid*., Art. 109 establishes the obligation to harmonize general acts with the new Act, therefore the paper will present the regulation of disciplinary liability based on general acts based on the old ZZDVO.

On the basis of the Law, the universities have regulated disciplinary procedures in their statutes, and in accordance with the provisions of the statute, the procedures at the University of Rijeka and Osijek are regulated by general acts - regulations on the disciplinary liability of university teachers and associates (which refer to all Faculties of the University), while at the Universities of Zagreb and Split, disciplinary procedures are governed by the statutes and general acts of the constituent entities. We can notice the difference in the very basic organization and regulation of the disciplinary procedure (by various general acts) between different public universities in the Republic of Croatia.

3.1. Regulation of disciplinary liability at the University of Zagreb

Article 79 of the Statute of the University of Zagreb stipulates that employees elected to scientific-teaching, teaching, professional and associate positions are subject to disciplinary action for violations of the Code of Ethics in accordance with the University Statute and general acts of the University's constituents.[29]

The Statute of the Faculty of Philosophy of the University of Zagreb stipulates that a teacher's employment contract may be terminated only with the consent of the Faculty Council, unless the employment contract is terminated by force of law or established disciplinary liability,[30] and stipulates disciplinary liability for failure to fulfil obligations and violations of rules of conduct, as well as causing damage to the reputation of the institution and employees.[31] The disciplinary procedure at the Faculty of Philosophy in Zagreb is governed by the Labour Regulations, where a separate section regulates the employer's actions in the event of a breach of employment obligations by the employee (disciplinary procedure). [32]As types of violations, minor violations and especially severe violations of obligations from the employment relationship are envisaged.[33] In the event of a minor violation of an employment obligation, the Dean has a right to issue a warning letter to the employee and indicate the possibility of dismissal in case of continued violation of employment obligations. If particularly severe violations of an obligation stemming from the employment relationship arise, the Rulebook stipulates a total of [5] disciplinary measures that the Commission can propose to the Dean based on the disciplinary procedure carried out.[34]

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[29] Statute of the University of Zagreb, revised text, 2017, art. 79. establishes the obligation of employees to adhere to moral and ethical principles when performing their work, which must be based on free scientific and artistic creativity, as well as that the Senate establishes a Code of Ethics that includes the professional and public activities of teachers and scientists (and artists) and other employees. Available at: http://www.unizg.hr/fileadmin/rektorat/O_Sveucilistu/Dokumenti_javnost/Dokumenti/Strateski_dokumenti/statut/Potpisani_procisceni_tekst_Statuta_Sveucilista_9.10.2017..pdf (6. 3. 2023).

[30] Statute of the Faculty of Philosophy of the University of Zagreb, revised text, 2012, art. 92 and p. 7. Available at: http://dokumenti.ffzg.unizg.hr/propisi/ (6. 3. 2023).

[31] *Ibid*., Art. 101, paragraphs 1-3.

[32] See the Rules of Procedure of the Faculty of Philosophy of the University of Zagreb, revised text, 2021. Available at: http://maia.ffzg.hr/att/propisi/Pravilnik_o_radu.pdf (6. 3. 2023).

[33] *Ibid.,* Art. 101., stipulating a total of 14 minor violations of obligations from the employment relations and a total of 42 particularly serious violations from the employment relation.

[34] *Ibid.,* Art. 105. stipulates disciplinary measures: "- written warning for violation of an obligation from the employment relation; - one-time reduction of the incentive part of the salary; - resignation with the

3.2. Regulation of disciplinary liability at the University of Split

Article 138 of the Statute of the University of Split stipulates that teachers and associates are disciplinary liable for violations of their work duties and other obligations arising from work and in connection with it, as well as for gross damage to the reputation of the Faculties in accordance with the Statute of the University and the Statutes of the Faculties.[35]

The Statute of the Faculty of Economics of the University of Split establishes the disciplinary liability of employees (teachers, associates and non-teaching staff) for violations of work obligations, as well as other work obligations and, for gross damage to the reputation of the Faculty and the University. The Work Regulations stipulates disciplinary acts, measures and disciplinary procedure,[36] and the Faculty's permanent working body, the Commission for establishing facts in disciplinary proceedings. The Work Regulation does not contain provisions on disciplinary proceedings, but the disciplinary proceedings are governed by the Regulations on Disciplinary Liability of Teachers and Associates of the Faculty of Economics in Split, which also governs the types of disciplinary offences: minor, severe and particularly severe disciplinary offences.[37] In the case of committing a minor disciplinary offence, the Dean can issue a warning to the employee as a disciplinary measure. For severe and particularly severe violations of work obligations, the Rulebook stipulates two disciplinary measures that can be taken by decision of the Dean after the disciplinary procedure has been carried out at the proposal of the Commission. Namely, it is the Commission which carries out the procedure in the case of a severe or particularly severe disciplinary offence for imposing a measure on an employee.[38]

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offer of an amended employment contract for a position for which the same or a lower degree of professional qualification is required; - regular termination of the employment contract; - extraordinary termination of the employment contract."

[35] Statute of the University of Split, revised text, 2021, art. 138 establishes that the disciplinary procedure is determined by the general act of the Faculty, and that one can be held liable only for the act that was foreseen as disciplinary by the general act and for which a disciplinary measure was foreseen. Available at: https://www.unist.hr/DesktopModules/Bring2mind/DMX/API/Entries/Download?language=hr-HR&EntryId=1874&Command=Core_Download&PortalId=0&TabId=1846 (6. 3. 2023).

[36] Statute of the Faculty of Economics of the University of Split, revised text, 2022, art. 63. Available at: https://www.efst.unist.hr/o-fakultetu/fakultet/pravilnici-i-upute (6. 3. 2023).

[37] See Rulebook on disciplinary responsibility of teachers and associates of the Faculty of Economics in Split, 2018, art. 5.-7., stipulates 12 minor disciplinary offences, 17 severe disciplinary offences and 9 particularly severe disciplinary offences. Available at: https://www.efst.unist.hr/o-fakultetu/fakultet/pravilnici-i-upute (6. 3. 2023).

[38] *Ibid.,* Art. 9. "a) Disciplinary warning measure before dismissal, which warns the teacher/associate about his obligations from the employment relationship and indicates the possibility of dismissal in case of continued violation of obligations with that disciplinary offence or other serious offence from the Ordinance. b) Disciplinary measure of termination of employment by which the teacher/associate's employment contract is regularly terminated due to violation of obligations from the employment report (dismissal due to behavior of the teacher/associate)."

3.3. Regulation of disciplinary liability at the University of Rijeka

Article 98 of the Statute of the University of Rijeka stipulates that teachers and associates are liable for disciplinary action for violations of work and other obligations, as well as for cases of gross damage to the reputation of the University, and that the Rulebook on Disciplinary Liability regulates disciplinary acts and disciplinary measures.

Pursuant to the provisions of the University Statute, the University Senate adopted the Rulebook on the Disciplinary Liability of Teachers and Associates of the University of Rijeka,[39] governing disciplinary liability, disciplinary acts, as well as particularly severe violations of obligations from the employment relation due to which the employee's employment contract may be terminated. The Rulebook on the Disciplinary Liability of Teachers and Associates of the University of Rijeka stipulates four disciplinary measures that can be imposed for disciplinary acts committed by behaviour,[40] as well as the course of proceedings before the disciplinary committee.

3.4. Regulation of disciplinary liability at the University of Osijek

The statute of the Josip Juraj Strossmayer University in Osijek stipulates the disciplinary liability of teachers and associates in the event of violations of work and other obligations arising from work and in connection with work and for gross damage to the reputation of the University and its constituents. At the same time, the Statute states that employee can only be held accountable for acts that at the time of their commission were intended as disciplinary offences and for which a disciplinary measure is stipulated by the law.[41]

Pursuant to the provisions of the Statute of the University of Osijek, the Senate of the University adopted the Rulebook on Disciplinary Liability of Teachers and Associates of the Josip Juraj Strossmayer University in Osijek,[42] regulating the disciplinary liability of teachers and associates at the University of Osijek and its Faculties. The Rulebook on the Disciplinary Liability of Teachers and Associates establishes disciplinary acts, which can be minor or severe.[43] In the case of committing a minor disciplinary offence, a warning

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[39] Rulebook on Disciplinary Liability of teachers and associates of the University of Rijeka, 2018, art. 5., listing 20 disciplinary acts. Available at: http://www.riteh.uniri.hr/media/filer_public/7e/7a/7e7a8168-a421-4f35-9746-2162c45b3e74/pravilnik_o_stegovnoj_odgovornosti_nastavnika_i_suradnika_sveucilista_u_rijeci.pdf (3. 6. 2023).

[40] *Ibid.,* Article 6, regulating disciplinary measures: a written warning to the worker on the obligations from the employment relationship that have been violated by his actions and a warning about the possibility of termination of the employment contract or termination of the contract, regular termination of the employment contract, extraordinary termination of the employment contract and termination of the contract (on a work or other contract).

[41] Statute of Josip Juraj Strossmayer University in Osijek, revised text, 2022, art. 213. Available at: https://www.fdmz.hr/images/dokumenti/na-razini-sveucilista/sijecanj_2022_statut-sveucilista-procisceni-tekst-sijecanj-2022.pdf (16.03.2023).

[42] Rulebook on Disciplinary Liability of Teachers and Associates of Josip Juraj Strossmayer University in Osijek, 2018, art. 1. Available at: http://www.unios.hr/wp-content/uploads/2018/01/Pravilnik-2018.pdf (3. 6. 2023).

[43] *Ibid.,* articles 5 and 6 regulate 8 minor disciplinary offences and 14 severe disciplinary offences.

may be issued as a disciplinary measure. For the commission of a more severe disciplinary offence, the Rulebook stipulates two disciplinary measures that can be imposed by the decision of the Dean at the proposal of the Disciplinary Committee following a previously conducted disciplinary procedure that determined the disciplinary offence.[44]

4. DIFFERENCES AND SIMILARITIES IN THE REGULATION OF DISCIPLINARY LIABILITY OF EMPLOYEES OF HIGH EDUCATION IN THE REPUBLIC OF CROATIA

At the time of research for this paper, the new ZZDVO entered into force and harmonization of the general acts of higher education institutions in the Republic of Croatia with the provisions of the new Act was in progress. The old ZZDVO, as well as the new ZVOZD, very succinctly stipulate the disciplinary procedure, stating only the basic criteria.[45] From the previous chapter, we can see that disciplinary liability is regulated differently at each of the observed four universities. At the same time, it is important to point out that ZOR does not recognize the institute's disciplinary or disciplinary liability, but rather lists "violations of obligations from the employment relation" without specifying in detail what these possible violations are.

4.1. General acts stipulating procedures for disciplinary liability and disciplinary actions

At the University of Osijek and the University of Rijeka, on the basis of their University's Statutes, unique regulations on disciplinary liability have been adopted. They are to be applied by all Faculties of both universities. We can conclude that the regulation of disciplinary liability at the University of Osijek and the University of Rijeka is uniform in relation to the Faculties to which the unique regulations adopted by the University Senate apply, ensuring equal and equitable treatment of all employees (teachers) of the University in terms of scope of application of disciplinary actions and the possible imposition of disciplinary measures in case of committed violations.

Similarity in the regulation of disciplinary liability can be established between the University of Zagreb and the University of Split, where the institute of disciplinary liability is governed by the statutes of each of two universities and on the basis of which each Faculty adopts its own general act. However, in this way, they could be put in a situation where, in the case of the same type of impermissible behaviour on different Faculties within the same university, such behaviour is unequally characterized (either as a minor or severe disciplinary offence) thus may result in a completely different disciplinary

[44] *Ibid.*, Art. 8. "2) Disciplinary warning measure by which the teacher/associate is warned about the obligation from the employment relationship violated by his behavior or action and is indicated to him about the possibility of dismissal in case of continued violation of these obligations. 3) Disciplinary measure of termination of employment by which the teacher/ associate's employment contract is regularly terminated due to violation of obligations from the employment relationship (dismissal due to behavior of the teacher/ collaborator)."

[45] See: Art. 104 of the Act on Scientific Activity and Higher Education.

measure. By further comparison, we can see a significant difference in the determination of disciplinary actions at each of the Universities. It is important to point out beforehand that Article 104 of the old ZZDVO, as well as Article 56 of the new ZVOZD, stipulates that an employee can be held disciplinary liable only for a disciplinary offence that, at the time of its commission, was intended as a disciplinary offence for which a disciplinary sanction is also stipulated, without specifying specific disciplinary actions or sanctions. Based on the legal provisions of the University, i.e. the Faculties, they have the possibility to independently adopt their own regulations on disciplinary liability, and to determine autonomously which impermissible behaviours of workers are disciplinary acts. Therefore, quite legally, they regulated differently the violations of obligations from employment relationships that constitute disciplinary acts.

As a result of the insufficient legal regulation of disciplinary acts and disciplinary liability, the possibility of putting workers to an unequal position is opened, as, if a disciplinary act is commited, it could be characterized as a more severe disciplinary act at one higher education institution in the Republic of Croatia, resulting in the termination of the contract on work, while at another University, the same disciplinary offence is stipulated as a minor one or is not even prescribed in the rulebook on disciplinary liability.

The aforementioned legal provision that every disciplinary offence must be determined in advance as such is unacceptable, because it is difficult or impossible to predict in advance every possible behaviour that would have the characteristics of a disciplinary offence. The above is additionally derived from the fact that each regulation on disciplinary liability of Universities or Faculties is envisaged differently, and despite the fact that the regulations at hand contain disciplinary acts that are common, each of the general acts also contains a description and qualification of disciplinary acts that do not exist in other higher education institutions.[46] Regarding the categorization of violations of obligations from the employment relation, there is a difference between individual higher education institutions.[47]

It is important to point out that the Rulebook on disciplinary liability of the University of Rijeka establishes that disciplinary acts and "other violations of obligations at work or in connection with work are established by law, implementing regulations or

[46] Here are examples of disciplinary acts that were previously established by a general act only at certain universities: failure to start work on the day specified in the employment contract - particularly serious violation of the obligation from the employment relationship prescribed in Article 101 of the Work Regulations of the Faculty of Philosophy in Zagreb; unauthorized use of computer systems - a disciplinary offence determined by the Rulebook on Disciplinary Responsibility of the University of Rijeka; failure to submit a travel order for calculation within five (5) working days from the day of the end of the trip - a minor disciplinary offence established by the Ordinance on Disciplinary Responsibility of Teachers and Associates of the Faculty of Economics in Split; making it necessary to take an exam or other tests of a student's knowledge by purchasing literature and other teaching aids - a more severe disciplinary offence established by the Ordinance on disciplinary responsibility of teachers and associates of Josip Juraj Strossmayer University in Osijek.

[47] At the University of Zagreb, it was established that there can be minor violations of the employment relationship and particularly severe violations of obligations from the employment relationship; minor disciplinary offences, more severe disciplinary offences and particularly severe disciplinary offences were determined at the University of Split's component; at the University of Rijeka, disciplinary acts and particularly severe violations of obligations from the employment relationship were established; at the University of Osijek, minor and more severe disciplinary actions were established.

appropriate general acts of the Employer."[48] and the Rulebook on the work of the Faculty of Philosophy in Zagreb established that particularly severe violations of obligations from the employment relationship are "other unmentioned violations of employment relationships from work and in connection with work which, according to the circumstances of the case, can be qualified as particularly severe violations and which in the process of determining liability determined by the employer".[49]

The aforementioned provisions, despite the fact that they are not harmonized with the legal provisions, are fully acceptable in the practical application of the institute of disciplinary liability, because it is obvious that it is not possible to foresee and prescribe in advance all possible violations of obligations from the employment relation that could be qualified as a disciplinary offence, and which additionally confirms the different determination of disciplinary actions at different universities.[50]

4.2. Procedures for disciplinary liability

At all analysed higher education institutions, the implementation of the procedure is stipulated for the case of a minor violation of obligations from employment relationships, as well as for the case of severe violation and particularly severe violation (the Faculty of Philosophy in Zagreb). At the same time, the procedure for minor disciplinary offences is initiated by the Dean, and at three higher education institutions it is stipulated that the Dean is obliged to invite the employee against whom the report has been filed to present his defence, while at one University it is left as a possibility that depends on the circumstances of the specific case.[51]

For the commission of a minor violation of the obligation from the employment relationship, a written warning is issued to the employee (at two Universities), that is, a decision is made on disciplinary measures (provided also at two Universities). Disciplinary proceedings for more severe disciplinary offences (and particularly severe disciplinary offences) are initiated by the Dean, based on a report or *ex officio* if he has knowledge of a violation, within 15 days by submitting a request to the authorized Committee (at three higher education institutions), and within 2 months (at one University).[52]

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[48] Rulebook on Disciplinary Liability of Teachers and Associates of the University of Rijeka, 2018, Art. 5th paragraph 1st sub-paragraph 20.

[49] Rulebook on the Work of the Faculty of Philosophy of the University of Zagreb, revised text, 2021, Art. 101, paragraph 3.

[50] The usual wording ”untimely, improper and irresponsible performance of work and tasks" which would be contained in the general acts at individual higher education institutions, would include all disciplinary actions that were not determined by the higher education institution during the adoption of the general act.

[51] The exception is the University of Rijeka, where the general act stipulates the initiation of disciplinary proceedings by the decision of the employer, presumably because disciplinary actions are determined uniformly (there is therefore no previous division into minor and more severe violations).

[52] The general acts of higher education institutions stipulate the course of proceedings before the Disciplinary Committee. After determining all the facts, the Committee, by majority vote, makes a conclusion with an opinion and a proposal for disciplinary measures to the dean if a disciplinary offence has been committed or on release from disciplinary liability if no disciplinary offence has been committed.

4.3. Disciplinary measures established by general acts

For minor violations of work obligations, the Dean issues a written warning to the employee or makes a decision on a disciplinary measure. It is important to point out that a warning would be the mildest disciplinary sanction, which has the purpose of warning the worker about work discipline and improving his/her behaviour and that the warning has no effect on the employment status. At the same time, some common measures have been established for severe violations of work obligations at all Universities, while separate (additional) measures have been established at individual Universities.[53] The general acts stipulate that the decision on disciplinary liability and issuing a warning is made by the Dean, as well as the decision on the termination of the employment contract and the implementation of the termination of the employment contract.

It follows from the above that, as a result of committing a disciplinary offence, the most severe possible sanction for the worker's employment status can be imposed - termination of the employment contract (both regular and extraordinary). From the overall analysis of the general acts of higher education institutions, a similar, but nevertheless significantly different arrangement of disciplinary procedures and system of disciplinary measures for committing disciplinary acts at higher education institutions in the Republic of Croatia emerges.

4.4. Protection of workers' rights in disciplinary proceedings

As the disciplinary procedure is used to decide on the rights and obligations of employees, and in case of violation of the obligations from the employment relations, the termination of the employment contract can be pronounced, disciplinary procedures should be uniform, in order to achieve equal rights arising from the employment relations for all employees of higher education institutions. It is therefore necessary to have a uniform regulation of the disciplinary procedure, which ensures the implementation of the principles of legality, legal certainty and predictability in the work of the administration and the implementation of procedures. It should be noted that different laws are applied in the implementation of the procedure and the imposition of disciplinary measures at certain higher education institutions[54] and we are of the opinion that it is necessary to decisively indicate the laws that will be applied.

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[53] Comparing the disciplinary measures prescribed by the general acts of the previously analyzed institutions of higher education for serious violations of employment obligations, we can conclude that the following disciplinary measures for serious disciplinary offences were jointly determined: a written warning for violating obligations from the employment relationship with a warning about the possibility of canceling the employment contract, then the termination of the employment relationship (regular termination of the employment contract) due to the violation of obligations from the employment relationship, which are therefore established at all four universities. At the same time, in the case of more severe disciplinary acts, the following disciplinary measures are additionally prescribed at certain universities: dismissal with the offer of an amended employment contract, termination of the teacher's employment contract and extraordinary termination of the employment contract.

[54] At one of the higher education institutions in the process of canceling the employment contract, in addition to the ZOR, the application of the Obligatory Relations Act is regulated, while the general act

It is justified to ask the question of the protection of workers in disciplinary proceedings that result in the termination of the employment contract, considering the application of ZOR.[55] The new ZVOZD regulates the disciplinary liability of all employees of higher education institutions and scientific institutes, the obligation to adopt regulations on disciplinary liability, and that the employee can only be held liable for an act that was previously stipulated as disciplinary, as well as that based on the established disciplinary liability, the employment contract can be terminated.[56]

Taking into account that higher education is a specific activity and that the new ZVOZD stipulates disciplinary liability for all employees, it was necessary to adopt unique provisions on disciplinary liability and disciplinary actions (within the law or a special regulation), in order to ensure the protection and legal security of employees, as well as equal treatment and equal position of all employees to whom the law applies.[57]

The purpose of the disciplinary procedure is to determine disciplinary liability and impose a disciplinary sanction that should not result in the termination of the employment contract.[58] Therefore, we are of the opinion that in the case of termination of the contract, it is not necessary to establish a "disciplinary procedure" as a separate procedure.

It is important to emphasize that the disciplinary liability of public officials is generally not regulated by a special regulation such as the disciplinary responsibilities of civil servants, where we have determined, on the example of an employee of a higher education institution, that the legislator did not clearly, unambiguously and comprehensively attribute the regulation and rules of the disciplinary procedure that would uniformly apply to all employees of the specified category of public service.

5. CIVIL SERVICE LAW AND DISCIPLINARY PROCEDURE IN EUROPEAN LEGISLATION AND REGULATION OF DISCIPLINARY PROCEDURE IN OTHER COUNTRIES

Starting from the legal values of contemporary public administration and the European principles of public administration concerning the quality of regulations and procedures, i.e. the principles of reliability and predictability as well as simplicity and

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of the other higher education institution indicates the application of valid legal acts, and the question is which is the valid legal act that needs to be applied.

[55] Severe and minor violations of work duties are prescribed by the Labour Regulations, in the procedure prescribed by the ZOR, therefore, if labour relations in the Republic of Croatia are regulated by the ZOR, the question arises of the arbitrariness of determining disciplinary acts and responsibilities and the imposition of disciplinary measures, where ultimately there is the possibility of canceling the employment contract - which is regulated differently at different universities.

[56] Law on Higher Education and Scientific Activity, Art. 56.

[57] On the basis of the current Act, each higher education institution can still adopt different solutions in terms of determining the general act and its content: the composition of the committee, disciplinary actions, disciplinary sanctions and disciplinary procedure.

[58] An employee may be terminated from an employment contract only in accordance with the Labour Law (regular or extraordinary termination), under the conditions and in the cases prescribed by the ZOR and in accordance with the general act - labour regulations.

clarity,[59] it is necessary to point out that the quality of regulations guarantees legal security to citizens, because only a high-quality legal basis, which includes clear, precise and unambiguous regulations and predetermined procedures and procedures without arbitrariness when deciding on the rights, obligations and legal interests of the parties, guarantees citizens a fair, every administrative (as well as disciplinary) procedure is fair and legal.

The only international instrument that serves as a framework for promoting the well-being of teaching staff in higher education and recognizing their key role in promoting academic excellence, research and innovation is the 1997 UNESCO Recommendation on the Status of Teaching Staff in Higher Education. The recommendation provides guidelines for employment, professional development and working conditions of higher education teaching staff and emphasizes the importance of academic freedom and institutional autonomy in higher education. A special section of the Recommendation regulates disciplinary penalties and dismissal, stipulating that members of the academic community may be subject to disciplinary measures only for a justified reason, which can be proven before an impartial body, and that it is necessary to ensure fair protection in all stages of the disciplinary procedure in accordance with international standards, and determines that dismissal may follow as a disciplinary measure solely for a justified reason related to professional conduct, citing examples.[60]

In the following paragraphs, we will refer to the legal regulation of the disciplinary procedure in certain European countries, primarily transition countries that are in the process of joining the EU and have implemented administrative reforms, which is a prerequisite for joining the EU, starting with Bosnia and Herzegovina, Republic of Serbia and Slovenia.

In Bosnia and Herzegovina, given its complexity, the disciplinary procedure that applies to all public servants is stipulated by laws and by-laws, i.e. rules and regulations.[61] As an example of a county law, we can use the Law on Civil Service in Civil Service Bodies

[59] Šimac, N. 2012. European administrative space and European principles of public administration. *Zbornik radova Pravnog fakulteta u Splitu,* 49(2), pp. 359-360.

[60] UNESCO, Recommendation concerning the Status of Higher-Education Teaching Personnel, 11 November 1997, Paris, France, Theme: Education, Type of instrument: Recommendations". , sexual or other misconduct with students, colleagues, or other members of the academic community or serious threats thereof, or corruption of the educational process such as falsifying grades, degrees, or degrees in exchange for money, sexual, or other favors or soliciting sexual, financial, or other material services from subordinate employees or colleagues in exchange for maintaining employment contract." Available at: https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel (3. 6. 2023).

[61] Law on Civil Service in the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina* nos. 29/2003, 23/2004, 39/2004, 54/2004, 67/2005, 8/2006, 77 /2006- decision US, 34/2010- decision US, 45/2010 - other law, 4/2012, 99/2015 and 9/2017- decision of the Constitutional Court; Law on Civil Servants, *Official Gazette of the Republic of Srpska* nos. 118/08, 117/11, 37/12 and 57/16; The Law on Civil Service in the Public Administration Bodies of the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of Bosnia and Herzegovina* nos. 17/2022 - revised text; Rulebook on disciplinary responsibility of civil servants in the institutions of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina* nos. 20/03 and 94/10; Rulebook on disciplinary and material liability of civil servants, public servants and employees in the administration bodies of the Brčko District of BiH, *Official Gazette of the Brčko District* nos. 40/06; Regulation on the rules of disciplinary procedure for

in Zapadnohercegovačka County (*Official Gazette of Zapadnohercegovačka County* nos. 16/2008, 7/2020, 8/2012 and 8/2013), which stipulates individually established light and severe violations of official duty for which the civil servant may be liable.[62]

We can see that the Law on Civil Service is applied in the institutions of Bosnia and Herzegovina, and disciplinary liability within the entity is stipulated by separate regulations (laws, rules and regulations). Therefore, *lex generali* regulates the general conditions of official liability, types of violations, bodies for conducting disciplinary proceedings, as well as disciplinary measures, while disciplinary liability of individual groups of civil servants is regulated by *lex specialis*, which includes additional violations of duty (for example, the Law on Police Officers of Bosnia and Herzegovina).[63]

Based on the analysis of the previous regulations, we can determine that, when determining the disciplinary procedure, its initiation, competent authorities (Disciplinary Committee), investigation, collection of evidence by the investigator, decision of the Committee on whether there was an alleged violation of the regulations are stipulated. The employee has the right to appeal the decision to impose a disciplinary measure (which can be: verbal warning, written warning, suspension, salary reduction or dismissal).

In the Republic of Serbia, the disciplinary procedure is stipulated by the Law on Civil Servants of the Republic of Serbia,[64] stipulating minor and severe violations of work duties of civil servants, and the legislator established a number of violations of work duties that qualified almost all impermissible behaviours. At the same time, within the framework of disciplinary punishments, a warning or a fine is stipulated for minor violations, while for severe violations, proportionately more severe penalties are stipulated. It is important to point out that, when deciding on disciplinary liability, in accordance with the provisions of the ZUP of the Republic of Serbia, it is necessary to justify factually and legally why the decision in question is made, to state the accepted evidence, that is, the basis for determining the conclusion about liability, as well as the decisive facts taken into account when deciding on the penalty.[65]

In the Republic of Slovenia, the disciplinary procedure was previously regulated by the Law on Public Servants [66] and now it is legally regulated by the Labour Relations

disciplinary liability of civil servants in the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina* nos. 72/04, 75/09, 17/21 and 55/21.

[62] The law stipulates that the County Government passes by-laws that determine in more detail the violations of official duties as well as the rules of procedure. Furthermore, the initiation of disciplinary proceedings, the composition of the disciplinary council as a special disciplinary body and the implementation of the proceedings before the council are prescribed, and disciplinary measures and disciplinary penalties have been established for minor and severe violations.

[63] Bečić, E. 2020. Legal regulation of the responsibilities of civil servants in Bosnia and Herzegovina, *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru*, 28(1), p. 24.

[64] Law on Civil Servants, *Official Gazette of the Republic of Serbia* nos. 79/05, 81/05 – amendment, 83/05 - amendment, 64/07 - amendment, 116/08, 104/09, 99/14, 93/17, 95/18, 157/2020 and 142/22.

[65] *Ibid.,* p. 197.

[66] Law on Civil Servants, *Official Gazette of the Republic of Slovenia* nos. 63/07 - official revised text, 65/08, 69/08 - ZTFI-A, 69/08 - ZZavar-E, 40/12 - ZUJF, 158/20 - ZIntPK -C, 203/20 – ZIUPOPDVE, 202/21

Act,[67] governing the working relations of employees in state bodies, local communities and institutions as well as other organizations and individuals performing public service, unless otherwise determined by a separate law. At the same time, it is important to emphasize the obligation of public and civil servants, as well as other persons under public law who mainly perform administrative tasks, to comply with the provisions of the Code of Conduct for Public Servants when performing work duties in the public service.[68]

6. CONCLUSION

Starting from the basic principles of the rule of law, which rests on respect for the Constitution, laws and regulations based on laws, as well as ensuring the legal implementation of all procedures, whereby the right to a fair trial is guaranteed, it is necessary to ensure the implementation of legal procedures of disciplinary liability in procedures that are conducted for all official categories of public administration. This is necessary in order to ensure equality before the law and the protection of the rights of citizens in proceedings conducted by public authorities, and specifically in disciplinary proceedings to ensure that the imposition of disciplinary measures must be preceded by the procedure established by the regulation, in order to achieve principles of legal certainty and equal treatment of all employees.

The disciplinary procedure for public servants in general, as well as for employees of higher education institutions and scientific institutes in Republic of Croatia, is insufficiently and imprecisely regulated by law.[69] Unlike in the area of public services, the disciplinary procedure for civil servants is regulated in detail by a law that ensures uniform application to all civil servants and state employees in the Republic of Croatia and leaves the possibility for certain issues for certain categories of civil servants to be additionally regulated.

With the aim of equalizing the rights of all public servants (in state and public services) and ensuring the legal security of employees of public servants, it is necessary to regulate a disciplinary procedure by a special (uniform) law for all public services in the manner it is regulated for state services, with the possibility of additional regulation of the mentioned institute within the framework of specific activities, if there is a need to do so. In this way, a unified legal regime would be achieved and, through equal treatment and predictability of legal acts, the realization of the principle of legality would be enabled.

– sec. US in 3/22 – ZDeb.

[67] Law on Labour Relations, *Official Gazette of the Republic of Slovenia* nos. 21/13, 78/13 - app., 47/15 - ZZSDT, 33/16 - PZ-F, 52/16, 15/17 - odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, 119/21 – ZČmIS-A, 202/21 – dept. US, 15/22 and 54/22 – ZUPŠ-1, art. 2.

[68] Code of Conduct for Public Servants, *Official Gazette of Republic of Slovenia*, nos. 8/01.

[69] Disciplinary procedure regulated exclusively (but insufficiently) by ZVOZD, instructs the institutions of the mentioned system to independently regulate the procedure, leaving them too much autonomy, which consequently leads to the possibility that each institution regulates the disciplinary procedure differently on the basis of the law, with its own general act.

Different regulation of disciplinary procedures causes unequal treatment when exercising the rights of the same category of employees within a single system (higher education and science), which leads to the unacceptable situation that in cases of identical violations of official duty and conduct of disciplinary proceedings, the disciplinary offence is qualified differently at different institutions and that as a consequence, a different disciplinary measure may follow; further, individual disciplinary acts do not have to be identically qualified as disciplinary at all institutions of the mentioned system.

As the law stipulates that an employee of a higher education institution can only be held responsible for a disciplinary offence that has previously been determined as such, it is a question of determining in advance in detail all disciplinary offences for which stipulated disciplinary sanctions would be imposed, which we consider an unacceptable legal solution. This is because it is not possible to foresee all disciplinary offences in advance, acts without stating the statement, for example "liability of employees in case of untimely, improper and irresponsible performance of tasks and duties".

Starting from the fact that higher education is a specific activity, it is critical to enact uniform provisions on disciplinary liability for all public servants of the above-mentioned system, in order to ensure equal treatment in equal situations in relation to all employees, assuming a previously established basic regulation that would stipulate a disciplinary procedure for all public services. As labour relations in the Republic of Croatia are regulated by the ZOR, the question arises of determining disciplinary acts and responsibilities, as well as the imposition of disciplinary measures or sanctions by a general act of institutions, which may result in the termination of the employment contract (as stipulated by the new ZVOZD), bearing in mind the provisions of the general regulation on work and labour relations, which does not recognize disciplinary liability in the sense of violation of obligations from the employment relationship (ZOR exclusively stipulates behaviour of workers).

The purpose of conducting disciplinary proceedings should be to determine disciplinary liability and impose a disciplinary sanction in the procedure stipulated by the ZUP, in the sense of warning the perpetrator of the disciplinary act, with the purpose of influencing his/her future appropriate behaviour, in order to protect the reputation of the institution and the personal reputation and honour of public officials and employees institutions. We are of the opinion that the established disciplinary liability outside the procedure established by ZOR and the labour regulations should not result in the termination of the employment contract. The reason for this is also the fact that following an identical procedure, different consequences can follow for the employee's labour law status: a warning, a disciplinary measure, but also the termination of the employment contract.

A prerequisite for ensuring the quality, efficiency and proper operation of the public administration is the legal regulation of all procedures it carries out in exercising the rights, duties and obligations of both citizens and its employees. In order to ensure the legal action of public law bodies and equal action in all procedures that would be carried out against public officials, it is also necessary to legally regulate the disciplinary procedure within the framework of a single regulation.

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VULNERABILITY OF "AGENCY WORKERS" AND THE NEED FOR THEIR PROTECTION**

Temporary-work agencies are present in the labour market worldwide as a result of the flexibilization of work, economic crises, globalization, and digitalization, as well as the unemployment. There are more people looking for employment than jobs offered by employers for recruitment. Those kinds of situations may put workers employed through agencies in a discriminatory position. In addition, law systems mostly do not regulate the establishment and terms of temporary-work agency. As a result, so-called agency workers are offered bad terms of work, which can lead to abuse of this institute.

On those grounds agencies for temporary employment are established, creating a triangle of contract relationships. The employee is therefore responsible for his work to an agency, and there is a special relationship between the user undertaking and the temporary-work agency. This kind of relationship might be positive for employees and their rights, first of all as regards the additional chances for employment. It might be also welcome for a user undertaking in urgent need of hiring, inter alia. On the other hand, this kind of work might cause more vulnerability for workers, in the sense of minoring their working rights.

In this paper, the author brings up the thesis that the lack of provisions for work of agencies for temporary employment and the lack of supervision of their work might put agency workers in a discriminatory position compared to other workers, and it might also lead to their exploitation. It can be also argued that the work of these agencies requires the permanent protection of agency workers.

Keywords: vulnerability, agency employees, temporary-work agency, discrimination, exploitation.

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1. INTRODUCTION

Economic crises have influenced all spheres of society, including labour law and employment. One of the consequences of this is seen in the development of the term flexibilization in employment. That resulted in new ways of doing work tasks. The crucial part of flexibilization is laying down new employment rules that differ from the standard ones. Unluckily, flexible work reduces rights and benefits for employees, representing "labour deregulation", and is called atypical (Božičić, 2016, p. 268). Part-time work, as well as employment through an agency, are the product of so-called flexibilization. It is said that economic crises and unemployment benefited to temporary-work agency, due to the fact that employers were willing to reduce costs that include administration papers, lawyer work, etc. (Laleta, Križanović, 2015, p. 306). The fourth industrial revolution brings less social security and fewer chances for employment, unlike the previous industrial revolutions (Urdarević, Antić, 2021, p. 154). That was the reason for creating additional new forms of employment, such as platform work (Kovačević, 2023, pp. 557-574). Some authors point out statistics that have shown the lack of security for those employees who work under the conditions of this atypical employment, with lower wages and higher chances of poverty and unemployment (Urdarević, Antić, 2021, p. 158). Even more vulnerable are employees discriminated on other grounds, such as migrant workers, and this kind of employment just increases their vulnerability (Feng, 2019, pp. 396-417). On these grounds temporary agency employment was established, with the aim to raise the rate of employment in the period of economic crises.

2. TEMPORARY-WORK AGENCY

Temporary-work agency is recognized as the most insecure of all contractual forms of labour (Eurofound, 2017, p. 7). It is also known as "leasing of employees" (Radulović, 2019, p. 515). Some authors stand that the remark on the agency work is the position of employees who are in practice deprived of basic labour rights, although there are some significant improvements in the field of the rights of agency employees (Gioia-Carabellese & Shuttleworth, 2013, p. 638). Generally speaking, employment through a temporary-work agency involves three subjects: agency, user undertaking, and employee. This kind of employment is complex and no more a two-party contract. There is a contract signed by the temporary-work agency and user undertaking, who will use the work of the employee, and another one signed by the employee and the temporary-work agency, which represents the mediator between the user undertaking and the employee. This kind of relationship is far different from standard employment due to the fact that there is an inexistent contract between the user undertaking and the employee. The agency is given a special role, not only to conduct the recruitment process but also to be in a position of an employer, and present the knowledge and skills of an employee to a user undertaking who is in need of that profile of employee (Kovačević, 2021, p. 347). Also, some authors stand that there are two different employers, one who represents the temporary-work agency, the contractual party with an employee, and the other who will use the knowledge and skills of an employee and have normative, management, and disciplinary authority (Božičić, 2016, p.

268). The position of an employee is complex. The employee is a contractual party with the agency but the majority of his rights should be available at the employer's premises, although there is no legal connection between these two subjects. An employee gives his effective work to a user undertaking, that is legally connected with an agency through the contract on the assignment of the employee.

There are several benefits of using services of this kind of agency. For user undertakings it means an easy way to find a suitable candidate for work, because the agency looks for the best employee for the job position among the employees in employment relationship with the agency. User undertakings rely on the agency when it comes to verifying the knowledge and skills of a potential employee, without any kind of obligation. User undertakings may benefit from this situation because they only have to chose the most suitable candidate. Also, there are situations when employers have no time for recruitment process due to the emergency of hiring an employee. Those situations may occur when unplanned additions of work happen. As Reljanović suggests, agencies deal with this kind of request within their profession, and it is assumed that it will be more expensive for user undertakings to look for a suitable candidate (Reljanović, 2017, p. 274). Some authors' stand is that the main reason for user undertaking to hire an employee through an agency is, beyond those mentioned earlier, "shifting liability for organizing work permits, checking workers documents and ensuring on-going compliance".[1] This is also a win-win situation for employees, for joining the labour market quickly, earning some money and so wanted work experience. For some, starting working with the temporary-work agency is the beginning of a long-term working if an employee is allowed to sign a contract with a user undertaking after the elapsed time of working through an agency (Kovačević, 2021, p. 343). This advantage of temporary agency work does not do along with statistics that have shown a long transition rate for agency employees and there is no evidence for a "stepping-stone effect" (Eurofound, 2017, p. 8). There is also the other side of agency work related to a higher rate of injuries at work, lower wages, non-continuous work, and unimprovement of skills (Eurofound, 2017, p. 8). Although it offers benefit for employees to join the labour market, there are no statistics that agency work is the first step to stable employment (Senčur Peček, Laleta & Kotulovski, 2019, p. 1102). Because of the economic crisis, this kind of atypical work has become typical in nowadays labour law legislation (O'Neil, 2020, p. 57), demanding future analyses and legal development.

3. VULNERABILITY OF AGENCY EMPLOYEES

The agency workers are employed in a nonspecific way, far away from employment that is stipulated as secure and permanent, with full working time, at the user undertaking's premises. They are employed at an agency, but they work effectively at user undertaking. That is the reason why they are entitled to some rights with agency and others with the connection of user undertaking and agency. As agency employees work at the

[1] Prassl, J. 2015. *Reconsidering the Notion of Employer in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?* Available at: https://www.jil.go.jp/english/events/seminar/2016_0229.html (26. 6. 2023).

user undertaking's premises, the user undertaking is obliged to provide those rights that are bonded with the premises such as health and safety at work at the premises, daily and weekly rest periods, and vacation (Reljanović, 2014, p. 201). The right to salary is the right that should be provided following the dual action of user undertaking and agency, the user undertaking takes record of employees' work and absence and the agency pays an employee on that basis. Reljanović points out the rights that are the agency's duty, such as allowing the employee to get to know new technologies and knowledge connected with the employee's work (Reljanović, 2014, p. 201).[2] We find this provision in Slovenian law, that stipulates that agency employees might be entitled to the right to improvement or education and that right will be provided in the agreement between the agency and the user undertaking, where the employee is doing work (Laleta & Križanović, 2015, p. 1110). This kind of provision is unusual and determined because it depends on the agreement of two subjects and their estimation. An important remark stays with the collective rights of agency employees, who are, under the Serbian Law on agency employment, entitled to syndical rights at agency and user undertaking, collective bargaining, as well as to take part in strikes at users undertaking, under the conditions of the Law on strike.[3]

Having in mind this complex position of agency employees, a higher level of protection of those employees comes as a necessity. As agency employees have practically two employers (Laleta & Križanović, 2015, p. 306), that is the reason why there is a need for special protection of this group of employees. We must admit that this group of employees is facing certain obstacles to finding a job. Their position in the labour market is insecure, due to the fact that agency might resign their employees as soon as there is no need for their work at the user undertaking's premises (Frenzel, 2010, p. 126). So, the position of agency employees at work is far from secure and that is the reason for special legal attention for this group of employees.

3.1. Protection of agency employees in the Private Employment Agencies Convention enacted by International Labour Office No. 181

The interest in prescribing agency employment in the International Labour Organization began with the Unemployment Convention No. 2[4], continued with Fee-Charging Employment Agencies Convention No. 34[5] and ended with Private Employment Agencies Convention No. 181.[6]

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[2] For comparison, this kind of provision is a part of the Croatian Act on Labour, *Narodne novine* nos. 93/2014, 127/2017, 98/2019, 151/2022, 64/2023, Art. 49, but the Serbian Law on Agency Employment lacks this kind of stipulation.

[3] Serbian Act on agency employer, Art. 30. Reljanović especially pointed out the need for changes in the Serbian Act on Labour, because of the specific position of agency employees who are practically working at users undertaking but under the employment contract with the agency.

[4] Unemployment Convention No. 2. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C002 (29. 6. 2023).

[5] Fee-Charging Employment Agencies Convention No. 34. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C034 (last visited 29. 7. 2023).

[6] Law on the Ratification of International Labour Organization Convention No. 181 on Private Employment Agencies, *Official Gazette of the RS - International Treaties* nos. 2/2013-155.

There are only several articles that consider the vulnerability of employees. First of all, one of the aims of the Convention that is proclaimed refers to the need for agency employees' protection (Art. 8). It seems that the legislator of the Convention was more focused on achieving another proclaimed aim that enables the functioning of the agencies for temporary employment (Božičić, 2016, p. 270). In Art. 11, it is stipulated that member states should take measures to protect workers who are employed by private employment, especially in the field of freedom of association, collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to training, occupational safety and health, compensation in case of occupational accidents or diseases, compensation in case of insolvency and protection of workers claims, maternity protection and benefits, and parental protection and benefits (Art. 11 of the Convention). In the next article, it is noted that member states should, as well, take measures to prescribe and provide the responsibilities of agencies involved in the process of employment (Art. 12 of the Convention).

We are close to a conclusion that this kind of provision is too general when it comes to the protection of employees. There are no provisions that become standard for states in regulating the position of agency workers. Also, there is no consideration that agency workers are even more vulnerable than the employees that are employed directly. Our conclusion is that this Convention has been passed to regulate the process of the new way of employment, rather than to recognize the vulnerability of so-called agency employees. Some authors stand that adopting this Convention was meant as a consensus and a need for increased flexibility in the labour system, as an "indirect nature of labour relations" (Standind, 2008, p. 366). The permanent higher unemployment rate and flexibilization as a solution are seen as minimizing all protective standards inside the ILO and "the attack on *raison d'être*" (Standind, 2008, p. 366). This kind of approach proves the lack of capacity of this organization to stand for the rights of employees who are hired with the help of agencies, without the effect on the unstoppable process of flexibilization.

3.2. Protection and vulnerability of agency workers in Directive 2008/104/EZ of the European Parliament and of the Council

The issue of agency work had its long path of regulation in EU law. Combining the interests of users undertaking and employees, taking into consideration the national policies resulted in passing the Directive 2008/104/EZ of the European Parliament and of the Council.[7] Some authors stand that this Directive was passed for employees to obtain better positions, security, and protection, by giving the agencies the position of quasi-employer (Senčur Peček, Laleta & Kotulovski, 2019, p. 1103). This Directive is seen as a tool to conduct flexibility and keep both employers and employees satisfied. For the user undertaking, recruitment through an agency brings the needed flexibility and can help him to obtain employees when he does not have time to do the selection of candidates. On the other hand, the flexibility that comes with this kind of employment contract

[7] Directive 2008/104/EZ of the European Parliament and of the Council on temporary agency work. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0104 (14. 6. 2023).

may bring benefits to employees to reconcile private life and professional responsibilities. Some authors conclude that these goals are too ambiguous due to the fact of huge discrepancy among national laws that make it hard to establish functional protection for workers, raise employment and establish so much wanted flexibility for employers (Petrović, 2019, p. 530). Others think that this Directive manages to do what Private Employment Agencies Convention issued by ILO failed to do, to protect agency employees by proclaiming the equal pay principle (Laleta & Križanović, 2015, p. 308).

First of all, we may notice line 15 of Preambule that specifies the fact that employment of an indefinite period is a general rule. That reminder is made with good reason, to mark the fact that the agency work is temporary, that may harm the consistency and security of employees and therefore there is a need for special protection of those workers. It is also suggested that agency workers should have a contract of an indefinite period with their agency to have all rights as other employees who are employed directly. If that is not the case, it must be an obligation of the state to provide safe conditions for that work, the supervision of applying the provisions and to make sure that these kinds of employees do not lack legal support (Reljanović, 2017, p. 279).

The more important is the equality principle, that should be provided for agency workers working with other employees who are working in the same working premises but are not employed through an agency. This concerns the equal pay principle because payment is the mark of the employment contract. This is crucial, bearing in mind the position of the agency employees. For a user undertaking, agency workers are more expensive than the others because, among other things, user undertakings bear the cost of paying for the favors of agencies, that is not the case with employees that are employed directly. The equality principle should provide the same conditions for all employees regardless of the way of recruitment. In practice, agency employees are deemed to lower salaries in order that the user undertakings might reduce the extra cost they have when hiring through an agency (Reljanović, 2017, p. 279). The user undertaking is not allowed to charge the employee for this kind of employment but user undertakings pay agencies for the assignation of their employees. Making the same rights, duties and responsibilities for all employees is a crucial matter when it comes to labour law, especially when agencies for temporary employment are involved. Agency employees are particularly vulnerable because they involve more costs for user undertaking. On the other hand, user undertaking wants to hire them because of the benefits of hiring through an agency but is also willing to reduce some of the rights of employees to compensate for that cost. That is the reason why the importance of the principle of equal pay is recognized and developed in Directive 2008/104/EZ (Art. 5 of the Directive). It stipulates the same working conditions for agency workers as well as for employees hired directly. The principle of nondiscrimination includes also special protection that is prescribed by the law for minors, and pregnant women as well as the principle of gender equality. The named article stipulates the same wage and other rights stipulated in the collective agreement.

These provisions are crucial for providing the equality of agency employees and those who are employed directly, but one cannot neglect the exception that is made in the Directive, which among others, allows a member state to pass different rules in the field of equal

pay if agency worker works for an indefinite time at the agency (Art. 5(2), (3), (4)). This exception is made with the idea that there will be no lower rate of protection for agency worker employed for an indefinite time and paid even when not hired by user undertaking because they are protected from the risk of unemployment and they will keep up with employment between assignations (Senčur Peček, Laleta & Kotulovski, 2019, p. 1113). As the equal pay principle is a compromise between the need of employees and the interests of user undertaking, it is justified to prescribe differences in wages for agency employees who are working for an indefinite time. We are not convinced that this kind of compromise will make good effects on agency employees with the fear of misusing this provision in practice. This can be connected with the situation when the employee is in an employment contract with an agency but his assignment with the user undertaking is over. The question is: will agency workers be paid until waiting for assignation? This is a very specific situation that touches upon the financial matters of an employee and the Directive only regulates the same terms of work just for the time when the employee is assigned to the user undertaking. We stand that this kind of provision should not have been missed in the Directive, considering its effects on the position of an employee. The Serbian Law on the Temporary-Work Agency prescribes the minimum wage for an employee who signed the contract for an indefinite time, intentionally excluding those who signed the contract for a definite time (Art. 24 of the Serbian Act on the Temporary-Work Agency). In Croatian law, the wage entitlement is stipulated only for the employee who signed the contract for an indefinite time, although there is a possibility to stipulate lower entitlement for employees with a definite period of time contract (Art. 95 of the Croatian Act on Labour). Slovenian law allows the entitlement of salary in both cases, but the rate of entitlement differs (ZDR, Art. 60). In the case of a contract for an indefinite time, the agency is obliged to pay 70% of the average salary and three months' salary is included. On the other hand, when an agency and an employee sign contract for a definite time, this entitlement can not be below 80% of the average pay. We can notice the difference between entitlements which are connected with the duration of the signed contract, aimed to protect with higher entitlement employees who signed a contract within a definite time.

3.3. Serbian Law on Agency Employment

The Serbian Law on agency employment was passed at the end of 2019 and its enactment began in 2020.[8] The expectation was high. One of them was the reduction of illegal work. Some experts were worried about the continuous supervision of the agency work,[9] others suggested that the maximum number of employees assigned to the user undertaking through the agency must be limited by the number that the user undertaking is hiring (Art. 14 of the Law on agency employment).[10]

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[8] The Law on Temporary Employment Agencies, *Official Gazette of the RS* nos. 86/2019.

[9] Komazec, M. Zakon o agencijskom zapošljavanju: radnici su izjednačeni, ali nisu isti. Available at: https://n1info.rs/biznis/a550662-strucnjaci-o-zakonu-o-agencijskom-zaposljavanju/ (26. 6. 2023).

[10] In accordance with this suggestion, there is a limitation on the maximum number of employees that may be assigned. The maximum number of assignations can not be higher than 10% of the number of

The Law on agency employment prescribes that an agency may opt to have an employee's employment contract for a definite or indefinite time (Art. 9 of the Law on Agency Employment).[11] We find that a good solution because it avoids hiring workers through various contracts beyond employment. Before enacting this law, employees in Serbia were often recruited with contracts that were not establishing employment, so employees did not enjoy some rights such as the right to vacation, or sick leave.[12] That was one of the reasons for enacting the law, to reduce illegal work and work beyond employment, but those expecting were in high demand and the situation in the labour market has not changed since. The time for this contract is supposed to be equal to the duration of the period that the employee will spend working for an user undertaking. So, we can conclude that the position of workers doesn't depend only on the concrete needs for work at the user undertaking, but, also it is related to the contract that is signed between the employee and the agency. That position gives agency employees more security, especially when it comes to payment.[13]

The important provision is also the one that bans the possibility for an employee to be hired at the same user undertaking through several agencies longer than 24 months.[14] Limitation of a period of assignation of an employee to one user undertaking is one of the measures that is usually used in comparative law, in order to prevent users undertaking to misuse agency workers in causing direct harm to employed employees on a definite or indefinite time (Kovačević, 2021, p. 346). This provision makes a good way of stopping the misuse of the contract of a definite time. If an employee keeps with his work under the contract of definite time at the same user undertaking for five days longer than 24 months, it is considered that he will continue working under the contract for an indefinite time (Art. 16). Although it makes a remarkable contribution to the protection of agency employees, it raises the question of probation for this kind of work in court. This kind of situation is made more difficult by the next provision in the same article, which entitles an employee to this kind of right only in case he brings a lawsuit. That may be discouraging for workers, considering the fact that they are not willing to confront user undertaking in court. For some employees, the financial aspect of gaining this right may stop them from pursuing it.

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employees hired at the user undertaking. This rule is very significant and prevents the user from undertaking to use agency workers when there is a need for permanent employment.

[11] In theory, it was spoken this question points out the necessity that the contract between agency and employee is made over a definite period of time, considering the fact that agencies serve to fulfil the current need for work of a user undertaking. In some countries, the law insists on signing the contract for an indefinite time, in order to make the position of employees more stable. For more read: Senčur Peček, Laleta, Kotulovski, 2019, pp. 1106-1108.

[12] Those were some of the problems in practice. For more: see Petrović, 2019, p. 532.

[13] Article 24 of the Act prescribes the entitlement of the salary for the period when the employee is not assigned to the user undertaking but signed a contract for an indefinite period of time with the agency. The Law on agency employment does not stipulate the wage entitlement for employees who signed an agency contract for a definite period of time.

[14] The exception can be made only where there is a legal possibility for an employee to work under the contract for a definite period of time which is longer than 24 months.

Salary is considered one of the main conditions relating to valuing the equality principle stipulated in Directive 2008/104/EZ. Agency employees should be given the same salary for the same work as well as they were directly hired by an user undertaking. Some authors stipulate the importance of the same salary, considering the fact of issues that work by agencies becomes the tool for reducing costs of a user undertaking to disadvantage of an employee (Laleta & Križanović, 2015, p. 327). In Serbian Law on agency employment, it is stipulated that agency workers are entitled to the same conditions during their employment period at the user undertaking as employees who are directly employed (Art. 18). The same condition is applied to working time, overwork, night work, vacations, salary, sick leave, health and safety at work, protection of minors, pregnant women and mothers as well as the ban of discrimination on any grounds. Our legislator specifies that the user undertaking is obliged to provide all the above-mentioned conditions, except salary. Agencies for employment are in charge of ensuring that agency workers have the same salary for the same work as employees who work directly at user undertakings. The law does not provide further information nor steps for equal entitlement, so we are close to concluding that this kind of provision is not precise enough and may leave space for misuse. In our opinion, the agency must keep a record of salaries of all employees who work the same job, supervised by labour inspection, taking in mind that the agency is obliged to pay the salaries with the working schedule of user undertakings. It is a positive thing that the law obliges agencies to pay salaries even in the case when a user undertaking is late with delivering the schedule, according to the average number of working hours (Art. 19). The work of the temporary-work agency is supervised by labour inspection, which is criticized as inadequate, due to the fact that a few people work within these inspections (Kovačević, 2021, p. 348). The solution might be seen in specialized bodies for supervision, such as public service for employment in Germany, or association of agencies for temporary employment in Belgium (Laleta & Križanović, 2015, p. 317).

4. COMPARATIVE LEGISLATION OF TEMPORARY–WORK AGENCY

The research on the vulnerability of agency workers cannot be complete without the comparative method, which provides a significant comparative preview of the position of this group of employees. Some of these provisions may help as a guide for national law, in order to improve the position of agency workers.

In Croatia, there is no special Law on Agency employment. This kind of work is regulated by a couple of provisions within the Act on Labour.[15] We will be focused only on provisions concerning the position of agency workers. Some authors witnessed the transformation of this institute in Croatian law, that is used to promote flexibility in labour law (Senčur Peček, Laleta & Kotulovski, 2019, p. 1104). The contract between agency and employee might be signed for indefinite or definite time that is notable, taking into account that employees will be working within the employment work and will avoid precarious terms that come with zero-hour contracts. When it comes to salary,

[15] Croatian Act on Labour, Arts. 44-52.

the agency worker is entitled to the same wage for the same work as employees who are directly employed by the same user undertaking (Art. 46, para. 6). Salary and other conditions of work must be in accordance with anti-discrimination laws. If there is no possibility that the salary of an agency worker is arranged by this law, it must be arranged by the contract signed by the agency and user undertaking. Laleta and Križanović stressed that this kind of provision was incomplete and it was unacceptable for the Act on Labour Law to have missed detailed regulation of salary (Laleta & Križanović, 2015, p. 327).

In Slovenian law agency employment is regulated by different acts.[16] In this country, the legislator insists on signing the contract for an indefinite time between the agency and the employee. This provision was not supported by user undertakings, but it was softened by the following rule that the number of agency employees that work under an indefinite time does not make a quota of a total number of assigned employees (Senčur Peček, Laleta & Kotulovski, 2019, p. 1108). The agency is obliged to provide all the rights for employees that are provided in the Labour Law (Senčur Peček, Laleta & Kotulovski, 2019, p. 1109). The salary of agency workers depends on the effective working hours done by the user undertaking, in accordance with the collective agreement and it is paid by the user undertaking.

Agency employment in Montenegro is stipulated by the Law on agency employment.[17] The legislator gives the agency the role of the legislator, using that term in the act (Art. 52). Montenegrin law stipulates that an agency may sign a contract for a definite or indefinite period of time with an employee. The Act also stipulates that the agency is in charge of providing the labour rights for the employees. This provision is unusual, having in mind the rights that employees are entitled to at the employer's premises and that they should be provided by the user undertaking. Although, we need to have in mind that further on the legislator brings the fact that the user undertaking is in charge of special protection of workers and taking measures that refer to the health and safety at work. The principle of equal pay is stipulated in the same way as in Serbian law. As for entitlement of salary, the law stipulates that right to the employee who is not assigned without his fault. The legislator fails to specify the terms of the entitlement and the cases when agency employees will have that right. Eventually, there is an important provision of Montenegrian law that stipulates the right of trade union associations (Art. 58), that makes a big contribution to the protection of this category of workers.

Italian law on agency employment is developed with the support of social partners (Voss *et al.*, 2013, p. 156). It is noted that social dialog has contributed to the quality of agency work, that resulted in training for employees established by collective agreement. The employee is entitled to the rights at the employer's premises provided by the user undertaking. The stability of the employment is stipulated by the obligation of hiring the agency worker if he

[16] According to the Law on the Regulation of the Labour Market, *Official Gazette of the RS* nos. 80/2010, 40/2012 – ZUJF, 21/2013, 63/2013, 100/2013, 32/2014 – ZPDZC-1, 47/2015 – ZZSDT, 55/2017, and according to the Law on Labour Relations, *Official Gazette of the RS* nos. 21/2013, 78/2013 – correction, 47/2015 – ZZSDT, 33/2016 – PZ-F, 52/2016, 15/2017 – decision of the Supreme Court.

[17] Montenegrian Law on Agency Employment, *Official Gazette of the Republic of Montenegro*, nos. 74/2019, 8/2021, Arts. 52-59.

works for the user undertaking longer than 36 months or has more than two extensions of the contract (Voss *et al*., 2013, p. 156). Interestingly, the agency is the one that is obliged to hire the employee for at least 12 months. Not the least, the authors stressed that economic crises jeopardize the labour market and the new reforms of the legislation do not contribute to the protection of the agency workers, on the contrary, they are focused on making it easier to use and dismiss temporary employees (Voss *et al*., 2013, p. 156).

Spain was the first country to provide rights for agency employees, introducing equal pay for equal work, as well as equal rights on overtime and holidays (Bentley, 2009, p. 17). But, these rights are prescribed by a collective agreement between the association of users undertaking and the association of agency employees and unions. That represents well legislative practice, having in mind the importance of the collective agreement. In Spain, this kind of regulation raised a question of protection of other employees who are directly employed, which developed another issue: the user undertaking must justify the reason for hiring the agency employees. That is why users undertaking in Spain are allowed to hire agency employees only in specific situations, such as unexpected growth of business and working instead of a worker who is on leave (Bentley, 2009, p. 17).

It is said that French law is the most regulated one when it comes to agency work and that it represents a good example of the functioning of agency employment. This type of work has been regulated by law and by collective agreement (Voss *et al*., 2013, p. 152). The agency work has been improved because it is realized that the employment of agencies for temporary employment is closely bonded with the qualifications and adaptability of its workers. As mentioned earlier, agencies are willing to provide training and new opportunities for employees, all with the aim to increase employability (Voss *et al*., 2013, p. 152). The equality principle is stipulated, especially when it comes to salary and other work employment, as well as other rights at work such as health and safety at work. Agency workers do not share capital with the user undertakings who are hired directly but do have compensatory bonuses after each assignment regardless of the type of contract employees signed.

5. CONCLUSION

Although there are benefits to establishing agencies for temporary employment, it seems that there is a need to review provisions to provide better protection for so-called agency employees. It was believed that an agency for employment should help in raising employment. But, that did not happen. There is no study that relates the higher rate of employment and agency employment. This kind of employment has also contributed to the lower quality of the employees' rights. Some point out the need of connecting laws and collective agreements to obtain employment flexibility together with the equality principle and security of the employer's premises (Eurofound, 2006, p. 38). First of all, it should be considered the period of assignment of an employee to one user undertaking. We agree with the authors who stand that the period of 24 months in Serbian law is too long, as well as who propose the possibility of introducing the rule of a maximum number of assignations of one employee to the user undertaking (Kovačević, 2021, p.

349). We consider that the position of employees might be advanced with a shorter duration of assignation and will be also a preventive measure for user undertaking not to use agency employment if there is a need for a permanent employee. We should also recall the rule of Directive 2008/104/EZ, which brings the obligation of states to adopt measures in order to prevent successive assignment of the same employee in order to circumvent the provisions of the Directive (Art. 5(5) of the Directive).

Furthermore, the possibility should be considered of forbidding agency employment in some professions, that bear a higher risk for health, such as construction work. Since agency employees are vulnerable and in insecure positions, there is also a suggestion that some categories should be excluded from agency work. For that reason, we stand that the migrant workers, as well as the disabled (Rajić, 2016, p. 175) and the young as sensitive and vulnerable category in the labour market should not be employed as agency employees because this kind of employment would increase that vulnerability. In our opinion, the position of these categories would be worsened by agency employment.

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ARTIFICIAL INTELLIGENCE IN HEALTH CARE – APPLICATIONS, POSSIBLE LEGAL IMPLICATIONS AND CHALLENGES OF REGULATION***

Recent developments in the application of artificial intelligence (AI) in health care promise to solve many of the existing global problems in improving human health care and managing global legal challenges. In addition to machine learning techniques, artificial intelligence is currently being applied in health care in other forms, such as robotic systems. However, the artificial intelligence currently used in health care is not fully autonomous, given that health care professionals make the final decision. Therefore, the most prevalent legal issues relating to the application of artificial intelligence are patient safety, impact on patient-physician relationship, physician's responsibility, the right to privacy, data protection, intellectual property protection, lack of proper regulation, algorithmic transparency and governance of artificial intelligence empowered health care. Hence, the aim of this research is to point out the possible legal consequences and challenges of regulation and control in the application of artificial intelligence in health care. The results of this paper confirm the potential of artificial intelligence to noticeably improve patient care and advance medical research, but the shortcomings of its implementation relate to a complex legal and ethical issue that remains to be resolved. In this regard, it is necessary to achieve a broad social consensus regarding the application of artificial intelligence in health care, and adopt legal frameworks that determine the conditions for its application.

Keywords: artificial intelligence (AI), health care, legal implications, regulation, protection.

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1. INTRODUCTION

Humanity is on the way to a fully technological, data-driven, digital world of health care, with new possibilities for diagnosing and treating diseases, as well as medicines that should contribute to a longer and healthier life. Clinicians, geneticists and technobiologists agree that the path to a healthier and longer life leads through personalized digital medicine, with therapies tailored to the individual, based on the analysis of his/her hereditary material and other individual data. The medical, digital and technical progress of humanity will be further enhanced by the increasingly widespread utilisation of artificial intelligence technology.

Nowadays the main problems of health care systems in many countries around the world are cost, quality and access to health care (Sovilj, 2018, pp. 143-161). The aim of healthcare is to become more personal, preventive, predictive and participatory (Sjeničić, 2011, p. 425). In an effort to improve and advance the health care system, scientists have begun to develop innovative technology like artificial intelligence, which will contribute to the achievement of those objectives. From a review of the progress made, we estimate that artificial intelligence will continue its impulse to evolve and mature as a powerful tool in health care (Rong *et al*., 2020, p. 292).

Having in mind that artificial intelligence aims to imitate human cognitive functions, it is bringing a paradigm change to health care, powered by the increasing availability of healthcare data and immediate progress of analytics techniques. Artificial intelligence can be applied to different types of healthcare data. Accepted artificial intelligence techniques involve "machine learning methods for structured data, like the classical support vector machine and neural network, and the modern deep learning, as well as natural language processing for unstructured data" (Jiang *et al*., 2017, p. 230). In a health care system, the artificial intelligence can be used to enhance the efficiency and quality of patient's life, as well as improving medical research. Until now, roughly 86% of health care providers (professionals) use at least one form of artificial intelligence in their practices (Kamensky, 2020, p. 1).

Namely, the legal issues that humanity is already facing due to the use of artificial intelligence in health care refer to, *inter alia*, patient safety, impact on patient-physician relationship, physician's responsibility, the right to privacy, data protection, intellectual property protection, and lack of proper regulation. The objective of this research is to comprehend the advantages of technologies, to appreciate the vast potential of artificial intelligence in health care and to point out certain controversial legal issues that humanity will face in the foreseeable future with the increasing prevalence of artificial intelligence in health care. Hence, the aim of this paper is to rationally understand the possibility of endowing artificial intelligence with a status of legal personality and to reveal the problems associated with legal regulation in health care system, in which artificial intelligence is used. Therefore, we will primarily analyze the issue of the legal nature of artificial intelligence, while the remainder of this paper will be devoted to the legal consequences of the applications of artificial intelligence in health care, as well as the challenges faced by regulatory bodies in the regulation of artificial intelligence.

2. THEORETICAL CONCEPT AND LEGAL NATURE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence has been discussed in scientific literature since the 1940s, when mathematician John Von Neumann devised the stored-program computer architecture - the idea that a computer's program and the data it processes can be stored in a computer's memory. In 1943, Varren McCulloch and Valter Pitts laid the foundations for the development of neural networks, i.e. architecture of neural network for creating intelligence (Prlja, Gasmi & Korać, 2021, p. 57). It is generally accepted that the modern field of artificial intelligence begins in 1956 during a conference at Dartmouth College, held under cover of the Defense Advanced Research Projects Agency (DARPA) (Prlja, Gasmi & Korać, 2021, p. 58). During this conference, John McCarthy first used the term artificial intelligence, when he determined intelligence as the computational part of the ability to achieve objectives in the world. According to McCarthy, intelligence includes mechanisms, and artificial intelligence has discovered how to make computers carry out some of them and not others (McCarthy, 2007, pp. 2-3). Therefore, with artificial intelligence, it is about computer systems being developed to such a level that they can independently perform functions that are traditionally performed exclusively by humans. Similar to people, there are new information systems that are capable of learning independently and undertaking different activities. Nowadays, the term artificial intelligence mainly refers to systems based on machine learning and deep learning, as well as other systems (Milosavljević, 2023, p. 500).

Artificial intelligence could be seen as a branch of the economy, an independent scientific discipline, or an area within computer science. Additionally, artificial intelligence could be seen as a new level of development of information and communication technologies (Andonović, 2020, p. 113). If we consider AI as an economic branch, artificial intelligence represents one of the richest markets in the world. The global artificial intelligence market size was valued at $136.55 billion in 2022 and is designed to extend at a compound annual growth rate (CAGR) of 37.3% from 2023 to 2030. The permanent research and innovation conducted by tech giants are driving the adoption of advanced technologies in many branches, such as health care, finance, retail, manufacturing, and automotive. *Exempli gratia*, from crucial life-saving medical devices to self-driving vehicles and unmanned aerial vehicles (drones), artificial intelligence is being infiltrated virtually into every machine and program (Grand View Research, 2023).

Artificial intelligence could be seen, also, as a scientific discipline or as a branch of Computer Science. If we determine artificial intelligence as a scientific discipline, the primary subject of its research is focused on automation, i.e. digitalization of the intelligent behavior of machines and programs. This behavior can relate to different forms of existence - from people, animal world, vegetation, and even objects (Chowdhary, 2020, p. 1).

If we consider artificial intelligence as a work tool, then it is used as a method of replacing the use of human intelligence in certain situations. Artificial intelligence can be viewed as ability of a computer or other machine to execute actions thought to require intelligence. Among these actions are logical deduction and conclusion, creativity,

the capability to make decisions based on past experience or incomplete or conflicting information, and the capability to understand spoken language (Andonović, 2020, p. 113). According to Chowdhary, the fundamental materials of artificial intelligence constitutes: „data structures, knowledge representation techniques, algorithms to apply the knowledge and language, and the programming techniques to implement all these" (Chowdhary, 2020, p. 2).

For numerous scientists and researchers, the aim of artificial intelligence is to imitate human cognition, while to certain scientists, AI is the formation of intelligence without considering any human features. On the other side, according to some scientists, the aim of artificial intelligence is to create useful items for the convenience and needs of human, without any criteria of an abstract notion of intelligence (Chowdhary, 2020, p. 4).

However, in the scientific literature a convincing argument is that due to the absence of an acceptable definition of artificial intelligence, it is difficult to determine the legal nature of AI. Can artificial intelligence be subsumed under existing legal categories, or is it a *sui generis* category that needs to be developed and legally formalized? One of the legal standpoints observes artificial intelligence as a general property because AI is creating intelligence in machines and programs, and not necessarily based on any characteristics of humans (Chowdhary, 2020, p. 4). However, from the perspective of copyright law, artificial intelligence cannot be recognized as an author based on the different cases related to animals, especially the famous case of the monkey's selfie.

In addition, a major dilemma in the legal theory and practice is about providing artificial intelligence with legal personality (subjectivity), particularly on the grounds of civil law. Legal personality, and the ability to be the holder of rights and obligations and to determine one's own legal situation, is prescribed by the law to human beings (natural persons) (Krainska, 2018). A human being has intelligence, feelings, free will, and self-awareness. How then should the law answer the question whether an artificial intelligence can acquire a legal personality, when it has not feelings, free will, and self-awareness? (Solum, 1992, p. 1243). Considering that legal personality is a compound institute, it can be recognized to certain entities or assigned to others. Hence, the notion of legal personality in the sense of the ability to be the holder of rights and obligations and to establish one's own legal situation has been extended to cover entities grouping together individuals sharing common interests, such as states or commercial entities (e.g. corporations). They are "artificial" creations, known as legal persons, designed by the humans standing behind them (Krainska, 2018).

Almost all legal scholars and practitioners agree that legal personality in the form recognized to a human being is unique and cannot be recognized to artificial intelligence because, at least for now, artificial intelligence does not indicate any evidence of being conscious and sentient (Wojtczak, 2022, p. 206). In the legal theory, when discussing the opportunity of recognition legal personality to artificial intelligence, two standpoints are represented. On the one side, artificial intelligence is compared to animals by analogy, while on the other side, artificial intelligence is compared to legal persons or collective entities (e.g. states, municipalities, companies, and associations). *A contrary*, analogy with animals seems more acceptable, as the capability of artificial

intelligence is limited in regard to humans. Also, artificial intelligence can be like collective entity in the sense that it is an artificial creation, a non biological one lacking in sensations and awareness (Wojtczak, 2022, p. 207). If we assume that in the future artificial intelligence would develop to such an extent that it could achieve complete reason, or a form superior than human reasoning, and if it gained some feeling, it would be upraised above collective entities and classified on par with humans. In that case, the advocates of this view believe that artificial intelligence cannot acquire dissimilar legal personality to that enjoyed by animals or collective entities, it must be analogous, derivative (Wojtczak, 2022, p. 207).

The issue of legal personality for artificial intelligence undoubtedly indicates that even if its ascription resolves some problems, it will induce others. Many legal scholars and practitioners warn that such ascription would not enable those who develop and employ artificial intelligence to outsource and avoid liability, thus incentivizing them to take risks and externalise costs because they know they will not be responsible (Hildebrandt, 2019, p. 12).

In the legal literature, there are some authors who advocate for the recognition of legal personality to artificial intelligence, but without any responsibility, which is *contradictio in adjecto*. Therefore, the determination of the legal personality of artificial intelligence must be approached carefully, considering that the recognition of legal personality entails certain rights and obligations, of which, at least for now, artificial intelligence has not consciousness. For instance, for a robot equipped with artificial intelligence, it is hard to say that it has a free will which can lead to commission of prohibited acts with the goal of achieving its own ends. Thus, a degree of fault, such as negligence or recklessness cannot be ascribed to it. Nor is it possible to hold it responsible for damage it caused, *exempli gratia*, such as malpractice by surgical robots or in the case of an accidents caused by an autonomous vehicles or drones (Krainska, 2018). The reason is based on the assumption that an artificial intelligence could not be responsible, that is, it could not compensate for damages, or be punished in the event that it breached one of its duties, because AI is not aware of its obligations.

If we look only at the utilization of artificial intelligence in health care, it is necessary to establish the fundamental legal problems and challenges in the application of artificial intelligence, such as: 1) data protection and the right to privacy; 2) responsibilities; 3) intellectual property protection; 4) security, efficiency and transparency and 5) cyber security (Sovilj, 2023, p. 17).

3. THE APPLICATION OF ARTIFICIAL INTELLIGENCE IN HEALTH CARE – LEGAL IMPLICATIONS

As in other branches, health care is characterized by a rapid increase in data and sophisticated artificial intelligence tools that could be used to find complex patterns in that data. In health care, data come from numerous sources: electronic health records (e-records), medical literature, clinical trials, health insurance claims data, pharmacy records, even information that patients enter into certain apps on their smartphones. On

the ground of collected numerous data and using sophisticated machine learning techniques, scientists have developed applications to improve the efficiency and quality of patients care, as well as to advance medical researches. The aforementioned tools rely on algorithms, i.e. programs created on the basis of health data, which can provide predictions or recommendations (Sovilj, 2023, p. 15).

Nowadays, artificial intelligence tools are used, *inter alia*, in radiology (screening and diagnosis), the accuracy of ultrasound diagnosis, patient counselling support by predictive algorithms, artificial reproduction technologies, pregnancy risk monitoring (prenatal diagnosis, hypertension disorders in pregnancy, foetal growth, gestational diabetes, preterm deliveries) (Silva Roch *et al*., 2022, p. 2). Artificial intelligence tools are also being used to detect lung changes caused by the COVID-19 virus. AI acts preventively and provides us with advance warnings about various diseases, stress and even dementia (Prlja, Gasmi & Korać, 2022, p. 44).

In addition to machine learning techniques, artificial intelligence is currently applied in medicine in other forms, such as robotic systems. Among the most widespread robotic systems used in health care is the da Vinci Surgical System. Since 2000, when the American Food and Drug Administration (FDA) authorized its use, more than 7 million surgical procedures have been performed around the world using da Vinci Surgical System. In the previous period, there was growing interest in the development of so-called social robots in health care. The most famous examples of them are: ASIMO by Honda, AIBO by Sony, PARO by Japan's National Institute of Advanced Industrial Science and Technology, Kaspar by University of Hertfordshire, Pepper from SoftBank Robotics and others (Wojtczak, 2022, p. 211). Additionally, health care institutions and nursing homes in Japan particularly utilize exoskeletons and exomuscles which help elderly patients to perform daily activities. Aiming at lessening the strain on physical therapists to train patients with serious or degenerative disabilities, motor cognitive limitation and at improving their quality of life, exoskeletons are applied in the field of rehabilitation, mainly on patient training (Guan, Ji & Wang, 2016, p. 1). Therapeutic Robot PARO, the so-called seal robot, is used in more than 30 countries in the world. Over 80% of state-run nursing homes in Denmark use the seal robot. In addition to the treatment of elderly people, robots are used in communication with children who stay in hospital for a long time, to hold psychotherapeutic sessions, lectures to students, etc.

Among recent examples of social robots in healthcare, global pharmaceutical company *Merck* teamed up with Furhat Robotics to reshape the way medical professionals approach early detection and diagnosis of common diseases. Merck has developed PETRA, a social robot that has the capability to detect signs of the three of the world's most common, yet under-diagnosed diseases: alcoholism, diabetes, and hypothyroidism (Furhat robotics, 2020). Also, the recent pandemic has emerged as an opportunity for artificial intelligence to enable computer systems to fight against the outbreaks, as several tech giants and start-ups commenced working on preventing, mitigating, and containing the virus.[1]

[1] For instance, the Chinese tech giant Alibaba's research institute Damo Academy has developed a diagnostic algorithm to detect new coronavirus cases with the chest CT (Computed Tomography) scan. The

However, the artificial intelligence used in health care is not fully autonomous in contrast to the artificial intelligence technology used in autonomous vehicles or unmanned aerial vehicles. Namely, the current application of artificial intelligence in health care is characterized as a technology that helps health care professionals to make decisions based on previously provided information or analysis (big data), while the final decision is taken by health care providers. "Even insisting that artificial intelligence has no decision-making potential, but that a person has power over it and that the artificial intelligence only provides a basis for human decisions, i.e., the result of reasoning, it cannot be denied that an artificial intelligence that communicates with a health care professionals through an understandable language has the capability to influence the decisions of health care professionals" (Wojtczak, 2022, p. 211). In this regard, the issue is whether health care professionals should be fully responsible for the decisions proposed or made by artificial intelligence algorithms, bearing in mind that the use of artificial intelligence can create unpredictable risks. Therefore, it is disputed and legally uncertain whether the traditional institutes of legal responsibility can be applied to medical errors, made on the ground of artificial intelligence decisions (Sovilj, 2023, p. 16). The majority of medico-legal standards are also undetermined as to where the limits of liability begin or end when artificial intelligence agents guide clinical care.

Namely, the legal problems that society is already facing due to the use of artificial intelligence in health care relate to the privacy concerns with the data used for training artificial intelligence models, and safety and responsibility issues with artificial intelligence application in clinical environments, surveillance, bias, and discrimination (Reddy *et al*., 2020, p. 491). Despite promising and encouraging results in the diagnosis and treatment of diseases, decisions made under the influence of AI bias can lead to discrimination against patients (even before they are born) and unintentional harm. Human biases transferred to the artificial intelligence algorithms can produce discrimination of future patients based on ethnicity, race, citizenship status, marital status, sexual orientation, gender, religion, and political orientation. Biased algorithms can lead to an underestimation or overestimation of risk in specific patient populations (Reddy *et al*., 2020, p. 492). In this regard, artificial intelligence technology represents a dangerous instrument of abuse. The misuse of artificial intelligence raises concern due to its possibility to become a new source of negligence, inaccuracies, and violations of patients' rights. In the absence of appropriate legal regulation, accelerated progress in development and application of artificial intelligence could lead to insecure and morally flawed practices in health care. In a high-risk profession such as health care, errors caused by the use of artificial intelligence can have fatal consequences for patients (Sovilj, 2023, p. 16). Therefore, a more detailed and comprehensive legal approach is necessary in regulating the use of artificial intelligence in health care.

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artificial intelligence model used in the system has been trained with sample data from over 5,000 positive coronavirus cases. In June 2020, *Lunit* developed an artificial intelligence solution for the X-ray analysis of the chest for simpler management of COVID-19 cases and offered assistance in interpreting, monitoring, and patient trials (Grand View Research, 2023).

4. CHALLENGES OF REGULATION OF ARTIFICIAL INTELLIGENCE IN HEALTH CARE

Legal and normative standards for the application of artificial intelligence in health care should be primarily developed by governmental bodies, regulatory authorities, and health care institutions. Legal standards should promote how artificial intelligence will be created and applied in the context of health care and should be consistent with the fundamental principle of law, namely justice. The principle of justice includes equity in access to health care. Consequently, the application of artificial intelligence should not lead to discrimination, or health inequities. "The legal framework should provide procedural (fair process) and distributive justice (fair allocation of resources) to be respected, in order to protect against hostile attack or the introduction of biases or errors through self-learning or malicious intent" (Reddy *et al*., 2020, p. 493). Hence, the artificial intelligence applications need to be reviewed for their data protection, transparency, and bias minimization characteristics in addition to safety and quality risks and protections against malicious attack or unintentional mistakes.

Currently, there is no legislation in the world that specifically regulates the use of artificial intelligence in health care. As aforementioned, for the approval of artificial intelligence applications, which covers license for the marketing and utilize of AI in health care, govermental bodies and regulatory authorities have a crucial role. For instance, in the USA, the Food and Drug Administration (FDA), which regulates medicines and medical devices, has introduced steps to approve software for medical use (Reddy *et al*., 2020, p. 495). In July 2016, the FDA issued three guidelines meant to encourage medical entrepreneurs to deploy and use devices that rely on advances in artificial intelligence in health care. In response to the growth of the digitalization of health care, through the use of artificial intelligence, the FDA is focused on creating a digital health unit within its Center for Devices and Radiological Health (CDRH) to include time and resources to invest in artificial intelligence (Bailey-Wheaton, 2017, p. 1). The CDRH facilitates "medical device innovation by advancing regulatory science, providing industry with predictable, efficient, consistent, and transparent regulatory pathways, and assuring consumer confidence in devices marketed in the USA" (Bailey-Wheaton, 2017, p. 1).

In the United Kingdom, the use of artificial intelligence is regulated by a patchwork of more general legislation, such as the Data Protection Act 2018, or the Medical Devices Act 2021, covering certain applications of artificial intelligence in health care. In June 2022, the Medicines and Healthcare products Regulatory Agency (MHRA) adopted guideline entitled Government response to consultation on the future regulation of medical devices in the United Kingdom. The MHRA outlined that "artificial intelligence as a medical device (AIaMD) would be treated as a subset of software as a medical device (SaMD)", which means that a robust guidance will be provided, but it will not be separated from the guidance for software (MHRA, 2022, pp. 121-123). The guidance, in addition to secondary legislation, will structure the legal framework in the UK. As opposed to legislation, one of the advantages of guidance is that it allows for a flexible and reactive approach to change (Vollers & Dennis, 2023).

At the EU level, in 2021, a proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) was adopted. It was the first comprehensive law which regulates artificial intelligence. This proposal constitutes a core part of the EU digital single market strategy (Raposo, 2023, p. 2). The main objective of this proposal is "to provide the proper functioning of the internal market by setting harmonised rules in particular on the development, placing on the Union market and the utilize of products and services making use of artificial intelligence technologies or provided as stand-alone AI systems". Meanwhile, some EU member States are considering national rules to make sure that artificial intelligence technologies are safe and are developed and used in compliance with fundamental rights obligations (Proposal of AI Act, 2021, p. 6).

In June 2023, the European Parliament has adopted an Artificial Intelligence Act that comes into force a short time after being published in the *Official Journal of the European Union*. The exact timeline is still being debated, but various parts of this Act will commence being implemented at different times, approximately during the first 2-3 years after the act comes into force. The main objective of this legislation is to create a more or less uniform legal framework across all EU Member States in relation to the use of artificial intelligence (Schneeberger, Stoger & Holzinger, 2020, p. 212).

The Artificial Intelligence Act uses a risk-based approach. The AI Act categorises artificial intelligence systems based on levels of risk as: unacceptable risk, high-risk, limited risk, and minimal or no risk. The level of unacceptable risk means that the artificial intelligence system must be deemed "a clear threat to the safety, livelihoods and rights of people", and will be banned. For instance, this includes a complete ban on "the use of social scoring systems by public authorities and various uses of real-time remote biometric identification in public spaces" (Vollers & Dennis, 2023). In contrast to AI Act, the use of the social scoring system is approved by the government of the People's Republic of China.

High-risk applications, such as a CV-scanning tool that ranks job applicants, are subject to additional legal requirements. In a health care system, for example, these tools could include robot-assisted surgery, medical devices with artificial intelligence, or *in vitro* diagnostic medical devices. Compliance assessments will be required for high-risk artificial intelligence systems. These tools will only be permitted to be placed on the EU if specified conditions are met, such as establishing a risk management system, complying with data governance requirements, and drawing up technical documentation (Vollers & Dennis, 2023). Current regulations, such as the Medical Device Regulation (Regulation (EU) 2017/745) and the *In Vitro* Diagnostic Medical Devices Regulation (Regulation (EU) 2017/746) would still be applied. The Medical Device Regulation applies to software as medical devices, including AI-based software, while the *In Vitro* Diagnostic Medical Devices Regulation applies to *in vitro* based diagnostics, including AI-based. These regulations include new approaches for more rigid pre-market control, increased clinical investigation requirements, reinforced surveillance across the device's lifecycle, and improved transparency by creating a European database of medical devices. However, many aspects specific to artificial intelligence are not taken into consideration,

such as continuous learning of the artificial intelligence models or the identification of algorithmic biases (EPRS, 2022, p. 30). In that case, the EU has an obligation to ensure that these regulations are harmonized and not inconsistent or contradictory.

Limited risk category systems will be subject to certain transparency obligations. In health care, for instance, these tools are artificial intelligence softwares that process data received from a fitness or heart rate monitors and provide results (Vollers & Dennis, 2023). At last, applications not explicitly prohibited or listed as high-risk are largely left unregulated.

5. CONCLUSION

As aforementioned, artificial intelligence is already helping to improve the quality and access to health care, and also has the potential to contribute to significant advances in health care. However, the use of artificial intelligence in health care represents a legal, ethical, social, and political challenge in the contemporary society. It is indisputable that artificial intelligence in health care must be safe, reliable, and effective. Nevertheless, the question is how to provide legal protection to health care professionals and patients while at the same tame ensuring the unconstrained and efficient development and use of artificial intelligence technology in health care? One of the most significant challenges for the regulators and policymakers will be engendering confidence among health care professionals and trust in their use of artificial intelligence.

In order to achieve adequate legal protection in health care due to the use of artificial intelligence, its legal status needs to be defined. As we mentioned above, one of the main legal problem of defining the status of AI is of the theoretical nature, which is due to the objective inability to forecast all possible results of developing new models of artificial intelligence. Until now artificial intelligence has not possessed a legal personality and is considered objects of law. In the legal literature, there is no generally accepted standpoint regarding the legal personality of artificial intelligence. As we aforementioned, almost all legal scholars and practitioners agree that legal personality in the form recognized to a human being is unique and cannot be recognized to AI. Therefore, the determination of the legal personality of artificial intelligence must be approached carefully, considering that the recognition of legal personality entails certain rights and obligations, of which, at least for now, artificial intelligence has no consciousness.

The growing legal inconsistency is due to the accelerated development of artificial intelligence and its spreading in different sectors of health care. All this testifies to the increased risk of a break between legal matter and the changing social reality (Filipova & Koroteev, 2023, p. 360). This is the reason why a comprehensive regulation on the use of artificial intelligence in health care has not yet been adopted. Some of the rules such as guidline of MHRA or EU Regulations treated artificial intelligence as a subset of software as a medical device. In order to understand the vast potential of artificial intelligence in the transformation of health care in the future, it is necessary that all actors, from health care professionals and patients, to lawyers and ethicists, are involved in a public debate about the use and regulation of artificial intelligence. The aim of the

debate is to achieve a social consensus and set limits in determining the conditions for the use of artificial intelligence. Therefore, communication with the patients and health care professionals will be crucial to building trust and encouraging the use of artificial intelligence technology.

In this research we offer an overview of how the use of artificial intelligence can benefit future health care, in particular increasing the efficiency of health care professionals, and improving medical diagnosis and treatment. In that regard, legislation and guidelines should ensure ongoing assessment of artificial intelligence health care technologies, while acting as an enabler, realizing the enormous potential of technologies that could represent a huge leap forward over current treatment and diagnostic abilities for all patients (Vollers & Dennis, 2023). As artificial intelligence expands into new areas, a relevant legal framework will be one that can quickly and effectively deal with the rise of yet unfamiliar technologies. Only time will tell whether the envisaged regulatory framework will be sufficient to match the pace of artificial intelligence development.

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DUE DILIGENCE MECHANISMS IN BUSINESS ENTITIES: CASE OF ALBANIA

This paper examines and explores the concept of due diligence mechanisms in respect of human rights as it pertains to business entities in Albania. In recent years, there has been increased attention paid to the responsibility of businesses to respect human rights, especially in countries with less robust legal frameworks. Albania, a country undergoing rapid economic development, presents a compelling case study for examining the implementation of due diligence in this due context. The paper considers the various approaches to due diligence in respect of human rights, including the UN Guiding Principles on Business and Human Rights, and the mandatory due diligence legal framework of the European Union, and examines their application in the Albanian context. It also highlights the challenges and opportunities for businesses operating in Albania, particularly in the extractive and manufacturing sectors, and identifies areas for further research and collaboration between the government, civil society, and the private sector. Eventually, this paper argues that due diligence in respect of human rights is not only a legal obligation but also a crucial element of sustainable business practices, contributing to the long-term success and prosperity of both businesses and society as a whole.

Keywords: due diligence, entities, social responsibility, business, EU, Albania.

1. INTRODUCTION

The topic of business and human rights is a crucial topic of the moment when discussing in the legal circles of collaboration. The due diligence mechanisms context as an integral part of the whole panorama of protecting and promoting human rights represents immense importance for its inclusion in the legal framework of the domestic legislation, moreover into the daily life of a certain business entity. Albania, a fragile country with robust development, is facing out day by day problems and issues about the infringement of human rights and the adverse impacts on those rights that produce risk, conflict, etc.[1]

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[1] An introduction to the OECD Due Diligence Guidance for Responsible Mineral Supply Chains for Upstream Actors. Available at https://mneguidelines.oecd.org/An-introduction-to-the-OECD-Due-Diligence-Guidance-for-upstream-actors.pdf (29. 9. 2023).

Due diligence can be defined as a mechanism, as a pro-active process, whereas business entities reserve the duty to identify, prevent, mitigate, and reward the risks that crucially and directly contribute to the adverse process of rights.[2]

This paper will discuss the relevant and coherent ways of upholding the protection of human rights committed by business entities with special attention on the provision and establishment of due diligence mechanisms sourced by the application and correlation of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs), and mandatory Human Rights Due Diligence (hereinafter: mHRDD) by European Union legal framework. It will be focused mainly on current opportunities that are in charge internationally for implementation in the business entities circles, their quasi-legal and quasi-legislative powers such as the UNGP and EU legal frame. About this, the paper will give an overview of the current situation in Albania and the application of the aforementioned legal instruments.

Albania, a fragile country in state formation[3], democratization process, and corporate development, is still new in the market of introducing and implementing human rights due diligence mechanisms to carry out the supply chain. Carrying out such process and mechanism, directly helps business entities that are not supporting conflict, corruption, human rights abuses, or other financial crime and adverse impacts.[4]

The analysis of the two quasi-legal mechanisms (UNGP & mHRDD) helps to configure the due diligence process of four key elements – identifying, preventing, mitigating, and rewarding – and their implementation in the Albanian system.

2. THE IMPACT AND ANALYSIS OF UNGP IN THE CONTEXT OF BUSINESS AND HUMAN RIGHTS

United Nations Guiding Principles on Business and Human Rights[5] is a leading soft law legal framework, still not mandatory in the field of Business and Human Rights.[6] However, being the only one that stipulates good, effective, and efficient solutions to the problems faced in the business world, focusing on human rights. The UNGP is structured and organized into three pillars[7]: the state's duty to protect human rights, businesses' responsibility to respect human rights, and victims' access to an effective remedy or the necessity for greater access to available remedies.[8] Concerning the analysis that is performed on the three pillars of UNGP, regarding the first one, it is a matter of fact that the State should comply with its positive and negative duty to protect and proclaim

[2] *Ibid*.

[3] Luarasi, A. 2018. *Historia e Shtetit dhe se Drejtes ne Shqiperi*. Luarasi: Luarasi University Press.

[4] *Ibid*.

[5] Herein after: UNGP.

[6] Hess, D. 2021. The Management and Oversight of Human Rights Due Diligence. *American Business Law Journal*, 58(4), p. 756.

[7] See the text of the UNGG. Retrieved from: The UN Guiding Principles on Business and Human Rights: UN Guiding Principles Reporting Framework.

[8] Hess, D. 2021. p. 756.

human rights.[9] It is necessary to clarify that it pertains to the fact of drafting and aligning a sustainable legal framework and sustainable legal acts such as treaties for example.[10] Also, it refers to the duty of the state to protect, not only individuals but also all the legal and natural subjects of the law against the hazardous commitment and attitude of third parties by inducing good policies, regulations, and adjudication by implementing with full responsibility the due process of law.[11]

As regards the second pillar of the UNGP, which is also the focus pillar of this paper, it relates to the accomplishment of due diligence in avoiding infringements of the rights of third parties and reports or addresses antagonistic impressions they tangle with.[12] In other words, it talks about the responsibility that businesses should bear upon the accomplishment of a reciprocal connection with other parties. It determines the concept or assumes the duty to underline the concept of connection between business and harm (or harmful actions and/or omissions).[13] Entities and companies that are running different businesses can violate human rights in different dimensions. For instance, a certain business can directly harm the environment (air pollution, water supply pollution, etc.), directly through its business relationships (labor law infringements, child labor abusive attitudes), or indirectly by supporting other parties' violations.[14]

Harmful contributions and human rights violations of the businesses towards third parties are not welcomed, moreover not supported; in that regard, certain steps and necessary measures should be taken to prevent, cease and mitigate the consequences of such action or omission.[15]

In that regard, taking into consideration the focus of this paper, in order to minimize and underline the link to adverse human rights impacts it should be of immense

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9 *Ibid*., p. 757.

10 See: The UN Guiding Principles on Business and Human Rights: UN Guiding Principles Reporting Framework.

11 *Ibid*.

12 *Ibid*.

13 Hesss, D. 2021. p. 758.

14 *Ibid*.

15 See: Commentary on United Nations Guiding Principle,19, cited below:

> *"Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.*
>
> *Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.*
>
> *Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products, or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations is the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences."*

Available at: https://globalnaps.org/ungp/guiding-principle-19/ (29. 9. 2023).

importance for business entities to establish a mandatory due diligence mechanism and implement a full process to identify, prevent, mitigate, and interpret how they address their influences on human rights.[16]

The High Commissioner for Human Rights in United Nations, Zeid Ra'ad Al Hussein describes the UNGP and relies on its application importance cited as follows:

> *"The global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights."*[17]

Going back to the third pillar of UNGP, for the sake of clarification, it only relies on the attributive way that companies should comply with the concept of reward to third parties when it comes to adverse human rights impacts of them. It is time to talk loudly, but most importantly to act hard with remedies. All violated parties should be legally entitled to acquire damage and reward for what had happened to their bundle of protected Human Rights.[18]

Key elements and components layed down in the UNGP for trumpeting due diligence mechanisms remain cliché, however still helpful for introducing and implementing a mechanism as such.[19] It is to be mentioned that the list of standards and components is as follows: Identification and accession of actual and/or potential adverse impacts, pro-activeness on actions taken in addressing the issue and the impacts, the tracks of the so-called effectiveness of the actions undertaken, and last but not least, the communication process (Guiding principle 17).[20]

This is a very helpful tool for entities and companies that are running different businesses to be in line with the respect bundle of human rights stipulated in Constitutions and Treaties, protected by the principles of International Law. Taking into consideration the suggestive nature of the UNGP, studies have shown that businesses neglect to align and comply with such standardizations. This means that businesses should not rely only on the protection that states themselves give for parties adverted in their rights, as it is a duty for the state itself, and in practice it is never enough to protect and reward rights, especially human rights. Businesses themselves should be prudent and should pay great attention to being principal and complementary in this process of defining and dimensioning the due diligence mechanism.

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[16] *Ibid*. See also: The UN Guiding Principles on Business and Human Rights: UN Guiding Principles Reporting Framework.

[17] Ruggie, J. G. & Sherman, J.F. III. 2017. The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale. *European Journal of International Law*, 28(3), August, pp. 921–928.

[18] The UN Guiding Principles on Business and Human Rights: UN Guiding Principles Reporting Framework.

[19] Fasterling, B. & Demuijnck, G. 2013. Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights. *Journal of Business Ethics*, 116, pp. 799–814.

[20] See: Commentary Guiding Principle 17. Available at https://globalnaps.org/issue/human-rights-due-diligence/ (29. 9. 2023).

I will close this remark and underline the help that UNGP has been screaming for since 2011 in performance and strengthening the restrictive and protective performance of businesses regarding the protection of human rights. The concept of human rights due diligence is defined by the UN as follows:

> *"Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size, and similar factors) to meet its responsibility to respect human rights."*[21]

In this sense, it is obvious the aim of promoting awareness about the protection of human rights is through promoting and implementing mechanisms that are being produced as intellectual products of other actors besides the state.[22] The state most of the time abrogates its power and its inclusion in such processes, by justifying itself on the issue of non-proportionality and private rights of entities. As a result, the parties infringed in the process lack the resources to ask and enforce accountability for such abuses. The rights-holders seek protection, accountability, and justice.[23] Guidelines like UNGP give way to uniformity and standardization of processes like Due Diligence Mechanisms for non-state actors by giving rise to awareness and result: remedies.

3. HUMAN RIGHTS DUE DILIGENCE IN THE CONTEXT OF EUROPEAN UNION LAW: THE BINDING DILEMMA

Guideline instruments like UNGP or others of the same standard are considered as fluent and optimistic instruments towards the process of giving raise and voices of mandatory due diligence concerning business entities' way of conduct. These quasi-legal documents have given roots to the formation of either a strong legislative effort or adjudication meaning judicial decisions of domestic and international various courts of law. They have always been a good tool in pushing non-state actors, specifically business entities to become lawmakers, with a focus on international standards and law.[24] There is a debate on the topic of whether these initiatives and the legal documents that business entities produce, with no rooting effect on the binding treaties, produce legal protection and legal consequences, however, this is not the focus of this paper. Most important is the fact that besides the binding or non-binding form, the issues still put some effort and contribution in the context of international law.

[21] See: UN High Commissioner for Human Rights. 2012. The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, p. 4. McCorquodale, R. & Orellana, M. 2012. *Briefing Paper: Human Rights Due Diligence.*

[22] Cernic, J. 2021. Institutional Actors as International Law-Makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and Beyond. *Pravni Zapisi*, 2, pp. 594-614.

[23] *Ibid*., p. 595.

[24] *Ibid*., p. 596.

Recently, for almost twenty years now, the European Union as a supranational organization has developed a lot in the premises of good and binding legislation and legal framework, by promoting values and standards on domestic and international levels in the spectrum of alignment and approximation of the process of law. Moreover, its contribution is also valued in the field of business and human rights.[25] The great challenge of the EU regarding promoting and protecting human rights and business law is the final enactment of the Corporate Sustainability Due Diligence Directive[26] which will enclose profoundly the legislative gap in the European Union area that has allowed until now the operation of business entities in escaping the accountability and responsibility in adverting human rights of third parties.[27]

By this, the EU is a worldwide supreme leader in promoting and supporting responsible business conduct and a frontrunner in the process of recognition and implementation of the UNGPs, as proclaimed the first globally agreed standard to prevent, address and remedy negative effects on adverting human rights by the actions and/or omissions of business entities activities.[28]

The EU has traditionally established and adopted a well-built mix of voluntary and mandatory measures on business and human rights in two areas, such as non-financial reporting and mandatory due diligence to use them for the identification and mitigation of human rights abuses.[29] Also, to ensure and guarantee access to remedy by the so-called victims of violations of this spectrum.[30]

In that regard, it shows that the EU has made big steps forward in introducing mandatory human rights due diligence as soon as possible and making it an integral part of business entities and their sometimes hazardous activity. By that time several European states, such as France, the Netherlands, and Germany, began to adopt versions of mHRDD.[31]

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[25] Directive 2014/95//EU as regard disclosure of non-financial and diversity information by certain large undertakings and groups.

Regulation 2017/821 of European Parliament laying down the supply chain due diligence obligations for Union importers of tin, tantum and tungsten etc.

Corporate Sustainability Due Diligence Directive - draft bill of 1st of June 2023, that passed in European Parliament, seeking to pass The Council and EU Council.

EU Action Plan on Human Rights and Democracy 2020-2024.

[26] See: Amnesty 2023. EU: European Parliament's vote for new corporate due diligence legislation should strengthen human rights. Available at: https://www.amnesty.org/en/latest/news/2023/06/eu-european-parliaments-vote-for-new-corporate-due-diligence-legislation-should-strengthen-human-rights/ (29. 9. 2023).

[27] See: Amnesty 2023. Closing the loopholes: Recommendations for an EU corporate sustainability law which works for rights holders. Available at: https://www.amnesty.org/en/documents/IOR60/6539/2023/en/ (29. 9. 2023).

[28] See: European Union External Action 2021. Business and human rights. Available at: https://www.eeas.europa.eu/eeas/business-and-human-rights_en (29. 9. 2023).

[29] Cernic, J. 2021. p. 598.

[30] See: European Union External Action 2021. Business and human rights. Available at: https://www.eeas.europa.eu/eeas/business-and-human-rights_en (29. 9. 2023).

[31] Business & Human Rights Resource Centre 2023. National & Regional movements for mandatory human rights & environmental due diligence in Europe. Available at: https://www.business-humanrights.

This was the culminant achievement by that time for the EU to reserve the playing role in the field. The problem question that is still coherent and not covered also by the UNGPs principle is the scope of conduct; whether to enter in the scope some certain rights or to be defind in terms of reliance. There are certain models of existing and proposed mHRDD that rely on these issues[32]: the ones that include a very narrow set of human rights[33], the ones that cover all human rights, and the model that covers all human rights but refers to specific treaties[34]. Regardless of the model chosen, the most important issue relies on the fact that the actors are playing their role and the mHRDD are in the priority agenda of the business entities. It is to be mentioned that the coverage role is acted by UNGP guidelines in all the value chain and downstream relationships.

4. ALBANIA'S DUE DILIGENCE MECHANISMS AND PROSPERITY TOWARD MANDATORY MECHANISMS

Albania, a fragile country in terms of democracy and corporate development, lacks a lot of things regarding the protection of human rights in the business law context. According to the Stabilization Association Agreement[35], Albania reserves the duty to harmonize and align the legislation with *the Acquis Communautaire*, and regarding that, there is a duty of the Albanian legislator, moreover an exclusive right, I would proclaim, and a commodity in this context to fill the gaps of legislation and practice with models of European legislation and international standards of law.

The context of the due diligence mechanisms is mainly unknown or better to say undeveloped, unpracticed. In recent years, public awareness has been raised about corporate social responsibility and its implementation of it in the big business entities of the state, however, it still remains abstract in the Albanian context, cosidering legal and financial context.[36] If you surf the internet about some big and important corporations in Albania, you will see on their websites an area related to corporate social responsibility (hereinafter: CSR) issues specific to human rights social responsibility, and environmental social responsibility[37]. What makes it difficult to understand is the implementation and the com-

org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/ (29. 9. 2023).

[32] Briefing: Human Rights Due Diligence Legislation - Options for the EU. Policy Department for External Relations Directorate General for External Policies of the Union PE 603.495 - June 2020. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf (29. 9. 2023).

[33] Examples: UK Modern Slavery Act of 2015 relates to the prohibition of slavery, servitude, forced or compulsory labour and human trafficking; Dutch Child Labour Due Diligence Act of 2019 addresses only the prohibition of child labour according to ILO.

[34] DD totally based on the rights proclaimed in the International Conventions or Covenants.

[35] MSA-1999

[36] Available at: https://fjala.al/2023/02/22/pergjegjesia-sociale-e-korporatave-sfidat-e-qeverisjes-se-mire/ (29. 9. 2023). Available at: https://dekoll.al/pergjegjesia-sociale/ (29. 9. 2023). Available at: https://www.alumil.com/albania/corporate/about-us/corporate-social-responsibility (29. 9. 2023).

[37] Available at: https://dekoll.al/pergjegjesia-sociale/ (29. 9. 2023). Përgjegjësia sociale për ne është obligimi i një organizate për të maksimizuar impaktin e saj pozitiv dhe për të minimizuar impaktin e saj

prehensiveness of such an issue. I have to distinguish that, even though CSR is an integral part of the big panorama of business and human rights, it does not mean that it stands out as mHRDD do. The practical point of view, and theoretical one too, of Due Diligence in Albania is almost incoherent and unknown even in the legal context.

In the context of CSR, Albania has developed in certain sectors such as mining, oil, gas, chrome, etc., mainly in the field of human rights with a focus on labor rights.[38] With emphasis that foreign investment companies and foreign business entities operating in Albania have shown awareness, concern, and prudence in that regard. For instance, Canadian companies working in Albania have well set up CSR practices in their improvement methodology based on the leading practice of their mother companies as well as commerce empowering environment in the Albanian nation.[39] However, it is of great importance to mention that companies in Albania do not draft reports regarding the policies and activities conducted in protecting and ensuring CSR, and also, their collaboration with the government in complying with policies is very poor, and inexistent.

Going back to the due diligence mechanisms in Albania, they seem far away from the momentum, and regarding the legal point of view, I would consider that there is a gap in the law and it is time for drafting the whole legislation in that regard. As a prosperous country aiming to adhere soon to the European Union Albania might perfectly use the path of the Union towards mHRDD.

Businesses engaged mainly in the industrial and extractive industries in Albania should take great care to respect human rights. The communities that live close to these enterprises as well as the environment are frequently significantly impacted by these industries. For instance, population involved in mining operations may be uprooted, have their land and water resources damaged, or suffer health effects from exposure to chemicals. The rights of these communities, including the right to information, consultation, and involvement, must therefore be respected by enterprises.

As a pure example of not respecting and not evolving DD in respect of human rights, I can mention the case of *Gerdec Factory* dated back in 2008.[40] Gerdec factory started to operate in 2007 after an agreement was concluded between MEICO and an American company named SAX Inc, whose object mainly consisted of dismantling old shells of the Albanian army. SAX Inc subcontracted Albdemil, which continued to dismantle

negativ në shoqëri. Dekoll e sheh përgjegjësinë sociale në dy aspekte: – përgjegjësia humane dhe – përgjegjësia mjedisore. *Përgjegjësia njerëzore* i referohet përgjegjësisë sonë ndaj pjesëve të ndryshme që lidhen me të, që në gjuhën e biznesit njihen si "aktorët". Këto pjesë përfshijnë të punësuarit, aksionerët, qeverinë, konsumatorët, investitorët, furnitorët, konkurrentët dhe shoqërinë në tërësi. *Përgjegjësia mjedisore* i referohet përgjegjësisë sonë në mbrojtjen e mjedisit. Dekoll është angazhuar në mënyrë afatgjatë në mbështetje të iniciativave qytetare për mbrojtjen e ambientit dhe për një mjedis më të shëndetshëm.

38 Gribizi, I. & Rrembeci, I. 2013. *Situation Analysis on Corporate Social Responsibility in Albania Current Practices and Challenges of Extractive Industries.OSCE Presence in Albania & Embassy of Canada to Albania*. Available at: https://www.osce.org/files/f/documents/4/e/106208.pdf. (29. 9. 2023).

39 *Ibid*., p. 43. Example: Tirex LTD, Titan, Bankers, Devolli Hidropower etc.

40 Euronews 2021. Who was convicted and what happened to the Gerdec trials? Available at: https://euronews.al/en/who-was-convicted-and-what-happened-tothe-gerdec-trials/ (29. 9. 2023).

high-caliber shells. A huge blast rocked the dismantling sector on March 15, 2008, leaving 26 dead, over 200 injured, and thousands required to evacuate the area.[41] This case is a *par excellence* example of what mandatory due diligence and corporate social responsibility comprise regarding business and human rights issues. Certain decisions of the court were delivered regarding the criminal offense, however, the civil damage and the harm done to the actors were only laid down to the payment of the funerals by the Albanian State and a 120,000 euros damage remedy paid by Albdemil. If we make a full analysis of the case from the point of view of mHRDD, we shall conclude that the companies have failed in their duty of care towards information, protection, mitigation, and compensation. However, on the other hand, the burden of proof is very difficult in this case concerning responsibility for safety and security in the workplace.[42]

There are also other different court cases in this context, mainly having regard in the issues of labor law and labor rights of the subjects that are being infringed from by the corporations, however, it is important to be mentioned that the culture of judicial opinion and decision remains still rigid in the context of judicial interpretation, and they do not go beyond the *strictu sensu* interpretation of labour code, or civil code of Albania. No intention has been shown, or issue raised upon the context of the infringement of human rights by business entities. For that reason, Albania needs a culture of conduct first of all, in the field of business and human rights, that should necessarily be followed with proclamation and implementation of legal mechanisms, such as in this case for example: due diligence mechanisms in the corporate and business area.

5. CONCLUSIONS AND RECOMMENDATIONS

To conclude, due diligence is a crucial component of risk management that can support ethical and sustainable business operations. Along with making a good contribution, business entities are also coming under increased scrutiny for their role in the disadvantageous environmental and social effects brought on by the businesses they fund or participate in. Processes of due diligence can assist business entities in perception and demonstrating to their third parties and the general public that they are functioning properly.[43] This paper aimed to describe and analyze how business entities might conduct due diligence procedures in the context of corporate social responsibility with a focus on mandatory human rights due diligence mechanisms.

With the in-depth analysis of the UNGP and EU mHRDD about the Albanian context of promoting and protecting business and human rights law, it is concluded that the gaps in law and the lack of a well-established practice can be filled out by the implementation of the quasi-legal instruments such as UNGP, EU legal frame etc. This

[41] *Ibid*.

[42] *Ibid*.

[43] OECD 2019. *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises.* Available at: https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf (29. 9. 2023).

will be a step forward to the compellation of the obligations as a candidate country to adhere to the EU family and of course in strengthening the corporate financial and legal patterns of business entities. It is recommended also to be compiled and then implemented a code of mHRDD in full harmonization with the EU Corporate Sustainability Due Diligence Directive.

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SELECTION AND EVALUATION OF JUDGES – IMPACT OF CRITERIA AND PROCEDURE ON INDEPENDENCE OF JUDICIARY

*Ever since the adoption of the Constitutional amendments in February 2022, Serbia has been accelerating judicial reform, including adoption of new judicial package of laws in early 2023. Dozens of bylaws have to be adopted in 2023 to ensure implementation of the reforms. One of the key discussion topics is criteria and procedure for selection and evaluation of judges as instruments that ensure independence of judiciary. The selection and evaluation of judges are raising discussions in all countries that are in the process of the judicial reforms. The EU accession process is the main driver of judicial reforms across Western Balkan countries. In order to fulfil EU requirements, the Western Balkan countries are putting efforts to align the judiciary with the EU standards on independence. The article provides the brief comparative analysis on the criteria for the recruitment and evaluation of judges. The analysis consists of best practices of selected jurisdictions for the recruitment and evaluation of judges, with the focus on the competences judges need to have, criteria to apply for judicial office, weighting of different factors for selection/evaluation, including the mandatory nature of the decision of the selection committee. The article puts special focus on EU member states and EU candidate countries with the aim to ensure a combination of different practices and factors. Selected countries are grouped in three categories: old EU member states, EU-11** and the EU candidate countries. Lessons learned from comparative examples and from previous Serbian experience could provide useful input for decision makers in the process of judicial reforms to establish legislative framework that ensures independence of judiciary.*

Keywords: selection, evaluation, criteria, independence of judiciary, European standards.

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** Poland, Czech Republic, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Hungary, Romania, Bulgaria, and Croatia.

1. INTRODUCTION

In February 2022, the Republic of Serbia adopted amendments to the Constitution in the area of judiciary[1] with the aim to align provisions with the relevant European standards and Venice Commission recommendations, especially related to the removal of shortcomings reflected in the influence of legislative branch over the judiciary.[2] Council of Europe developed some of the main European judicial standards, which are further elaborated by the EU institutions (Matić Bošković & Nenadić, 2018, p. 39). EU standards on judiciary are defined based on the goal that should be achieved, specifically independence, impartiality, integrity, efficiency, and trial within the reasonable time (Matić Bošković, 2020, p. 334). Independence of judiciary is based on the right of the individual to a fair trial.[3]

European standards that relate to the independence of judiciary include recommendations on procedure for selection of judicial candidates, appointment of judges, irremovability, career path and promotion, accountability, tenure.[4]

Although there is no doubt that selection and evaluation of judges is relevant for independence of judiciary, it is also important for the efficiency and quality of justice. The judiciary can only achieve its objectives if the selection and evaluation process is based on proven competence, integrity, and independence of judges. An independent, impartial, competent, and ethical judiciary is essential for the rule of law and for the fair and impartial resolution of disputes and predictable application of the law. Ensuring that the judiciary is capable to perform these tasks requires specific competences and integrity of individual judges.

For the appointment and career development of judges there must be clearly defined criteria which are known in advance not only to prospective candidates, but also to the public for transparency purposes.[5] The article assesses the European standards on selection and evaluation of judges, expressed in the Venice Commission Opinions, Opinions of the Consultative Council of European Judges, UN Basic Principles, and other relevant documents.

To align relevant legislation with the Constitutional amendments, authorities in Serbia adopted the new package of judicial laws in February 2023.[6] The next step is drafting

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[1] Ustav Republike Srbije, *Službeni glasnik RS* no. 98/2006-3, 115/2021-3 (Amandmani I-XXIX), 16/2022-3. Available at: http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/ustav/2006/98/1/reg (29. 9. 2023).

[2] Venice Commission, Opinion No. 405/2006, Opinion on the Constitution of Serbia, 19 March 2007, para. 60.

[3] See: Bangalore principles of judicial conduct adopted in 2002. Value 1 is independence and it is defined as "a pre-requisite to the rule of law and a fundamental guarantee of a fair trial".

[4] European Charter on the statute for judges and Explanatory Memorandum, Council of Europe, 1998.

[5] UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[6] Law on Judges, *Official Gazette of the Republic of Serbia* no. 10/2023; Law on High Judicial Council, *Official Gazette of the Republic of Serbia* no. 10/2023; Law on organization of courts, *Official Gazette of the*

relevant bylaws, including those that regulate selection and evaluation of judges, by spring 2024. In the process of drafting, it is important to transpose a spirit of the Constitution and intention to ensure stronger guarantees of judicial independence. Existing system of selection and evaluation of judges has shortcomings that have to be overcome in the new legislative framework. Some of the challenges were absence of obligatory power of the proposal for the candidates for judicial office,[7] lack of clear link between performance evaluation and career advancement,[8] and assessment of majority of judges with the highest mark which eliminates purpose of the evaluation.

The article can inform decision makers of the process of judicial reforms in Serbia, but also across Europe. The brief comparative analysis is prepared to facilitate identification of objective criteria for the recruitment and evaluation of judges. The comparative analysis consists of best practices from selected jurisdictions for the recruitment and evaluation of judges. The analysis focuses on the competences judges need to have, criteria to apply, weighting of different factors for selection and evaluation, including the mandatory nature of the decision of the selection committee. The analysis also provides an overview of the level of the normative act that regulates procedures of the selection and evaluation.

In the comparative analysis, special focus is put on EU member states and EU candidate countries with the aim to ensure a combination of different practices and factors. Selected countries are grouped in three categories: old EU member states, EU-11[9], and the EU candidate countries. The old EU member states (i.e., Germany, Italy, the Netherlands) are selected since they present good practices developed over the centuries with the aim to protect independence of judiciary. Furthermore, three different models were taken, Italy as a representative of the Southern model of the Judicial Councils, the Netherlanders as a representative of the Northern model of the Judicial Council and Germany as a country in which there is not the Judicial Council (Castillo-Ortiz, 2019, p. 505). As the EU founding treaty highlighted, the EU is based on common values, including the rule of law.[10] The "old" EU member states are characterized as a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality prevail. However, during the EU enlargement to the East,[11] the EU faced the situation that countries in the transition, with different economic, political, and social environment, are aspiring to become members. To address this challenge, the EU developed approach that included, among other requirements,

Republic of Serbia no. 10/2023.

[7] Although the problem was within the Parliament that did not appoint candidates selected and proposed by the High Judicial Council, there is a possibility that in the future the High Judicial Council will not respect the proposal of the selection panel.

[8] European Commission, Serbia 2021 Report, SWD(2021) 288 final, p. 22.

[9] Poland, Czech Republic, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Hungary, Romania, Bulgaria, and Croatia.

[10] According to Article 2 of the Treaty of European Union, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

[11] Ten countries that joined in 2004 – Poland, Czech Republic, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Hungary, Malta and Cyprus; Romania and Bulgaria in 2007 and Croatia in 2013.

stability of institution guaranteeing democracy, rule of law, human rights, and the respect for and protection of minority rights. The EU-11 countries are thus good example how ex-communist countries reformed their judiciaries to fulfil EU requirements of independent and efficient judiciary (i.e., Croatia, Slovenia, Estonia).[12] The EU candidate countries are in the third group (i.e., Bosnia and Herzegovina, Montenegro, and Albania) since they are in the process of the alignment of the judicial system with the EU requirements. Examples from other countries are provided across the analysis to highlight specific questions. Although Cyprus and Malta are countries with the common law legal tradition, they were included in the article due to the relevant Venice Commission Opinions related to the normative framework on the judges' selection.

2. LEVEL OF NORMATIVE ACT

Level of normative act that regulates selection and evaluation of judges is an important element for guarantying judicial independence, however it has to be aligned to the normative tradition of the country to avoid too many technical issues being regulated by the law instead by secondary legislation.

However, the recent case law of the European Court of Human Rights[13] and the Court of Justice of the EU[14] highlighted that citizen is entitled to have the case trialed by a tribunal that is established in accordance with law and this includes that the judges on the tribunal should also be appointed in accordance with the law (Karlsson, 2022, p. 1060).

The general normative framework on selection and evaluation of judges is usually established by laws. In some countries the key provisions in relation to the procedure and criteria for appointment and promotion of judges are regulated by a specific law, such as the Law on Judges in Serbia[15] that in detail envisages procedure for application for judicial office, process of interview and selection of judges for different levels and court specialization, as well as criteria for evaluation. A similar approach is taken in Albania where Law no. 96/2016 on the status of judges and prosecutors of the Republic of Albania,[16] in relation to the appointment includes provisions on the scores achieved in the initial training organized by the Schools of Magistrates. A comparable solution is applied in Estonia, where the Courts Act[17] in detail regulates the appointment of judges

[12] Some EU-11 countries, like Poland and Hungary, were not taken into consideration since they are facing with rule of law backsliding.

[13] *Astradsson v Iceland*, application no. 26374/18. Participation of judge whose appointment was vitiated by undue executive discretion without effective domestic court review and redress.

[14] Joined Cases 585, 624, 625/18, *A.K. v. Najwyższy*, ECLI:EU:C:2019:982

[15] Articles 34-40 on evaluation and Articles 48-59 on selection, *Official Gazette of the Republic of Serbia* no. 10/2023.

[16] Articles 35, 36 and 47 of the Law on the status of judges and prosecutors. Available at: https://www.euralius.eu/index.php/en/library/albanian-legislation?task=download.send&id=198&catid=86&m=0 (29. 9. 2023).

[17] Courts act of Estonia. Available at: https://www.riigiteataja.ee/en/eli/502032022003/consolide (29. 9. 2023).

including requirements and judgeship examination (Arts. 47-69). Furthermore, In Italy criteria are regulated by the Legislative Decree (Law) no. 160/2006 Chapter I, which sets forth the conditions for participating in the exam, the modalities for presenting the application, the composition and functions of the examining committee, the conduction of the written and oral exams and the modalities to be followed by the examiners.

The Venice Commission in the recent Opinion on Cyprus stated that the Judicial Council as deciding body should be bound by "pre-existing, clear and transparent criteria for appointment" that would be elaborated in the normative act.[18] The Venice Commission assessed that inclusion in the law of the criteria such as years of experience and high moral are not sufficient since these are very basic criteria that offer little guidance on the selection process in search of suitable candidates.[19] Similarly, the Venice Commission in the Opinion on Malta[20] and Report on the Independence of the Judicial System[21] highlighted that all decision concerning appointment and the professional career of judges "*should be based on merit, applying objective criteria within the framework of the law*". Having in mind the Venice Commission standards, the detailed regulation of the criteria and selection procedure should be included in the normative framework to ensure proper guidance and legal security. However, the Venice Commission leaves decision to each country to decide what is the level of details that will be included in the law, and which issues will be regulated by bylaws and internal acts.

Nonetheless in most countries details of the procedure and indicators are regulated in secondary legislation and internal acts. In most countries, the laws include provisions on general requirements for judgeship, such as citizenship of the country, years of relevant experience and clear criminal record, while details related to the procedure of testing and/or interviewing and needed results are part of bylaws. In Croatia detailed provisions are included in the law,[22] however specific issues are regulated by the State Judicial Council normative acts. In Bosnia and Herzegovina selection criteria are regulated at the state level in the Law on the High Judicial and Prosecutorial Council,[23] while there are several bylaws to ensure implementation. The High Judicial Council of the Republic of Serbia adopted in June 2023 new Rulebook on conducting and evaluating interview with the candidate for judicial office.[24] However, the Rulebook did not accomplish to establish objective procedure. It is not clear how Commission will evaluate communication skills, readiness of the candidate to conduct judicial office or professional integ-

[18] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 44.

[19] Venice Commission, CDL-AD(2021)043, Cyprus – Opinion on Three Bills Reforming the Judiciary, para. 43.

[20] Venice Commission, CDL-AD(2018)028, Malta, para. 44.

[21] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: para. 27.

[22] Article 51, Law on State Judicial Council, *Narodne novine* no. 116/2019, 75/2011, 130/2011, 13/2013, 28/2013, 82/2015, 67/2018, 126/2019, 80/2022, 16/2023.

[23] Article 43, *Official Gazette of Bosnia and Herzegovina* no. 25/2004, 93/2005, 48/2007, 15/2008.

[24] *Official Gazette of the Republic of Serbia*, no. 48/2023-116.

rity. It is to be seen if the future Rulebook on criteria for selection of judges will provide more details and guideline for the selection process, including an interview.

At the same time, there are examples where the procedure for appointing and promoting judges is provided by the Constitution. Article 90 of the Greek Constitution[25] includes details on the appointment and promotion of judges. However, this is rather an exception, and this provision also requires further regulation by law. Amendments to the Constitution of the Republic of Serbia ensures inclusion of one article (Art. 145) that prescribes those conditions for selection of judges will be determined by law. Although there were expectations in the professional public that amendments will include more guarantees and precision, this approach ensures that criteria for selection has to be regulated by law, not by secondary legislation.

The regulation of the selection and evaluation of judges in a dedicated law could be a good solution for fragile democracies, however, further elaboration in bylaws will be necessary.[26] The incorporation of the provisions on selection and evaluation of judges in the law could be an adequate mitigation measure for countries in which there is a risk of abuse, if procedure, criteria, indicators and the verification means are clearly defined to reduce discretionary power of competent body.[27] The technical details of the selection and evaluation should be further regulated by the secondary legislation.

3. CRITERIA FOR SELECTION AND EVALUATION OF JUDGES

3.1. Selection of Judges

Choosing the appropriate system for selection of judges is one of the primary challenges with which newly established democracies are faced, where often concerns related to the independence and political impartiality of the judiciary persist (Resnik, 2004, p. 579). Through the selection and appointment process decision makers control who enters the judicial profession and under which conditions (Spač, 2019, p. 2077). However, there is no ideal model of selection which guarantees independence of judiciary. In some older democracies, systems may work well in practice and allow for independent judiciary because the executive is restrained by legal culture and traditions (Volcansek, 2007, p. 368). New democracies, however, did not have a chance to develop these traditions and they are incorporating explicit provisions in the constitution and laws to ensure merit-based selection of judges.

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[25] Constitution of Republic of Greece. Available at: https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (29. 9. 2023).

[26] Examples provided below on criteria and their weighting, as well as detailed procedure and work of selection panels are too technical to be regulated by law.

[27] The monitoring of the selection and promotion mechanism applied by the Superior Council of Magistracy of Moldova revealed that the SCM did not organize proper interview with candidates nor explained in its decisions reasons for scoring each candidate's performance. More information on the shortcoming of the SCM selection available in the Chirtoaca, I. 2020. *Resetting the System of Selection and Promotion of Judges – Lessons Learned and (New) Challenges*. Legal Resource Centre from Moldova (LRCM).

To better understand criteria for selection of judges it is important to understand methodology of the selection process. Specifically, it is important to understand sources of information and validation of data.

3.1.1. Criteria for Selection of Judges

The requirement that judges should be appointed on the bases on clearly defined criteria also expresses a necessity of the public to be informed of the characteristics that qualify persons for judicial office (Van Zyl Smit, 2015, p. 3). Merit is central in the selection process but needs to be defined by the establishment of objective criteria (Malleson, 2006, p. 128). The principle that judges should be appointed on merit is central to many international declarations and statements on the judiciary. The Committee of Ministers of the Council of Europe, in its Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities, provides that outline of a definition by requiring that appointments "*should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity*".[28] These formulations confirm that merit is to be understood in relation to the role which a judge has to perform.

The most common criteria for selection of judges are professional competence (knowledge of law, ability to conduct court proceeding, capacity to write reasoned decisions), personal competence (ability to handle the workload, ability to decide, openness to new technologies) and social competence (ability to mediate), respect for the parties and the ability to lead for those whose position requires it (Bulmer, 2017, p. 18).

Furthermore, many countries introduced selection criteria that relate to the personal characteristics of a judicial candidate as part of the assessment of their integrity. For example, in Estonia, the suitability of the personal characteristics of a judicial candidate is evaluated by the judgeship examination committee. In the evaluation of the personal characteristics of a judicial candidate, the judgeship examination committee takes into account the information which is important for the performance of the duties of a judge and may make inquiries.[29] A judicial candidate has to pass a security vetting before being appointed as a judge, unless they hold a valid security clearance for access to state secrets classified as 'top secret' or unless at the time of becoming a candidate, they hold a position which provides the right of access to any level of state secret by virtue of office.

In Finland,[30] the applicants' qualifications are assessed by looking at the knowledge and skills they have acquired through their education and earlier work experience. The focus is on the applicants' actual ability to perform the duties required in the position. Knowledge includes issues such as substantive and process knowledge, command of legal information, problem analysis and solving skills, ability to understand the facts and legal material of a case, process management skills, reasoning skills and language skills.

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[28] Para. 44, Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, Judges: independence, efficiency and responsibilities.

[29] Article 54, Courts Act.

[30] Courts Act of Finland. Available at: https://www.finlex.fi/fi/laki/kaannokset/2016/en20160673.pdf. (29. 9. 2023).

In Montenegro, legal knowledge is assessed through written test, while in the interview the following criteria are evaluated: the motivation for work, communication skills, ability to adopt decision and resolution of conflicts, understanding of the judge's role in the society.[31]

In Bosnia and Herzegovina selection criteria are specified by the Rulebook of the High Judicial and Prosecutorial Council and in addition to knowledge and education communication skills are required.[32] The assessment of a candidate to become a judge is based on the following criteria: a) candidate's experience, b) abilities of legal analysis; c) the candidate's ability to responsibly, independently and impartially perform the position he or she applied for, professional impartiality and reputation, and behavior outside of work, d) previous work experience of the candidate, e) acquired knowledge and competences of the candidate, f) education and training, publication of scientific works and other activities in the profession, and g) communication skills. For candidates who are holders of judicial office, the criteria a) and b) are determined based on performance evaluation, while other criteria are assessed at the interview. For candidates who are not holders of judicial office, the criteria a) and b) are determined based on the results of the written and qualification test.

3.1.2. The Selection Process

The methodology for conducting the selection usually consists of a combination of oral hearing and written exam, while some countries that have introduced Judicial Academy usually ensures direct entry to judicial profession for graduates from the Academy (Guarnieri, 2018, p. 170). However, there are jurisdictions that in addition to the graduation from the Judicial Academy envisage interview with the candidates for judge position. For example, in Croatia the results from the final exam at the Judicial Academy are combined with the points achieved at interview in front of the Judicial Council and evaluation of work as judicial assistants (after graduation from the Judicial Academy).[33]

In Italy, the selection process is carried out through written and oral exam on legal subject,[34] passing the public competition for exams and successful completing an internship period. The winners of the competition assume the qualification of "ordinary magistrates in apprenticeship" and carry out a period of apprenticeship, for a total duration of eighteen months and divided into theoretical-practical in-depth courses and sessions at judicial

[31] Articles 48-49, Law on Judicial Council and Judges.

[32] Poslovnik Visokog sudskog i tužilačkog vijeća Bosne i Hercegovine. Available at: https://vsts.pravosudje.ba/vstvfo/B/141/kategorije-vijesti/1172/1180/4570. (29. 9. 2023).

[33] Article 17, Rules on evaluation of candidates in the process of appointment of judges in first instance, regional and high courts, State Judicial Council, No. OU-114/22. Available at https://narodne-novine.nn.hr/clanci/sluzbeni/2022_11_132_1992.html (29. 9. 2023).

[34] There are three written exams consisting of three compositions in which they have to consider specific questions concerning civil law, criminal law, and administrative law. There are nine oral exams: civil procedure; criminal law; criminal procedure; administrative law, constitutional law and fiscal law; labor law and social security law; European community law, international law and elements of juridical information technology; a foreign language chosen by candidate among the official languages of the EU member states.

offices. Once the internship is completed, the Superior Council of the Judiciary, based on the reports drawn up by the magistrates assigned to the judicial offices and by the *tutors* of the Superior School of the Judiciary, and pertaining to the activity carried out during the internship period, evaluates the suitability of the magistrate to exercise judicial functions. If the judgment is positive, jurisdictional functions are conferred and a place of employment is assigned. In case of negative evaluation, the ordinary magistrate is admitted to a new one-year traineeship period. Any second negative evaluation determines the termination of the employment relationship of the ordinary magistrate in traineeship.[35]

In some countries the process of conducting interview is regulated in detail to ensure equal opportunities for candidates. For example, in Germany, the federal state of North-Rhine-Westphalia, in court in Dusseldorf, candidates have to go through a 10-minute interview on the role of a judge, a 5-minute role play concerning a situation at a court trial, a 20-minute general interview designed to obtain an impression of the candidate's personality, a 10-minute role play, a 30-minute group discussion (Frederico, 2005, p. 82).

In addition to the written test and interview, some countries introduced intelligence test and psychological assessment as a step for admission to the judicial profession. In the Netherlands, the procedure of selection for entry consists of an intelligence test , followed by an interview with the selection committee of candidates that fulfil requirements.[36] The candidates admitted by the selection committee have to go through a psychological assessment and another interview with the selection committee. The psychological assessment consists of a test and real working life situation under observation (Frederico, 2005, p. 166). Access is granted according to the test results and according to the number of vacancies.

3.2. Criteria for Evaluation of Judges

Most Council of Europe countries use some form of individual evaluation of judges with the aim of assessing and improving the quality of their work and for decisions on the promotion of judges.[37] Moreover, evaluation is used for identification of training needs of judges and to ensure accountability of judges.

The approach to evaluating judges reflects the difficulty of finding the right balance between the aim of promoting the best qualified members and the aim of the judiciary to maintain and encourage individual judicial independence (McIntyre, 2014, p. 901). The additional difficulty lies in the problem of how to characterize individual judges as "high performers", "average performers" and "poor performers".

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[35] Article 22 of the Legislative Decree 26 of 2006.

[36] Formal demands are: having graduated at a law faculty with the *effectus civillis* exams in civil law, criminal law and administrative law; to be of Dutch nationality and to have the following personal characteristics – analytical capabilities, juridical expertise, decisiveness, being able to produce adequately under pressure, good communication skills, having a clear judgement.

[37] International Association of Judges (2006). 1st Study Commission, How can the appointment and assessment (qualitative and quantitative) of judges be made consistent with the principle of juridical independence. Available at https://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2006-conclusions-E.pdf. (29. 9. 2023).

Professional evaluation of judges is conducted regularly in most European jurisdictions. In Germany, most of the federal states have regulations providing for evaluation of judges at regular intervals, usually every four or five years. In Bosnia and Herzegovina evaluation of work of judges is conducted annually. In Italy, judges are subjected to professional evaluation every four years. Frequency of the evaluation also depends on the assessment of the complexity of the procedure and its burdensome effect for the judicial administration and management.

In most member states, a combination of quantitative and qualitative criteria is used for the individual evaluation of judges, albeit in very different ways. Quantitative criteria are usually based on statistical data such as the number of resolved cases, clearance rate, time to judgement, number of reversed decisions. In the process of selection of quantitative criteria decision makers should have in mind availability of statistical data in the justice system, existence of the automatized case management system and reliability of collected statistics. Working with incomplete or paper records is possible, but the compilation of data set is time consuming and may require additional checks on data accuracy. Quantitative criteria enable monitoring of different aspects of judges' work (efficiency, quality, but also integrity). Qualitative criteria are more challenging to define, as well as to ensure reliable and objective sources for their collection. Qualitative criteria are usually focused on treatment of the parties/users, judicial quality, fairness, and integrity of judges. Different tools are used for collecting information on qualitative criteria, such as surveys (users' satisfaction survey), self-assessment and peers' assessment, review of case files, monitoring of trials, etc. While statistical data are relatively easily accessible through case management system, the collection of quantitative data is complex, time consuming and could depend on the culture (peer assessment in some countries failed due to lack of objectivity).

Criteria could be grouped in relation to the efficiency, quality, and independence/integrity of judges. Sometimes countries are using point systems with point values assigned to certain criteria. Productivity figures (the number of cases solved by the judge compared with an average workload of all judges) are considered as relevant. In relation to the quality of work, the outcome of cases appealed from the judge are usually taken into account.[38]

There are jurisdictions with elaborate evaluation systems, fairly strict procedures, and very detailed catalogue of evaluation criteria (Croatia, France, Italy, the Netherlands, Serbia, Montenegro, Bosnia and Herzegovina). However, there are countries in which evaluation of individual judges does not exist. For example, in Sweden there is no evaluation of individual judges, but there is the evaluation of system performance, while

[38] For example, in Croatia efficiency of work is evaluated based on following indicators: the number of cases in which a decision has been made by a judge; clearance rate (number of cases, where a decision has been made, vis-à-vis the total of the cases forwarded to the judge); the average time to judgment (the time required to deliver a judgment by a judge after the judge completed hearing). To assess quality of work, in Croatia the Council is using indicators such as the number of decisions reversed and/or cases remitted by the appellate court showed in percentage and in absolute numbers; the grounds for reversal and/or remittal; the number of decisions reversed vis-a vis number of decisions which have been appealed showed in percentage and in absolute numbers.

in Denmark evaluation of judges is a result of a concrete complaint against a judge concerning improper or unseemly behavior.

The methodology for conducting evaluation usually is a combination of the assessment of the statistical data and interview with the respective judge, and in some countries the analysis of case files, monitoring of hearings and feedback of superior is also taken into consideration (superior judge or court president) as well as self-assessment (assessment by colleague).

Germany is an example of the country with the complex evaluation procedure that requires inspection of the case files, statistical data (performance and quality) and monitoring of trials. The person who conducts evaluation is always the president of the court. Evaluation is the personal responsibility of the court president which means that it cannot be delegated to anyone else (except the vice-president). Considering the number of judges which may well amount to 200 or more in one regional court, periodic evaluation at a given date is an enormous task. While preparing the evaluation it is necessary to look into court files, to read judgments handed down by the judge, to go through statistics and to gather other information (e.g., from lawyers, from other judges - especially those presiding over the panel of which the respective judge is a member, from appeal court judges).

In Germany, in the federal state of North-Rhine-Westphalia, the evaluation is conducted in line with employee profiles that describe criteria of certain judicial position.[39] The evaluation relates to four areas – professional competence (e.g. knowledge of substantive and procedural law, ability to conduct trials), personal competence (e.g. ability to cope with the workload, ability to decide, openness for new technologies), social competence (e.g. ability to mediate, respect for concerns of parties, ability to lead constructive discussions), and competence to lead (administrative experience, ability to lead and instruct teams). Based on the results, the judges could be in one of the following categories: below average, average, above average, high above average and excellent.[40]

There are countries in which evaluation relies only on statistical data. This approach depends on sophisticated case management system that captures all relevant information; however, it has some shortcomings since judges are focused to achieve only quantitative elements. Croatia and Bosnia and Herzegovina are good examples of this approach. The Priebe Report on Bosnia and Herzegovina concluded that system is over-reliant on quantitative criteria and statistics, which has shown to lead to distorted incentives for judges.[41] However, transition towards a more quality-based system of evaluation of judges could cause difficulties.

[39] The classification of professional competence, personal competence, social competence and competence to lead has found widespread acceptance following an expert meeting on judicial independence organized by OSCE in Kyiv, Ukraine, in 2010. The "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia", paras. 27 to 31 have incorporated these elements (Organization for Security and Co-Operation in Europe 2010).

[40] Majority of judges are in the category above average and high above average, while among excellent there are 5-10% of judges.

[41] Expert Report on Rule of Law issues in Bosnia and Herzegovina, Brussels, 5 December 2019, para 72.

Available at: http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf (29. 9. 2023).

In Bosnia and Herzegovina, evaluation is based on the data stored in the electronic case management system. Evaluation is based on the record of the achieved orientation norm[42]; records on the quality of judges' decisions; records on the duration of solved and unsolved cases and records on absences from work.[43]

In Croatia, the evaluation of judges is based on thoroughly defined criteria. The State Judicial Council prepares an assessment of a judge's judicial duties based on the following criteria:[44] efficiency - the number of decisions judge made during the evaluated period compared to the number prescribed by the Framework Standards for the Work of Judges;[45] quality of decisions - based on the percentage of annulled decisions regarding the regular legal remedy directly to the higher court, during the evaluation period; the proper performance of judicial duties - respecting deadlines for the preparation of written decisions, regular schedule of hearings, respecting the order in which cases were resolved; experience in performing judicial duties; and other activities of the judge.[46] A similar approach is taken in Montenegro where the quality and quantity of work is evaluated based on statistical data and inspection of cases (randomly selected, selected by the judges and cases in which decision was annulled).[47]

In Serbia, new Law on judges defined in Article 36 eight criteria for the evaluation of judges and most of them are qualitative, which implies that procedure of the evaluation of judges will include at least inspection of cases and maybe participation at the hearings to ensure collection of all relevant data. Prescribed criteria are: professional knowledge and ability to apply it; the ability to think analytically and solve legal issues; ability to make a decision within a reasonable time; the skill of conducting discussion

[42] Many countries have the defined number of cases that judges have to achieve during the month. Each category of law has different monthly norm (i.e. civil, criminal, commercial, administrative). The norm is very often combined with application of the case weighting methodology. More on case weighing is available at: https://documents1.worldbank.org/curated/en/529071513145311747/pdf/Case-weighting-analyses-as-a-tool-to-promote-judicial-efficiency-lessons-substitutes-and-guidance.pdf (29. 9. 2023).

[43] Article 5(3) Rulebook on the procedure for evaluating work of court presidents, judges and judicial assistants, High Judicial and Prosecutorial Council, 14.12.2016, No. 06-02-3-3488/2016.

[44] Article 6, Methodology for evaluation of judges, State Judicial Council, No. OU-132/19. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/full/2019_12_125_2509.html. (29. 9. 2023).

[45] The result of the work by type of case, in absolute numbers and percentage, work on more difficult cases, and indicate whether they are justified reasons if the judge did not make the number of decisions prescribed by the Framework Standards for the Work of Judges.

[46] Other activities listed in the bylaw could be: - Did he or she participate in some forms of professional development as a lecturer of legal topics, at seminars and workshops?

- As an author or co-author, has he or she published professional papers, scientific papers or books in the field of legal sciences, has he or she completed a university program of lifelong learning in the field of law in which he or she has obtained a minimum of 10 ECTS points?
- Whether he or she completed a postgraduate specialist study in legal sciences, obtained an academic degree of master's degree or doctor of science in the field of legal sciences?
- Whether he or she is a teacher or associate in the teaching of legal subjects at a university graduate or postgraduate study?
- Whether he or she was a member of the judicial council?

[47] Articles 89-92, Law on Judicial Council and Judges.

and hearing; the ability of oral and written expression and argumentation; the ability to organize the judge's work; the ability to perform the task of a managerial position; taking on additional work and responsibilities. It will be very challenging to include objectively measurable indicators for abovementioned criteria and it should be carefully designed to reduce lack of trust in the evaluation system. The High Judicial Council in the new bylaws that must be adopted by spring 2024 should consider comparative practice in selection of casefiles that will be evaluated, as well as possibility of monitoring of trials as it exists in Germany.

3.3. Innovative Approaches in Evaluation

There are few examples of innovative approaches in evaluation of judges that put focus on qualitative elements, such as assessment of judges' behavior through "intervision" or user-satisfaction surveys.

The Netherlands judiciary[48] has developed an instrument of self-reflection – "intervision" and has been encouraging their judges to observe and discuss each other's behavior during court session. The legal content of the case is not the issue. The underlying idea is that the judge influences the course of the proceedings with his or her behavior during the court session. If the judge doesn't listen carefully, draws conclusions too quickly, divides his attention unevenly between the parties or fails to keep things under control, the litigants will read things into this. Their observations of the judge's behavior will determine how they see their chances and what their next move will be. The judge's behavior is therefore of crucial importance.

The Swedish National Court Administration introduced users-satisfaction surveys to gauge and improve the court user experience.[49] Although the user feedback is not developed to evaluate work of individual judge, it is used to improve judges and court staff behavior. The four criteria were used to determine how a person experiences procedural justice: the possibility to make your voice heard, that the court is perceived as neutral, that the court respects the users and their rights, and that the court employees are perceived as trustworthy. The findings of the survey are discussed among judges and staff. Common problems are identified, brainstorming ensues, and low-cost solutions are then proposed and implemented by judges and staff. The experience of the Swedish courts demonstrates that impressive results can be achieved to improve user satisfaction and courts and judges' performance. The Swedish model offers a practical tool that is easy to implement in other countries and could be also used for evaluation of judges.

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[48] Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe. Available at: http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf (29. 9. 2023).

[49] More information are available at World Bank (2017) Court User Feedback: A Swedish Case Study. Available at: https://documents1.worldbank.org/curated/en/338251513700016007/pdf/122136-WP-P165762-PUBLIC-Court-User-Feedback-A-Swedish-Case-Study.pdf (29. 9. 2023).

3.4. Evaluation of Independence and Impartiality

The independence, impartially and fairness are standards required from judges, however very few countries introduced mechanism for assessing these criteria. In Italy, the independence, impartiality and balance are assessed based on the report from the head of department and report received from the Bar Chamber. Reports refer to facts specifically relevant for independence and behavior that denote an evident lack of balance. However, this approach might raise concerns of objectivity.

The criteria established for the evaluation of judges in Italy is slightly different than previous examples and includes independence, impartiality and fairness, capacity, commitment, diligence and conscientiousness.[50] Independence, impartiality and balance are the so-called "prerequisites" for the judicial function and present the ability to exercise judicial functions independently from internal or external interference, in a position of impartiality with respect to the subjects involved in the process, and with a balanced attitude. The capacity criterion relates to the technique of drafting the provisions, the techniques of conducting investigations, the organization of work, the methods of holding hearings, and the coordination with other offices. Diligence pertains to the presence in the office and/or in the hearing, the observance of the deadlines established for the drafting of deeds and provisions or for the fulfillment of judicial activities, the participation in the meetings of the office. The commitment criterion concerns cooperation in solving organizational or juridical problems, the willingness to replace absent magistrates, participation in refresher courses. The conscientiousness criterion relates to the quantity of procedures dealt with, the time of treatment of the same, and the cooperation in the activities of the office to which one belongs.

Italy is an example of a country that is using a self-assessment report.[51] The decision on the evaluation is based on numerous activities and documents which allow the assessment of professional aspects of the judge. The most relevant are the following documents: "self-report", a document in which the interested party gives an account of all the elements he or she deems necessary or useful to bring to the attention of the Superior Council of Judiciary in relation to the profiles being assessed; the deeds and provisions of the magistrate, as well as the minutes of the hearing, acquired "on a sample" basis within the context of those drawn up in the four-year period under evaluation; the "informative report", which consists of a report on the various relevant aspects for the purposes of the assessment, drawn up by the manager of the office to which the magistrate belongs, i.e. the subject who, due to her or his role and proximity to the interested party, knows best the professional profile; statistics relating to the number of provisions drawn up, the time for dealing with the proceedings, the time for filing the documents, also in comparison with the other magistrates of the office; any scientific publications; and any reports from the Bar.

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[50] Article 10, Legislative Decree 160 of 2006. Available at https://www.csm.it/documents/21768/112811/Decreto+legislativo+5+aprile+2006+n.+160/590b9611-b703-4a78-8eec-340467b9185c (29. 9. 2023).

[51] https://www.csm.it/web/csm-internet/magistratura/ordinaria/percorso-professionale?redirect=/web/csm-internet/magistratura/ordinaria/percorso-professionale&show=true&title=valutazioni%20di%20professionalit%C3%A0&show_bcrumb=valutazioni%20di%20professionalit%C3%A0.

However, introduction of the complex system of evaluation does not always reach the goal. Although the evaluation system in Italy was expected to introduce effective evaluation of judges, it failed in practice. It looks quite unlikely that almost all the 9,000 magistrates reach a positive assessment.[52]

In Slovenia there is criteria of safeguarding of the reputation of the judge and the court as determined from the way in which procedures are conducted, communication with parties and other bodies, the preserving of independence, impartiality, reliability and uprightness, and behavior inside and outside the service.[53] The criteria is elaborated in the bylaw and should be assessed by following qualities: ability to make independent decisions, dedication to the profession, honesty and fairness, legal and moral courage, critical and self-critical assessment, impartiality, and diligence, perseverance and precision.[54]

3.5. Consequences of the Evaluation

Results of the evaluation are commonly used for the promotion of judges. However, the Council of Europe highlighted that if an individual evaluation has consequence for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to the objective interpretation of the fact and the law, but in a way that may be meant to please the evaluators.[55]

In Germany, professional evaluation of judges plays a major role in their career as decisions on higher judicial appointments are largely based on the results of evaluations in regular intervals as well as of evaluations made on applicants seeking promotion. The process of promotion is quite formalized. It resembles the process of initial recruitment and selection (Riedel, 2014, p. 980).

Some countries have separate procedures and criteria for promotion. On the recommendation of the GRECO IV Evaluation round[56] the Supreme Judicial Council of Cyprus in October 2019 adopted a Procedure and Criteria for the Promotion of Judges.[57]

In very few countries results of the evaluation could be ground for demotion of judges, initiation of disciplinary procedure, reduction of salaries and even dismissal from the office. In Bosnia and Herzegovina violation of timelines, as one of the evaluation criteria, could be ground for initiation of disciplinary procedure against the judge.

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[52] See: Fabri, M. 2015 *Regulating Judges in Italy*, Research Institute on Judicial Systems, Bologna. Available at: https://www.ippapublicpolicy.org/file/paper/1432887610.pdf (29. 9. 2023).

[53] Article 29, Law on judicial service, *Official Gazette,* no. 13.4.1994 & 13.3.2015.

[54] Article 5, Measurements for the selection of candidates for the post of judge, *Official Gazette* no. 64/17.

[55] Consultative Council of European Judges, Opinion No. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, para. 6.

[56] GRECO RC4(2020)17 Fourth Evaluation Round – Second Compliance Report, Cyprus, para 55. Available at: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a06389 (29. 9. 2023).

[57] Available at: http://www.supremecourt.gov.cy/judicial/sc.nsf/All/AC0BEE644B92B162C2258488001F-633D?OpenDocument (29. 9. 2023).

In some countries poor performance results of the judges could be ground for requirement of the specific and obligatory training (Serbia, Montenegro) or for initiation of disciplinary procedure (for example in Belgium, Bulgaria, Croatia, Cyprus, Greece, and Slovenia). Dismissal from the office as a consequence of poor evaluation results is possible in Austria, Estonia and in rare cases in Greece, Italy, and Slovenia.[58] In Austria dismissal is a consequence of two negative evaluations ("not sufficient") which follow one after the other. In Italy, if the negative judgement is confirmed twice, the judge is dispensed from the service.[59]

Evaluations might be accompanied by recommendations for improvement of the results. For example, in Bosnia and Herzegovina, the evaluator is obliged to propose measures to improve the work of a judge who has been evaluated with the grade of "unsatisfactorily performs the judicial function" or "satisfactorily performs the judicial function". Recommended measures are listed in the bylaw, such as a change of department, organization of internal education in the court, additional specific training, including training and engagement of mentor judge if there is a need for an additional period of professional support.[60]

Having in mind the purpose of the evaluation of judges, the mitigation measures should be priority for the low performance of judges to enable improvement of knowledge and skills. If these educational measures do not improve performance, then it should be considered introduction in legislation of ground for initiation of disciplinary procedure for continues poor evaluation results.

3.6. Criteria Weighting

Selection bodies need formula for weighting different criteria to ensure selection of candidate who is fitting judicial office (Malleson, Russell, 2006, 8). Furthermore, the country should establish flexible approach to enable different weighting of criteria depending on the judicial vacancy that has to be filled. For example, oral communication may be particularly valuable in first instance court, while the written communication skills are more relevant for the appellate courts.

Only few countries have in details elaborated weighting of criteria for selection and evaluation. Most of the countries that have complex criteria weighting are those in the process of the EU accession or which recently joined EU (i.e., Croatia).

Evaluation criteria and their weighting depend on the goals set in front of judiciary. If judiciary is facing efficiency challenges, then focus will be on efficiency indicators

[58] Consultative Council of European Judges, Compilation of replies to the Questionnaire for the preparation of the CCJE Opinion No. 17 (2014) on justice, evaluation and independence. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680640ff1 (29. 9. 2023).

[59] Available at: https://www.csm.it/web/csm-internet/magistratura/ordinaria/percorso-professionale?show=true&title=valutazioni%20di%20professionalit%C3%A0&show_bcrumb=valutazioni%20di%20professionalit%C3%A0 (29. 9. 2023).

[60] Article 20, Criteria for evaluation of work of judges in Bosnia and Herzegovina, No. 06-08-1-4014-2/2022. Available at: https://portalfo1.pravosudje.ba/vstvfo-api/vijest/download/98435 (29. 9. 2023).

(i.e., number of resolved cases, clearance rate, disposition time) and these indicators will bring more points in the evaluation of judges. Furthermore, in young democracies quantitative criteria and statistics are prevailing since these elements are undisputable and easily verifiable.

4. OBLIGATORY POWER OF ELECTION COMMITTEE DECISION

The aim of selection and evaluation is merit-based appointment and promotion and in most countries the scores assessed for candidates is obligatory for the decision-making body (Judicial Council, Ministry, Parliament, President). Exceptions are possible in very limited cases and should be reasoned.

In Germany, the final marks reached in the evaluations play a decisive role in the decision on promotion, and generally the Ministry is not in a position to promote a person with a lower final result over an applicant who has reached a better result in the evaluation. The rule is well established by a long series of decisions of the federal administrative court, where the court has pointed out that selection among applicants for higher posts has to follow, above all, the results of professional evaluations including evaluations that may date back some time; other criteria which are not related to professional performance (age, rank, time spent in office) can only be taken into account if, in view of their professional performance, applicants can be regarded as "by and large" of equal standing.[61] Exceptions to this rule would have to be well founded in order to be upheld on judicial review; they may be possible, for example, where applicants have been evaluated by different bodies (different court presidents, a government ministry, another Land judicial administration) and if there is evidence that the practice of evaluation in one case may have been more lenient than with other applicants. If several applicants hold the same result after evaluation, additional criteria may be brought in. These may be the period for which the relevant evaluation result has been achieved by the applicants, the time served in the judiciary, their age, or laws asking for preferential treatment of female applicants.

In Bosnia and Herzegovina, the rank list is obligatory, while deviation from the rank list could be done on an exceptional basis.[62] According to the High Judicial and Prosecutorial Council Policy note on election and appointment of judges and prosecutors from 2023, the decision on selection of candidate with the lower score should be reasoned.

In Croatia the State Judicial Council has discretionary right to appoint judges from a maximum of 15 candidates who have achieved the highest number of points. Only limitation envisaged by the legislation is that the difference between the selected candidate and the candidate with the highest number of points must not exceed 15 points.[63] This

[61] Cf. Bundesverwaltungsgericht, judgments of December 19, 2002 – BVerwG 2 C 31/01 – and of February 27, 2003 – BVerwG 2 C 16/02 -. Oberverwaltungsgericht Lüneburg, Decision of June 5, 2003, - 2 ME 123/03 -; Oberverwaltungsgericht Berlin, Decision of January 15, 2004, - 4 S 77.03 -.

[62] Available at: https://vsts.pravosudje.ba/vstvfo-api/vijest/download/98483 (29. 9. 2023).

[63] Article 17, Rules on evaluation of candidates in the process of appointment of judges in first instance, regional and high courts, State Judicial Council, No. OU-114/22.

solution gives significant power to the Council to deviate from the selection list, which might result in abuses of power and undue influence over the appointment process.

The opinion of the Italian Superior Council of Judiciary on the evaluation process is not binding on the Board of Governors which formulates the final assessment. The Superior Council draws up the opinion, based on the documents indicated above, giving specific reasons on the various profiles subject to evaluation and formulating a judgment, which can be "positive", "deficient", "seriously deficient" or "negative", on each of the elements into which the evaluation itself is broken down.

Although most countries allow for the selection of candidates that are not first on the rank list, the German approach and practice is the most relevant for ensuring merit-based approach in the selection process. The German approach prevents any misuse of the selection process and should lead to increased integrity and transparency of the process.

5. CONCLUSIONS

Regulation of selection and evaluation criteria and process by law is common across Europe to ensure transparency of the process for both general public and candidates/judges. Details of both processes are usually regulated by the secondary legislation.

Existence of robust and objective criteria for selection of judges is characteristic of majority of European countries, even those that have established Judicial Academies. In addition to the criteria that relates to the performance and test results, some countries introduced different integrity or psychological assessment that could provide comprehensive insight into the profile of future judge. Countries that are in the process of the judicial reform could consider introduction of such tools to ensure selection of adequate candidates.

Evaluation of individual judges is perceived as accountability tool, but also raises concerns that could jeopardize independence of judiciary. Ensuring balance between standards of independence and accountability is important task for legislator. Furthermore, different sources are used for evaluation and Serbian authorities should consider to expand source to statistics to include inspection of case and monitoring of trials. In only few countries negative evaluation can lead to demotion of judges, initiation of disciplinary procedure, reduction of salaries and even dismissal from the office. Countries should be very careful in introducing such consequences of the evaluation. There are good examples of envisaging mitigation measures for poor evaluation results, that are focused on improvement of judge's performance (i.e., mentoring work, additional trainings, transfer to another chamber). Furthermore, evaluation results should be directly linked with promotion of judges.

Although prevalence of the statistical indicators for evaluation of judges has its shortcomings, it is a good starting point for young democracies. Indicators that are based on interviews, surveys, inspections or monitoring of hearings inevitably include subjective aspect to the evaluation which raises concerns among professionals and public (Spigelman, 2006, p. 72).

Obligatory power of the selection and evaluation results is ensuring merit-based approach. Limitation of discretionary power to avoid rank list of candidates (both in the selection and the evaluation process) ensures objectivity of the process and prevents any abuses. If country introduces comprehensive selection and evaluation indicators and process, establishment of the obligatory power of the selection and evaluation results will lead to the trust in the system.

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A "CONSTITUTION" WITHOUT A CONSTITUTION – THE ISRAELI EXPERIENCE

A written comprehensive constitution, usually defined as "formal", is not the only form the constitution might take. There are unwritten constitutions, such as in the UK and Israel, that include laws prescribing constitutional principles and landmark decisions of the Supreme Court. 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 based on the Israeli Declaration of Independence, which states that the country will be established "on the foundation of freedom". In doing so, the court followed the "Background Understanding Model". Under this model, which is similar to the interpretive theory in the USA, there is a general understanding of civil rights, human rights, the rule of law, separation of powers, and other fundamental principles. In March 1992, a significant event occurred in the Israeli constitutional arena. The Knesset (The Israeli Parliament) enacted the Basic Law Freedom of Occupation and Basic Law Human Dignity and Liberty. These laws formed a "Constitutional revolution" and imposed restrictions on the power of the Knesset to pass any law it pleased. In enacting those Basic Laws, 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. However, these fragile achievements might be under constant threat.

Keywords: A Constitution without a Constitution, Human Rights, Rule of Law, Separation of Powers, Basic Laws, Constitutional Revolution.

1. INTRODUCTION

The phrase "a Constitution without a Constitution" might seem impossible for an American or a European reader. Such a reader views the Constitution as a formal written document, symbolising the supreme law of the land.[1]

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[1] Segal, Z. 1992. A Constitution Without a Constitution: The Israeli Experience and the American Impact. *Capital University Law Review*, 21(1), p. 1.

In the narrow sense, a written comprehensive constitution, usually defined as "rigid" and "formal", is not the only form the constitution might take. There are unwritten constitutions, such as are found in the United Kingdom and the State of Israel, that include basic laws and ordinary laws prescribing constitutional principles and landmark decisions of the Supreme Court.[2] One may argue that written constitutions curb the supremacy of the legislature, while under unwritten constitutions, the legislature is supreme. However, unwritten constitutions might be deemed more flexible and better secure substantive due process and guarantees of civil liberties.[3]

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.[4] This presumption ensures that civil rights will be upheld. Based on decades of experience, this strong presumption enables the court to modify the ordinary meaning of statutory provisions to be consistent with the concept of civil rights. According to the prevailing sentiment of interpretation, the legislature has no intention to curtail civil liberties or empower other public authorities.

It should be noted that the presumption favouring civil rights could be overridden by the legislature, if it wishes to do so, unlike in a country with a written constitution.[5] In numerous cases, this practice has allowed the Israeli Supreme Court to develop a body of law protecting civil rights as if a written bill of rights existed. Thus, a judge-made "Constitution" has grown in Israel without a written constitution, even in the face of legislation that seems hostile to civil liberties. In practice, Israeli citizens enjoyed, to a large extent, the same civil liberties as citizens of the United States, primarily due to the significant input of the Israeli Supreme Court. In its endeavour to protect human rights, the Israeli Supreme Court has based its landmark decisions, *inter alia,* on American Constitutional law as a source of inspiration when interpreting the existing laws in Israel.[6]

The Israeli Supreme Court has based its "background understanding" on the Israeli Declaration of Independence, which states that the country will be established "on the foundation of freedom". In doing so, the Israeli Supreme Court followed an interpretation model called the "Background Understanding Model". Under this model, which

[2] For the UK, see, in general: Leyland, P. 2016. *The Constitution of the United Kingdom – A Contextual Analysis.* 3rd ed. Bloomsbury Publishing. See also: Lock, T. 2017. Human Rights Law in the UK After Brexit. *Public Law*, Vol. Nov Supp 2017, p. 117.

[3] So-called unwritten constitutions are also called uncodified ones since they might not be entirely unwritten but rather scattered in separate legal texts. See, for example: Sartogi, G. 1962. Constitutionalism: A Preliminary Discussion. *American Political Science Review*, 56(4), p. 853.

[4] Grimm, D. 2012. Types of Constitutions. In: Rosenfeld, M. and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law.* Oxford Academic, p. 106.

[5] Shapira, A. 1983. Judicial Review Without a Constitution: The Israeli Paradox. *Temple Law Quarterly*, 56(2), p. 417.

[6] Maoz, A. 1988. Defending Civil Liberties Without a Constitution - The Israeli Experience. *Melbourne University Law Review*, 16, p. 815.

is similar to the interpretive theory in the United States, there is a general background understanding of civil rights, the rule of law, the separation of powers, and other fundamental principles.[7] According to this understanding, every provision in a written text - constitution and statute alike - is read in light of that general background understanding. The background understanding adopted by the Israeli Supreme Court is the understanding of a system founded on democratic values, recognising a whole array of "unwritten rights", such as personal freedom, freedom of speech, freedom of religious worship, freedom of movement, freedom of association, and freedom of property. These vital principles included in the background understanding model also incorporate equality before the law, the dignity of the human being, integrity of the judicial process, the right to a fair trial, and many other rights recognised in a written bill of rights.[8]

2. ALLOCATION OF POWERS

Israel is a hybrid parliamentary-constitutional democracy.[9] Israel's Parliament, the Knesset, is the elected "House of Representatives of the State".[10] The electorate chooses among party lists of candidates, whose representatives are then elected Knesset members for four years. The Knesset is the Legislative Branch of the State, meaning all legislative power is vested in the Knesset, as it is the only legislative body. In the absence of a written constitution, there are no limitations on the Knesset's legislative powers, with one exception: a qualified majority, as prescribed in specific pieces of legislation.

The government is defined as the "Executive Branch of the State."[11] It serves by virtue of the confidence of the Knesset. The executive powers are vested in the government, subject to any law enacted by the Knesset that might limit the government's executive power.[23] The Knesset and the Government are two organs of the State, and, together with the courts, these branches constitute the three central authorities of the State through a system of checks and balances in their mutual relations.

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7 For the USA, see, in general: Tushnet, M. 2020. *Taking Back the Constitution: Activist Judges and the Next Age of American Law.* Yale: Yale University Press.

8 The most important part in the Declaration of the Establishment of the State of Israel (known as the Declaration of Independence), which served the Israeli Supreme Court as a tool of interpretation, states: "*The State of Israel ... will be based on freedom, justice and peace envisaged by the prophets of Israel ... will ensure complete equality of social and political rights, to all its inhabitants irrespective of religion, race or sex ... will guarantee freedom of religion, conscience, language, education and culture ...*". The Supreme Court mentioned the Declaration of Independence as a source of recognition of civil rights, even though the Declaration is not a Constitution and an explicit law may override its statements. In the absence of an explicit law, the Supreme Court interprets the law in question in light of the values referred to in the Declaration. Thus, Israeli judges uncover the basic values of Israeli Constitutional Law in the Declaration, which is a framework for the whole system. An English version is available at: https://main.knesset.gov.il/en/about/pages/declaration.aspx (5. 9. 2023).

9 For a comprehensive overview, see: Navot, S. 2016. *Constitutional Law in Israel.* 2nd ed. Wolters Kluwer.

10 See Basic Law: The Knesset. An English version is available at: https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheKnesset.pdf (5. 9. 2023).

11 See Basic Law: The Government. An English version is available at: https://www.mfa.gov.il/MFA/MFA-Archive/2001/Pages/Basic%20Law-%20The%20Government%20-2001-.aspx (5. 9. 2023).

The principle of Government Under Law, or the rule of law, as defined by the Israeli Supreme Court over the years, guarantees a democratic system. Under Israeli Constitutional law, the government is subject to the principle of legality, which is a part of the doctrine of Government Under Law. This principle requires that the Government base its actions on a law empowering the government to act. For example, the government is not allowed to restrict civil rights unless authorised by an explicit law of the Knesset. A legal source for vast governmental executive powers can be found in Knesset's legislation. This legislation states that the government is empowered "to execute in the name of the State, any act the execution of which is not imposed by law upon another authority".

In the absence of restricting legislation in Israeli Constitutional law, the executive branch enjoys a wide range of powers, such as signing international treaties, declaring war or signing peace treaties, and selling weapons to foreign countries. Thus, national security and matters of foreign relations are under the government's sole authority.

A significant departure from the doctrine of separation of powers lies in the authority vested in the Government and its Ministers to pass emergency regulations for the defence of the State, public security, and the maintenance of supplies and essential services. The exceptional legal power of the emergency regulations lies in the government's capacity to suspend the effect of or modify any law and impose or increase taxes. An emergency regulation expires three months after its promulgation unless it is revoked earlier or extended by a law promulgated by the Knesset. The Executive has not misused the power to make emergency regulations, but it is still argued that the government's power should be limited in this area.

3. THE ABSENCE OF A WRITTEN CONSTITUTION: THE EFFECT ON THE LEGAL SYSTEM

The Israeli Declaration of Independence, adopted on May 14, 1948, imposed upon the yet-to-be-elected constituent assembly the duty to draft a constitution for the State of Israel. The founding fathers understood the term "Constitution," to mean a written constitution in the American sense. When the constituent assembly was elected, it changed its name to the Knesset and dissolved itself before drafting a formal constitution. In the course of debates in the first Knesset, opponents of a written constitution advocated the postponement of a formal written constitution. These opponents argued that Israeli society comprised an evolving young community awaiting the ingathering of Diaspora Jews. Thus, they argued that a formal constitution would hinder the dynamism of the evolving State and disregard the potential creative contributions of the many expected immigrants.

Another argument the opponents of the written constitution raised was that enacting a Bill of Rights in the Constitution might bitterly divide the new nation, especially over the separation of church and State. Additionally, some politicians opposed a written constitution, fearing that it would curb the supremacy of the Knesset and impede the efficient functioning of the Executive.

Instead of adopting a formal constitution, the Knesset passed a policy decision known as the "Harari Resolution" on June 13, 1950. The Resolution provided that the

first Knesset would charge the Constitutional, Law, and Justice Committee with preparing a proposed constitution for the State. The constitution was to be constructed in chapters in such a way that each chapter would be a Basic Law by itself. The chapters were to be brought before the Knesset as the Committee completed them, and all the chapters were to be combined into a constitution for the State.

It should be noted that the result of this decision was not to draft a written constitution or at least to postpone the adoption of a formal, rigid constitution. The Knesset has never clearly explained the notion of a "chapter" while enacting Basic Laws. However, the decision does not explain the possible special status of Basic Laws promulgated under the Harari Resolution's directive. Some commentators have argued that the Knesset intended for Basic Laws to stand superior to ordinary laws: this, however, does not seem to be the case.

Basic Laws had no special constitutional status in Israel, and they could be altered by the Knesset passing an ordinary law by only a regular majority of the members of the Knesset participating in a vote. Since an ordinary Knesset majority is sufficient to enact Basic Laws, it could be well understood that Basic Laws, as such, can be amended by a regular majority. In the absence of a written Israeli constitution, a court has no explicit and formal power of judicial review of that amending statute once the Knesset alters a Basic Law. In principle, judicial review is essentially related to rigid constitutions.

4. DEFENDING CIVIL RIGHTS: THE ROLE OF THE JUDICIARY

Without a written constitution and an entrenched Bill of Rights, the Israeli Supreme Court has developed a presumption that civil rights prevail, unless limited by an unequivocal expression of the legislature. The presumption favouring civil rights is the strongest in Israeli Constitutional law, and it enables the Supreme Court to develop a judge-made constitution that recognises human rights. In developing this judge-made constitution, the Supreme Court drew inspiration from the Israeli Declaration of Independence and American Constitutional law.

The Israeli Supreme Court's endeavour to secure civil rights is exemplified by the landmark decision of *Kol Ha'am* in the 1950s.[12] *Kol Ha'am* dealt with the Minister of Interior's power to suspend any newspaper from publishing material that is, in his opinion, "likely to endanger the public peace." In 1953, the communist paper Kol Ha'am severely criticised the government for allegedly agreeing to send Israeli troops to Korea to fight on behalf of the United States. The allegations were false, and thus the criticism was unfounded. However, the Minister of Interior suspended the newspaper's publication for ten days. The newspaper brought a petition for judicial review before the Supreme Court. The Supreme Court could have easily concluded that the petition should be rejected, strictly construing the statute's express language. However, the Supreme Court flexibly interpreted the statute, basing its ruling on the presumption of civil rights, under which every law should be interpreted. Following this reasoning,

[12] 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 (5. 9. 2023).

Justice Shimon Agranat transplanted a whole corpus of First Amendment jurisprudence into Israeli law. At the time of this decision, the prevailing First Amendment test for resolving the conflict between freedom of speech and national security was the "clear and present danger" test. Justice Agranat refrained from adopting that test and instead adopted the "near certainty of danger" test, which is a broader, more lenient standard than the "clear and present danger" test. In applying the "near certainty" test, the Israeli Supreme Court annulled the Minister of Interior's decision and created the legal principle of free speech in Israeli Constitutional law, which could be limited only under a probability of grave danger to the national security of the State. 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.[13]

Kol Ha'am introduced standards of freedom of speech into the Israeli legal system similar to the American standard of "clear and present danger". *Kol Ha'am* mandated that the right of free expression could be limited only when there is a clear probability of· danger to national security in the court's opinion exercising judicial review over executive actions. *Kol Ha'am* also influenced Israeli freedom of speech law in areas unrelated to national security. Regarding the right to demonstrate, the Supreme Court ruled that -permission for processions may be denied only if a near certainty of danger exists to public order.

The discussion of Israeli Constitutional law above shows, to a large extent, the impact of American Constitutional law in the area of freedom of expression. While laws in Israel cannot be declared "unconstitutional," the goal of securing civil rights is embodied in the Israeli Declaration of Independence and the American Constitution, as interpreted by the Israeli Supreme Court. The reflection of American constitutional values derives from common traditions of sharing democratic values.

These two documents served as resources for the Israeli Supreme Court to develop freedom of speech jurisprudence. Development of law in this area became possible through the Israeli Supreme Court's divergence from a purely interpretive model and the acceptance of the court's additional role as the expounder of fundamental national ideals of liberty and fair treatment, even when these ideals are not expressed in the existing laws of the land, many of which are hostile to civil rights. The creation of this conceptual attitude was the most important consequence of the *Kol Ha'am* decision, which had an impact reaching far beyond the interests covered by the principle of freedom of speech.

5. THE ADOPTION OF A BILL OF RIGHTS: A CHALLENGE

Constitutions, including bills of rights, are usually drafted at a historical crossroads, such as attaining national independence or the revolutionary change of a regime. This was the experience in the United States when the Constitution was adopted shortly after independence was gained, and the Bill of Rights was adopted four years after the Constitution was signed. In Israel, the opportunity to adopt a formal constitution and a written bill of rights was lost due to various arguments raised in opposition to the statute

[13] Halmai, G. 2012. The Use of Foreign Law in Constitutional Interpretation. In: Rosenfeld, M. and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford Academic p. 1340.

authorising the drafting of a written constitution.[14] Some of those arguments, especially those relating to religion and the State, continue to date, illustrating a lack of consensus on other crucial problems, including emergency powers and majority-minority relations. A bitter debate over the above subjects prevented the adoption of a formal written constitution and an entrenched Basic Law of civil rights for decades.

Several proposed bills of rights were submitted to the Knesset over the first four decades of the existence of the state of Israel, but none ever succeeded in becoming law. The Knesset approved one of the comprehensive proposed bills of rights in a preliminary reading in November 1989. The proposed bill encompasses the classic liberal freedoms, including freedom of speech, equality before the law, the right to property, freedom of assembly, freedom of association, the presumption of innocence, the privilege against self-incrimination, and the right to appellate review, among others. The bill did not change the *status quo* regarding marriage and divorce or the religious status in Israel. Nonetheless, the religious faction of the government opposed this bill because the Supreme Court, sitting as a Constitutional court, would be empowered to declare future legislation invalid if it contradicted the adopted bill of rights and the "basic values of Israeli society". The religious faction feared that such authorisation might lead to the annulment of future legislation benefitting the religious faction. Due to the power of the religious faction in the Knesset and its traditional participation in the government, it was indeed improbable that this proposed bill would become law. Nevertheless, after three years, in 1992, a huge change occurred.[15]

6. THE ISRAELI CONSTITUTIONAL REVOLUTION

In March 1992, a significant event occurred in the Israeli constitutional arena.

The Knesset enacted two new Basic laws: the Basic Law: Freedom of Occupation[16] and the Basic Law: Human Dignity and Liberty.[17] These laws, which formed a "Constitutional revolution" and "a constitution in miniature", created a new era in Israeli Constitutional law. They recognised fundamental rights — freedom of occupation, the right to property, the right to freedom, privacy, and human dignity — and provided that these rights could not be infringed save by legislation that meets certain specific criteria. This approach imposed restrictions on the power of the Knesset to pass any law it pleased.

The Canadian Charter of Rights and Freedoms significantly influenced the Israeli constitutional revolution, through the incorporation of "limitation clauses" and "override clauses" in Israeli constitutional legislation. The "limitation clauses," which were included

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[14] Gavison, R. 1985. The Controversy over Israel's Bill of Rights. *Israel Yearbook of Human Rights*, 15(1), p. 113.

[15] Edrey, Y.M. 2005. The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements. *The American Journal of Comparative Law,* 53(1), p 101.

[16] 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 (5. 9. 2023).

[17] An updated English version is available at: https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx (5. 9. 2023).

in both the *Basic Laws Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), are of particular importance in the newly evolved constitutional structure. The provisions were intended to place constraints on future legislation enacted by the Knesset and thus deviate from the principle of "parliamentary sovereignty," which has characterised the Israeli legal system since the establishment of the State in 1948.

The "limitation clauses" provide that "there shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required". The inclusion of the "limitation clause" clearly created basic laws of a superior status: the Knesset is not empowered to infringe the rights recognised by the basic laws — in whatever way it sees fit — through its regular legislation.

Still, the precise legal status of such a Basic Law was open to discussion. One theory holds that Basic Laws enjoy a special status due to the fact that they form part of the future constitution of the State. It has thus been suggested that a provision in such a law may only be amended by another Basic Law (even though enacted by a regular majority), which explicitly affirms the validity of the amendment notwithstanding any provision of the original Basic Law being amended. A different approach holds that ordinary legislation may also supersede a "limitation clause", provided, however, that it declares explicitly that it is valid despite the provisions of the Basic Law. The first approach is to be preferred. It recognises the absence of an entrenched provision, thus enabling a regular majority's deviation from the Basic Law. At the same time, it requires that the regular majority express its will in a Basic Law, affirming its validity notwithstanding the provisions of the Basic Law being amended. Such a requirement strengthens the status of a Basic Law marked by a "limitation clause".

In any event, it would appear that the Israeli legal system accepts that the mere existence of a "limitation clause" prevents the Knesset from infringing, on a whim, the fundamental rights of individuals. 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 Knesset law if, in its view, it conflicts with the fundamental rights safeguarded by the Basic Laws and does not "accord with the values of the State of Israel" — an imprecise term of uncertain boundaries. [18]

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 unfamiliar. [19]

This silence has resulted in a situation where every court can annul any law that conflicts with the basic laws relating to freedom of occupation and human dignity. The

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

[19] The absence of a specific provision indicating the appropriate forum for constitutional scrutiny in the American constitution has not barred judicial review of statutes since the decision in *Marbury v Madison,* 5 U.S. 137 (1803). When a Basic Law or Charter of Rights is amended in modern times, when questions of judicial review are under discussion, the legislature should express its will explicitly. This approach is open to debate. Nevertheless, the judicial review remains possible because of express limitations on legislative power, such as those found in a "limitation clause".

validity of the law may arise in a lower court — Magistrate or District — where the contention is raised in civil or criminal proceedings brought before the court. Such an attack on the validity of legislation may be entitled an "indirect attack", as the validity of the law is not the primary cause of the legal proceedings. A lower court decision affects only the parties to the action and does not constitute a binding precedent for other cases. A direct attack on the constitutionality of a law of the Knesset, where it is the sole ground for the legal proceeding, may be initiated in a petition to the Supreme Court of Israel sitting as a High Court of Justice. Such a request for judicial review may be described as a "direct attack." The Supreme Court then sits as a court of first and last instance.

With the enactment of Basic Laws regarding Human Dignity and Freedom of Occupation, the State of Israel entered a new era. As a broad and all-embracing right encompassing a whole range of fundamental principles and specific rights, human dignity has evolved into a fundamental right in Israel. The climax of the constitutional revolution — which unfolded so quietly and without the promulgation of a comprehensive formal constitution — resulted in the possibility of annulling primary legislation because it was contrary to the values of the State of Israel. This formula, which has found expression in the "limitation clause," is both broad and ill-defined, and indeed, it is more far-ranging in scope than the mere annulment of a law that is contrary to any specific constitutional provision.

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 Human Dignity and Liberty is general and all-embracing. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process, and more. It may even evolve into a substitute for a constitution that expressly addresses fundamental rights such as equality or freedom of expression.

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. In interpreting these Basic Laws, the Israeli judiciary will rely on the fact that the State of Israel is Jewish and democratic and committed to equality for all its citizens, Jewish and non-Jewish. The hope was that the Israeli courts would draw upon the wisdom of other legal systems, which have assigned to the concept of human dignity its rightful place at the head of the hierarchy of human rights.[20]

Indeed, on November 9, 1995, the Israeli Supreme Court announced its decision – which comprises hundreds of pages –, by an expanded panel of nine Justices, in the case of the *United Mizrahi Bank Limited* [21]— a decision which might be retitled the "Israeli *Marbury v. Madison*." It contains a wide-ranging analysis related to many aspects of

[20] Jacobsohn, G.J. 2012. Constitutional Values and Principles. In: Rosenfeld, M. and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford Academic,, pp. 777-792, pp. 781-782.

[21] Civil Ap. 6821/93 *United Mizrahi Bank Ltd. v Migdal Cooperative Village*, 49(4) PD, p. 222 (1995) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village (5. 9. 2023).

Israeli Constitutional law, including, *inter alia,* the constitutional power of the Knesset to bind itself by a "limitation clause". The express recognition of such a power in the court's judgment is of significant importance to Israel as a constitutional democracy.

The importance of the decision does not stem from the concrete decision that deals with a specific law. Instead, the primary importance of this landmark case is that it represents the first Supreme Court pronouncement that every court in the country enjoys the power to declare laws unconstitutional and invalid. This is only true if the law violates fundamental rights, which the Basic Law recognises, and goes beyond the exceptions specified in the limitation clause. Such a judicial pronouncement — especially in the absence of an express constitutional provision that recognises the supreme status of the Basic Laws and the validity of judicial review of statutes — constitutes a "Constitutional Revolution" and a new era in Israeli Constitutional law.

The Supreme Court's decision presents a clear and robust majority view — with only one Justice dissenting on this point — that the Knesset enjoys the power to enact Basic Laws, which are chapters in Israel's Constitution. These laws bind all public authorities, including the Knesset itself, and the Courts entertain the power to declare laws invalid. Prior to these constitutional developments, human rights in Israel were subject to the laws of the Knesset. Still, it has become part and parcel of Israeli democracy that the laws of the Legislatures are subject to human rights as embodied in the two Basic Laws.

In this wide-ranging judgment, the President of the Israeli Supreme Court, Justice Aharon Barak, stressed the importance of judicial review of statutes in a democratic society. Justice Barak mentioned the American case of *Marbury* v. *Madison* as a source of inspiration for recognising the power of the Courts to declare laws unconstitutional despite the absence of an express provision in the Constitution.

Once the power of the courts to declare laws unconstitutional was established, the court focused on the extent to which this power could be used. This power is essential to any judicial system recognising the power to annul legislation. A court reluctant to use its power, even when the use of such a power is demonstrably justified in a democratic society, deprives judicial review of its prime objective of scrutinising legislative acts to strengthen the foundations of democracy.

The court has since taken a very active role in evaluating and invalidating actions of the Knesset and the Executive, even in cases involving security measures—an area previously considered beyond the reach of the courts.[22]

7. FINAL WORD: BACKLASH AGAINST THE COURT?

Judicial activism has generated a significant backlash against the court.[23] In response to the court's activism, the legislature and Executive are attempting to weaken the court,

[22] Barak, A. 2020. Human Rights in Times of Terror - A Judicial Point of View. In: Albert, R. and Roznai, Y. (eds.), *Constitutionalism Under Extreme Conditions. Ius Gentium: Comparative Perspectives on Law and Justice*. Cham, Springer, p. 109.

[23] Weill, R. 2020. The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-Led Constitutional Revolutions and Democratic Backsliding. *Law & Ethics of Human Rights*, 14(2), p. 227.

particularly its power of judicial review. Moreover, recent public opinion polls reveal a substantial decline in public confidence in the court, mainly among religious and illiberal publics. Consequently, the future potency of judicial review in Israel remains uncertain.

This uncertainty accelerated recently. Following the November 1, 2022 Israeli elections, the right-wing bloc of parties headed by the Likud and Benjamin Netanyahu—which won, jointly, 64 out of 120 seats in the Knesset—was able to form a government. Two critical positions in the government and the Knesset were assigned to two longtime critics of the Israeli judiciary: Yariv Levin (Likud), who was appointed minister of justice, and Simcha Rothman (Religious Zionism), who was appointed chair of the Knesset Constitution, Law and Justice Committee. In a press conference on January 4, 2023, Levin presented a "legal reforms" package, which he described as the first in a planned series of such packages. Levin declared that the package would include laws limiting the power of the Supreme Court to strike down Knesset legislation, limiting the power of the Supreme Court to review administrative acts, increasing the influence of the Executive and legislative branches on judicial appointments, and overhauling the process for appointing government legal advisers and reducing their legal powers.

Massive demonstrations and protests by the liberal public erupted in Israel.

The International Bar Association (IBA) issued a public "notice of concern", declaring that it "…is profoundly concerned with the proposed reforms to the legal system in Israel, which would seriously undermine the independence of the judiciary, including the Supreme Court, and dismantle legal checks on executive power. Israel has been recognised as a substantial upholder of the Rule of Law with a senior judiciary which is much admired globally. These changes would wholly undermine that proud position. The proposed legislative reforms were introduced in January 2023 by the Israeli Minister of Justice, Yariv Levin. If passed, they would resultd in amending the composition and functioning of the judicial appointment committee to confer a dominant position to representatives of the government, enabling the Knesset (Israel's parliament) to override decisions of the Supreme Court, impairing the Supreme Court's ability to review governmental decisions; and severely undermining the independence of legal advisors to the government ministries… The Rule of Law is an inherent component of modern democracies. At its core, it establishes the principle that no one is above the law. It also provides protection from the arbitrary use of power. On an institutional level, this translates into guarantees of the independence of the judiciary and the monitoring of the exercise of executive power. Indeed, while there is no single model for democracy and every State has its own ways of establishing checks and balances, certain elements are foundational to the separation of powers. This is particularly so for a state like Israel, with a unicameral legislature represented by the Knesset and a parliamentary system that can lead to the Executive, namely the government of the day, having full control over the Knesset. Without a second chamber exercising control and without a written constitution, the restraints on the majority are mostly entrusted to an independent judicial system. This is why the Israeli Supreme Court plays a pivotal role in constraining the Executive from a potentially negative use of power. The proposed reforms would have the effect of completely dismantling both the external and internal checks on the Executive, through the

independent judiciary and the independent legal opinions of the Attorney General and of the legal advisors to government ministries. These reforms would curb legitimate oversight of the actions of Government and the Knesset, leaving the Executive free to use its power in a potentially arbitrary and discriminatory manner".[24]

The local protest and the international criticism had impact. When these lines are being drafted, the "reform" is mainly on hold, although one main change to the Basic Law: The Judiciary was adopted by the Parliament in July 2023. With the opposition boycotting the decisive vote in protest, the government approved legislation that amends the Basic Law by eliminating what is known as the "reasonableness standard". Under Israeli law, "reasonableness" refers to a balance between political and public interests in decision-making. An "unreasonable" decision is one that disproportionately focuses on political interests without sufficient consideration for public trust and its protection. The doctrine of reasonableness originates from English law and has been applied by the Supreme Court in Israel over the years. It protected individuals from government infringing on their fundamental rights and invalidated extreme and unreasonable appointments. Under the newly approved law, the Supreme Court can no longer invalidate any government decisions, including those made by the prime minister, ministers, or Knesset members, such as appointments or dismissals. In other words, the previous law offered the public a way of challenging government decisions that were not in its best interest through the use of reasonableness. The amended legislation eliminates the High Court of Justice's power to block certain government decisions that it finds unreasonable.

In recent years, the Supreme Court has hinted that it might establish criteria that can be used in exceptional cases to cancel even a Basic Law. The first criterion exists if the court determines that the Knesset has abused its authority by enacting a law that is defined as a Basic Law but represents an action that is not considered a "constitutional norm". The second would be the passage of what is known as an "unconstitutional constitutional amendment".[25] Using these criteria, petitioners against eliminating the reasonableness clause could potentially argue that the newly amended law violates the principle of separation of powers, which negates the democratic character of Israel and is, therefore, unconstitutional. Ultimately, the possible intervention of the court will be a question of measure, not of nature.

The debate on the question: "Who has the final word" or, in other words, whether Israel is a parliamentary democracy or a constitutional one, is far from its end.

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[24] See: https://www.ibanet.org/Israel-The-IBA-is-profoundly-concerned-with-the-proposed-reforms-to-the-legal-system-that-would-jeopardise-the-Rule-of-Law (5. 9. 2023).

[25] See: Roznai, Y. 2017. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford: Oxford University Press.

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THE PROSPECT OF REGIONAL INTEGRATION UNDER THE OPEN BALKAN INITIATIVE: A CONSTITUTIONAL APPROACH

The Open Balkan Initiative is a regional political initiative launched in 2020 by the leaders of three Western Balkan countries: Albania, North Macedonia, and Serbia. The aim of the initiative is to promote cooperation, economic integration, and political stability in the Western Balkan region. This is being conducted apart from the European Union integration process of these participating countries, and along the Berlin Process, which was set up in 2014 as a platform for high-level cooperation between high official representatives of the Western Balkan Six (WB6) and their pee.rs in Berlin Process's host countries.

The Open Balkan Initiative promises to introduce four fundamental freedoms that shall integrate further the markets and the economies, namely the free movement of persons, goods, services, and capital. As such, this regional initiative promises to deliver the benefits of a preferential trade agreement in terms of regional integration of countries and their economies. This paper analyzes the prospect of the Open Balkan Initiative as an instrument for furthering the integration of the participating states and the region in general. This question shall be analyzed through the lenses of the European Union theories of economic integration, with a particular focus on the spill-over effect paradigm. The ultimate aim is to understand, from the legal and scholarly perspective, whether the Open Balkan Initiative is capable of serving as a constitutional instrument for enhancing regional integration in the Western Balkan region.

Keywords: Regional integration; Open Balkan Initiative; European Union; European integration.

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1. INTRODUCTION

The Open Balkan Initiative (hereinafter: OBI) can be seen as a political denomination for the regional economic cooperation of three Western Balkan countries: Albania, North Macedonia, and Serbia. The aim of the cooperation is to introduce and implement four fundamental freedoms in the region, which are coined by the European Union (hereinafter: EU). These are freedom of movement of persons, freedom of movement of goods, freedom of movement of services and of capital. Although supported by significant partners of the region, such as the EU and the United States of America (hereinafter: USA) and in line with the Joint Plan for Regional Market and the Berlin Process, the region claims its ownership over the process (Albanian MEFA, OBI, 2023).

As a result of the OBI process, participants have entered into several bilateral and multilateral agreements. Accordingly, with respect to the free movement of persons, several agreements and technical instruments have been entered to ensure that the border control procedures shall be reduced for citizens of all participating states, by introducing joint border checkpoints, as well as by recognizing several identification documents, including biometric identification documents (ID cards). The latter overlaps with a similar measure under the Western Balkan Initiative, since six members accept travellers from each country by means of their ID card. When it comes to the freedom of workers, the OBI countries concluded an Agreement on the conditions for free access to the labour market in the Western Balkan on 20th December 2021. The said agreement allows citizens of each country to enter the territories of other OBI countries and reside there for employment purposes. This agreement provides in Article 3 the right to equal access to the labour market of the host country.

With respect to the free movement of goods, the OBI countries executed a Memorandum of Understanding for cooperation in terms of import, export, and transit of goods in the Western Balkan (hereinafter: MoU on Trade in Goods) on 29th July 2021. The general objectives of this MoU on Trade in Goods are to simplify the procedures for the import, export, and transit of goods to the widest possible extent, promote the harmonious development of economic relations between parties through the expansion of mutual trade, and the gradual reductiontrade barriersrade. The MoU on Trade in Goods aims to reduce technicaltrade barrierse and to increase the efficacy of trade by implementing international standards, guidelines, and recommendations of the United Nations Centre for Trade Facilitation and Electronic Business (hereinafter: UN/CEFACT), World Trade Organization (hereinafter: WTO), International Organization for Standardization (ISO), World Customs Organization (hereinafter: WCO), including the principles of the Revised International Convention for the Simplification and Harmonization of Customs Procedures (hereinafter: Revised Kyoto Convention), the Codex Alimentarius Commission, the World Organization for Animal Health, as well as the International Plant Protection Convention (hereinafter: IPPC) and relevant international and regional organizations operating within the framework of the IPPC. In terms of stock farming, the OBI countries concluded an Agreement on cooperation in the fields of veterinary, food safety, animal feeding, and phytosanitary in the Western Balkan on 2020ecember 2021. The given

agreement introduces the principle of mutual recognition of reports and test results. Other agreements do not address specific freedoms in an explicit manner.

Regarding the free movement of services and capital, no proper instruments have been enacted yet, but it can be assumed that they should be enacted in the following summits.

2. THE REGIONAL CONTEXT OF THE OBI AND ITS ORIENTATION IN THE POLITICAL SPACE

It is reasonably expected based on the aims and content of the OBI agenda, that the OBI should *strengthen regional cooperation*, *generate economic growth,* and *assist participants in their efforts for the EU integration*.

First and foremost, it should be noted that the three OBI countries are members of the WTO Agreement. In view of those facts, OBI agreements can be regarded as regional trade agreements, which are preferred to the extent that they may lead to deeper integration in trade relations.

In terms of *regional cooperation*, the OBI is claimed to complement other regional initiatives, such as the Regional Common Market, the Digital Agenda, Connectivity, the Western Balkan Green Agenda, Green Corridors, and the wider Berlin Process (Albanian MEFA, OBI, 2023). As to the Berlin Process, this includes the six Western Balkan countries, namely Albania, Bosnia and Hercegovina, Kosovo[1], Montenegro, North Macedonia, and Serbia. When it comes to the relationship with the Berlin Process, the OBI is claimed to be seen as an implementing unit of the Berlin Process which helps the acceleration of the Berlin Process (Albanian MEFA, OBI, 2023). If this is the case, the question arises what explains the reluctance of the remaining Western Balkan countries to join the OBI in an active manner? The relevance of this question for the constitutional process behind the OBI is indisputable. However, this article addresses this question laterally.

As to expectations on *economic growth*, it lays upon the nature of economic integration of markets, and their expansion in the neighbouring areas, which may lead to the expansion of the participating economies. It remains to be seen in the light of the national policies whether this should be able to increase the flow of foreign investments. The dominant factors for this process are strongly related to the political approach of host countries towards home countries of foreign investors, to the experience of host countries in relation to foreign investors, and to the foreign investment protection standards. Other legal and economic factors also play a relevant role in this regard. Hence, any sort of advanced regional integration should not be overestimated as a premise for attracting foreign investment and should not be taken for granted in this respect.

Behind the political agenda characterizing the OBI, one cannot overlook the strong similarities between the normative structure of the OBI and the motors of EU integration inherent in the legacy of the four freedoms. Although the region does claim ownership of the OBI, the model is clearly transposed from the EU model of integration into the regional context only in the three Western Balkan countries.

[1] All reference to Kosovo, whether to the territory, institutions or population, in this article shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

3. RELEVANT EU PARADIGMS ON INTEGRATION

In order to analyse the normativity and the constitutional nature of the OBI processes, it could be appropriate to highlight, in a nutshell, the EU paradigm on integration based on the four fundamental freedoms. The EU model of integration is based on a linear number of relatively distinct phases of the integration process, starting with discrete economic sectors that could be furthered in other sectors in the future (Craig & De Búrca, 2011, p. 2). The central thesis under this functionalist approach was the role of supranational institutions and technocrats responsible for efficient management of these sectors, away from the interests of the back-then Contracting Parties, now Member States of the EU. The integration theories are particularly based on the so-called spill-over effect created by integration starting with non-controversial areas and technical sectors, to continuing with areas of a greater political salience. This integration, as managed at a supranational level, shall lead to a continuous reduction of national dominance over the integrated areas, by giving priority to supranational normative power (Craig & De Búrca, 2011, 2). The deficits of these theories were polarized against the intergovernmental theories relying on the fact that the Member States were the Masters of the Treaties, and as such they played the dominant role in the integration process. Both of these theories could be right to a certain extent, but none of them exhausted the explanation of the nature of the integration processes in the EU polity. Between these theories, the rationalist and constructivist approaches emphasized even more the influence of norms, ideas, and principles in the process of integration (Craig & De Búrca, 2011, p. 3) by endorsing the ideas of post-functionalism, which emphasizes the way the EU has raised issues of identity in the EU (Craig, P. 2021, p. 25).

It could be underlined based on the above theories that EU integration is, to a certain extent, described by the functional and political dimensions of the spillover effect inherent in the functionalist approach to EU integration. Accordingly, the integration instituted in a specific area of the economy shall make use of the interconnectedness nature of economic areas as a pressuring mechanism for extending the integration into other adjacent areas of the economy. The need for integration facilitated also by pressure groups or stakeholders, shall trigger regulators to adapt policies *appropriately*.

Notwithstanding the inability of the main theories of EU integration to exhaust the explanatory factors of the very complex and *sui generis* nature of the EU integration, such theories are not regarded as exclusive nor competitive in such explanations (Binici, 2022, p. 5). The debates are polarized even further if the integration process is analysed in terms of the democracy and legitimacy concerns in the EU (Craig, P. 2021, p. 45).

In terms of the constitutional dimension of the EU polity, we should certainly refrain from reference to nation-states and draw comparisons for analysing the constitutional order in the EU. The EU legal order is a creation of public international law, and its supranational features define it as "a developed form of international organization which displays characteristics of an embryonic federation" (Arnull & Wyatt, 2006, p. 132). These considerations reaffirm the highly disputed nature of the EU polity, which is based on a legal order that accommodates various conflicting interests and tensions (Ruka, 2017, p.

145 *et seq*.). In this view, the EU and its Member States constitute a polity that combines the actions of supranational and intergovernmental institutions, whereby both the EU institutions and its Member States exercise powers that are conferred to the EU institutions or maintained by Member States, or shared between the EU and Member States. This constitutional setting is the highest level of integration currently in the EU polity, which actually keeps the EU away from the federal nature of the state.

From these insights on the content of integration and the constitutional dimension of the EU, it could be suggested that the integration of particular areas of the economy, such as coal and steel, led to a deeper integration of the economies of the EU into a common market, and the four freedoms remain certainly the flagship of the positive and negative integration in the EU.

4. THE OBI AS A NORMATIVE FRAMEWORK FOR REGIONAL INTEGRATION

From a positivist analysis of the OBI agreements and instruments, it could be observed that the political leadership has first introduced legal and technical arrangements for the free movement of persons among the contracting parties. This could be regarded as a very pragmatic choice inasmuch as the visa-free regime was introduced in the region more than ten years ago (*cf*. Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Serbia on the mutual movement of citizens, executed on 5th July 2011, as amended on 9th November 2020).

The arrangements introduced through the OBI in terms of joint border checkpoints or crossing of the border through ID cards cannot be regarded as constitutive for the free movement of persons *per se*. Rather, the Agreement of 20th December 2021. on the conditions for free access to the labour market in the Western Balkan could be regarded as more constitutive for market integration. Indeed, this provides for the nationals of any of the OBI contracting parties to move, stay, and work freely within the territory of the contracting parties. If we refer to the free movement of persons provided in Article 45 of the Treaty on the Functioning of the EU, it can be observed that the OBI Agreement on labour access, besides the right to equal access to the labor market (Article 3, para. 2), does not provide for the abolition of discrimination measures in terms of employment, remuneration and other conditions of work and employment. Hence, the principle of non-discrimination should be interpreted under the auspices of equal access to the labor market principle.

In terms of the free movement of goods, the parties have executed only a MoU on Trade in Goods in the Western Balkan on 29th July 2021. Hence, no international agreement is concluded. This MoU on Trade in Goods cannot be regarded as a strong normative framework for developing the concept of free trade in goods. Unlike the EU model for the freedom of movement of goods, which is based on the systemic provision of the EU as a single customs union, the MoU on Trade in Goods is limited to providing the parties with simplification of the customs procedures for import, export or transit of goods. However, the MoU on Trade in Goods failed to give any further regard to the prohibition of quantitative restrictions on imports or exports or technical barrtrade

barriersich are also regarded as constitutive for the free movement of goods. In this way, this MoU on Trade in Goods seems to provide almost the same level of trade cooperation as could be provided under the WTO Agreement for any of the WTO members. In view of these observations, it could be suggested that the freedom of the trade in goods, similar to the one in services and the free movement of capital which are currently missing, need to be elaborated further at a normative level in the future OBI processes.

5. A CONSTITUTIONAL APPROACH TO THE PROSPECT OF INTEGRATION UNDER THE OBI

In view of the EU integration paradigms, we now turn to the OBI as a constitutional premise for the regional integration of three participating states of the Western Balkan. It is important to address the question of what level of integration is preferable. From the general objectives of introducing the fundamental freedoms in the OBI countries, it could be concluded that the ultimate goal of the OBI could be to constitute a regional integration of the participating economies, as a strong premise for connecting persons with each other. In other words, it could be reasonably expected that the political process underlying the OBI should aim to deconstruct the borders imposed by nation-states over the past decades. This expectation is based on two main prerequisites: firstly, the model which is chosen is the one on which the EU countries are based (common market based on four freedoms of movement of persons, goods, services, and capital), and secondly, the fact that this model is chosen to integrate and expand markets and persons of the countries, rather than to unite the markets in a single one. Certainly, one cannot expect integration if borders and barriers between countries exist. In light of this, the question is raised whether OBI processes have sufficient normative power for accommodating regional integration, or in other words, to open the Balkan among its participants.

Given the analysis of the current acts enacted under the OBI, it should be underlined that the OBI remains a political process lacking its own normative valence, inasmuch as it consists of a political agenda that the participants shall follow in order to introduce elements for accomplishing the four freedoms by means of international agreements or internal measures. Hence, the normativity of integration imperatives should be traced within the agreements that the OBI countries have concluded and implemented in the context of the OBI.

As a general remark, it can be easily observed that none of the OBI agreements or instruments endorse the idea of a common market. Rather, the goals remain to integrate further the economies of the parties in order to expand the markets. Hence, absent from the common market, the idea of the four freedoms shall, if implemented successfully, accomplish a slightly more advanced type of regional trade area, which could most probably amount to WTO (+) and EU (-). Without prejudicing the (rather limited) effects that the implementation of the four freedoms could have on the region, the missing common market goal could be a sign that the political elite, who endorsed the idea of the OBI based on the four freedoms, is not prepared yet to take leadership over the historic and socio-systemic differences between the three countries. This could explain also the

reluctance of the other three Western Balkan countries to join the OBI, notwithstanding the continuous calls from the current OBI country representatives.

Further to the missing element of the common regional market, the parties have not established any sort of supranational institution to take over the integration process. Rather, the coordination of the implementation as well as the settlement of disputes is bestowed to various non-permanent committees or expert commissions that should convene once a year to discuss the implementation status of each agreement. This not only significantly distinguishes the nature of the OBI integration from the EU paradigm, but also questions the relevant guarantees over the four fundamental freedoms endorsed by the OBI instruments. The missing supranational structure is not merely an institutional issue, but rather evidence of the systemic obstacle to implementing in a transparent way the four freedoms. It can also be regarded as a missing opportunity for benefiting from the negative integration which played a significant role in achieving the current level of evolution in EU polity.

In terms of the constitutional perspective, it remains unclear what would be the fate of the OBI if any of the parties would access the EU at a certain date in the future. In a scenario where all contracting parties access the EU simultaneously, the impact on the economic level of integration would remain neglectable. However, the differentiated EU integration would amount to a certain level of disintegration of the economic areas in the region. Since this scenario is relatively unpredictable, it could be suggested that this reason alone would suffice to explain the reluctance of the remaining Western Balkan states to join the OBI.

In view of these constitutional concerns, it can be questioned whether the founding fathers of the OBI intentionally limited the OBI from these systemic features of EU integration, or did not fully rely on epistemic teachings of the EU integration processes for the Western Balkan.

6. CONCLUSION

The Balkan region, after the dissolution of the Ottoman Empire, has suffered devastations of two world wars as well as internal conflicts and wars between states. It is certainly the responsibility of political leadership to find effective solutions for long-lasting peace in the region, beyond any sort of populism that would characterize the political activism as an exercise for showing the partners, namely the EU and the USA, loyalty and adherence to their values. The quest for peace is much more prized, and tough than any sort of political credit. Certainly, the EU model of integration is a prime paradigm for bringing nations together and for ensuring peace. It is particularly due to these imperatives that political leaders in Western Balkan should take leadership to overcome any kind of obstacles that hinder the peace project. From the current (missing) constitutional and (very limited) normative infrastructure introduced under OBI processes; it could be suggested that the leadership in the Western Balkan is not ready yet to introduce transforming projects for their societies. The inability to overcome internal nationalistic barriers shall keep the nations even more distant. The constituent power for adopting a joint future cannot be taken for granted, but people and societies should build it jointly. Only if this war is won, can the leaders claim ownership over the integration process.

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INTERNATIONAL AGREEMENTS AS INSTRUMENTS FOR FURTHERING REGIONAL COOPERATION IN SOUTHEAST EUROPE

Regional cooperation between the countries of Southeast Europe and the Western Balkans was launched more than two decades ago. Since then, a number of different initiatives, cooperative platforms and other means of international cooperation have been deployed and used for the sake of strengthening this cooperation. There are almost all areas of inter-state actions that have been included in the intergovernmental coordination and cooperation with a varying degree of connecting and integrating them. The concrete modalities of cooperation included not only political manifestos, joint declaratory statements by the governmental representatives, but over time materialised in a more solemn and official forms, such as the one of international agreements. Some cooperative initiatives resulted in the establishment of intergovernmental organisations and entailed further coordination, or even harmonisation, of the national policies in certain areas by conclusion of multilateral agreements. In this respect, this paper aims at exploring in which manners furthering regional inter-state cooperation was implemented via conclusion of international agreements as the tools of intergovernmental interaction, which are governed by International Law. The paper examines used formats of the agreements as well as the extent of interconnecting activities and coordinating efforts in the areas covered by concrete agreements.

Keywords: international agreements, regional cooperation, Southeast Europe, Western Balkans.

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1. INTRODUCTION

Regional cooperation in the area of Southeast Europe and the Western Balkans[1] has been developing for more than two decades and led to establishing different layers and forms of intergovernmental interactions (Semenov, 2022, p. 26; Minić, 2019, p. 25). The main purpose of such cooperation is not only overcoming the conflicts that occurred in the end of the previous century, but also ensuring the lasting stability in the Western Balkans (Šekarić, 2021, p. 142) and addressing the European standards by the national authorities (Minić, 2019, p. 26). The concrete cooperation modalities have been defined through the conclusion of a number of multilateral international agreements, as well as through the concerted political declarations and other diplomatic instruments. This article will try to critically examine some of the international agreements that have been concluded with a view of pursuing regional cooperation and it will focus on two types of them: the agreements constituting regional organisations and the agreements setting policies. Given the limited size of this article, a limited number of the most significant agreements, according to the author's opinion, will be examined.

This article will be based on the general knowledge related to the multilateral intergovernmental cooperation and practice of conclusion of treaties and there will be an attempt to assess the concrete examples of regional cooperation in Southeast Europe in the light of the usage of international agreements concluded between the region's parties. Therefore, this article will, at the first place, elucidate the notion of regional cooperation in the context of Southeast Europe and the Western Balkans, examine the international agreements that have been used for creating the intergovernmental bodies, and finally focus on the examples of the international agreements concluded with the purpose of defining the common policy objectives and relevant procedures among the participating countries. We aim at demonstrating that the agreements constituting the regional organisations, considered as the most stable way of channelling cooperation, have been used as the stepping stones for creating preconditions for a durable cooperation, while the agreements setting concrete policies represent gradual progress towards more substantial coordination of national legislation and practices in the given fields.

2. REGIONAL COOPERATION IN SOUTHEAST EUROPE AND WESTERN BALKANS

For the purpose of this article, regional cooperation is understood as the process of international and multilateral cooperation between the countries of the region of Southeast Europe and Western Balkans and it is characterised by the general traits of international cooperation limited to a given geographical context (Lopandić & Kronja, 2010, p. 17). This process may be accomplished through the various regional diplomatic and other intergovernmental tools, including creation of regional organisations and defining

[1] From the geographical perspective, this region appears as "*the part of Southeast Europe that is not integrated into the EU, but is territorially completely surrounded by its member states, stands out for its specific as a kind of zone of discontinuity within the integrated part of Europe*" (Karakoç Dora & Botic, 2022, p. 10).

common objectives that are, in the concerned region, mainly related to the stabilisation and association process of the countries on their EU integration path (see: Džananović, Emini, Krisafi, Nikolovski & Velinovska, 2021, pp. 8-10). Consequently, this process has been widely supported by the EU, its member states and some other international bodies by providing political facilitation and financial support to the creation of intergovernmental bodies (Bechev, 2006, pp. 27-28). As such, regional cooperation should also contribute to building better relations among the participating countries (Delevic, 2007, p. 40).

From the substantive point of view, the process of regional cooperation is necessarily linked to the EU policies and acquis. As such, this process is expected to facilitate the reception of the established practices, legal rules and policies developed at the EU level through the mutual exchange between the region's governments of their best practices on how to cope with the requirements of the integration process. Regional cooperation mainly relies on networks, organisations and more or less structured cooperation fora between the representatives of the governments. Therefore, it requires solid and stable institutional support through intergovernmental organisations that define clear procedural processes (Glodić, 2019, pp. 40-44). This intergovernmental cooperative process has progressed unevenly, but a new wave of strengthened interaction between the regional governments has started within the Berlin process, initiated in 2014. This process, while involving the six Western Balkan governments, also included a number of the EU member states besides the EU institutions, and this is estimated as an innovative element favouring deepening of cooperation (Marciacq, 2017, pp. 10-13).

When launched in 2014, the Berlin process had as its ambition to revive cooperation in the Western Balkans and bring into these processes some new areas, such as energy, transport, digitalisation, environment, cooperation between the youth organisations (Minić, 2019, p. 27; Ristovski & Kacarska, 2022, p. 12). The summit in Trieste in 2017, organised within this process, motivated defining the Regional Economic Area that should enable fulfilment of the four freedoms as conceived in a multiannual plan (Đukanović & Đorđević, 2020, p. 598). In this context, the RCC facilitated the adoption of the Common Regional Market (CRM), which covers the policy objectives related to trade, investments, digital transformation, economic development, with the major focus on freedom of movements of goods, people, services and capital. The policies of the involved governments related to these areas should be harmonised and gradually aligned with the EU single market principles (Semenov, 2022, p. 26; Đukanović & Đorđević, 2020, p. 597). The same commitment was confirmed also at the summits held in 2018 (Sofia) and 2020 (Zagreb) whereby it was highlighted that the governments should establish inclusive regional cooperation and economic integration between the involved countries (Đukanović & Đorđević, 2020, p. 600).[2]

[2] It should be noted that in parallel to this process, the Open Balkan Initiative, involving the governments of Albania, North Macedonia and Serbia, has been in place since 2019 as a platform for facilitating political talks with a view of facilitating economic development and free movement of goods and workers. The Open Balkan initiative operates through the high-level meetings resulting in political declaration endorsed by the dignitaries representing the participating countries (Semenov, 2022, pp. 27-29). Although the formats of the Berlin process, on the one hand, and the Open Balkan, on the other hand, are not involving the same actors, the latter being restricted to only three countries, the two initiatives consist of

The most notable example of institutionalising the process of regional cooperation is through the creation of a number of intergovernmental organisations,[3] which are in the light of general theory of international institutional law considered as the regional organisations due to the geographically limited scope of their membership (Klabbers, 2009, p. 22). A wide range of the areas of governmental actions is currently covered by regional cooperation between the countries of Southeast Europe, including economic, transport, security, facilitating civil society cooperation, administrative cooperation, etc. Some authors estimate that there are currently more than 30 active regional entities that pursue different objectives of regional cooperation (Džananović, Emini, Krisafi, Nikolovski & Velinovska, 2021, p. 11). This has been further upgraded by regionally defining the policies in a limited number of areas, which will be further explored below.

3. AGREEMENTS ESTABLISHING THE REGIONAL ORGANISATIONS

The first type of international agreements to be analysed in this article involves constituent instruments of the regional organisations. In international practice, such agreements are like other treaties considered as multilateral instruments of international law and the established international law rules apply to them (ICJ, 1996, p. 74).

Although the use of international agreements as constituent instruments of international organisations is predominant in international practice, there are also instances where the political declarations have been used for creating international entities, as in the case of the Organisation for Security and Cooperation in Europe and Nordic Council (Dailler, Forteau & Pellet, 2009, pp. 644-646). Similarly, the region's countries used two types of instruments for establishing the regional organisations. While the treaties, as formal legal instruments, were used for setting up most of the organisations, such as the Regional School of Public Administration (ReSPA), Energy Community, Centre for Security Cooperation – RACVIAC, Regional Youth Cooperation Office, Transport Community, and Western Balkan Fund,[4] the creation of the Regional Cooperation

basically the same objectives. However, the Berlin process is still dealing with a wider set of topics. Thus, it would not be correct to argue that these are two different, parallel and fully separate processes. Moreover, the Open Balkan meetings usually refer to the declarations from the Berlin process summits, thus demonstrating the close links between the two formats (Đukanović & Đorđević, 2020, p. 603; Ristovski & Kacarska, 2022, p. 13). Some authors (Đukanović & Đorđević, 2020, pp. 610-611) assess that the Open Balkan initiative is the product of stronger regional ownership than it is the case with the Berlin process, but it is not in any case substituting the expected future accession of the involved countries to the EU.

[3] Since the beginning of this century dozens of regional organisations have been created, the most renowned being: Regional Cooperation Council, Regional School of Public Administration, Regional Youth Cooperation Office, Western Balkan Fund, CEFTA, Centre of Excellence in Finance, Energy Community, Transport Community, etc.

[4] See: Traité instituant la Communauté de l'énergie, *Journal Officiel de l'Union européenne*, L 198/15, FR, 20. 7. 2006; Agreement Establishing the Regional School of Public Administration (ReSPA) of 21. 11. 2009. Available at: http://www.respaweb.eu/11/library#legal-documents-18 (10. 8. 2023); Agreement on RACVIAC – Centre for Security Cooperation of 14. 4. 2010. Available at: https://mvep.gov.hr/UserDocsImages/files/file/dokumenti/ugovori/150925-02agreement-on-racviac.pdf (15. 8. 2023); Agreement on the Establishment of the Regional Youth Cooperation Office of 4 7. 2016. Available at: https://rycoblog.

Council (RCC) was effectuated by the political declaration of participants to which the Statute of this body was annexed.[5]

The establishment of the intergovernmental organisations, primarily formed by the region's countries, has proved their ownership over the process of cooperation and made the concrete achievements of this cooperation as an important element of their internal politics as well as their foreign policy (Glodić, 2019, p. 46). Although there are no substantive requirements in international law as for the form in which the constituent instruments have to be concluded (Brownlie, 2001, p. 610), they usually follow the pattern that is typical for such instruments. Namely, they usually define the mandate and objectives, relevant internal procedures, institutional structure and bodies that exist within the organisation (Glodić, 2020, p. 44). We shall give a brief overview of the major issues regulated by the constituent instruments and provide few concrete examples.

Firstly, these constituent instruments regulated the institutional framework needed for the functioning of the regional organisation. As in any international organisation, there are two types of bodies that are established: the intergovernmental bodies, composed of the representatives of the organisation's members at political and senior officials' levels, and the professional bodies, usually called secretariats, composed of the officials of the organisation (Glodić, 2019, pp. 127-128). The intergovernmental bodies provide the political guidance and adopt the regulatory framework of the organisation, while the professional secretariats support their functioning by providing expertise, administrative and technical support and their decision making rules and internal procedures are defined by these agreements. For example, the main decision-making bodies of the RCC are the Annual meeting and Board (RCC Statute, Point 14), while the administrative support is ensured through the secretariat headed by the Secretary General (RCC Statute, Point 17). The Energy Community has its Ministerial Council, High-level Group, Regulatory Board and Secretariat (Traité instituant la Communauté de l'énergie, Titre V). The similar structure can be found in the case of ReSPA, whereby the members are represented within the Governing Board that may be conveyed at ministerial and technical levels, and the daily business is executed by the Secretariat (ReSPA Agreement, Arts. 15-21). Analysing the other agreements will also lead to the similar findings.

Secondly, the constituent instruments define the objectives of the organisations and their mandate. In this context, the RCC Statute defines the objectives and areas of activities of this organisation in a rather general way, with an overall task to ensure the process of cooperation between the participants, from economic cooperation to security (Point 12). The Energy Community has somewhat more specific mandate that is concentrated on creating regulatory and economic frameworks for network energy supplies, as

files.wordpress.com/2016/07/ryco-agreement-final.pdf (15. 8. 2023); Agreement Concerning Establishment of the Western Balkan Fund. Available at: https://westernbalkansfund.org/wbf-documents/ (15. 8. 2023); Treaty Establishing the Transport Community. Available at: https://www.transport-community.org/wp-content/uploads/2022/10/treaty-en.pdf (15. 8. 2023). It is noteworthy that the EU is one of the parties that established the Energy Community and the Transport Community.

[5] Joint Declaration on the Establishment of the Regional Cooperation Council of 8. 2. 2008. Available at: https://www.rcc.int/docs/17/declaration-on-rcc-establishment-its-participants-and-statute (15. 8. 2023).

well as alignment of the national legislation with the relevant EU acquis (Traité instituant la Communauté de l'énergie, Arts. 2-5). The CEFTA 2006 Agreement defines the duty of the parties to establish a free trade area within a transitional period and a number of specific goals of this treaty (Art. 1 of Annex 1 to the CEFTA 2006 Agreement). The RACVIAC Agreement defines that the Centre for Security Cooperation RACVIAC shall foster the dialogue between the countries of Southeast Europe and their relevant international partners on the security matters, arms control and sector reforms and related tasks (Arts. 2-3). ReSPA is tasked to support cooperation in the area of public administration reform through alignment with the European Administrative Space, strengthening administrative practices and human resource management (ReSPA Agreement, Art. 4), while the Regional Youth Cooperation Office - RYCO supports the exchange between the youth organisations from the region with a view of promoting the values such as democracy, tolerance, respect for human rights, etc. (RYCO Statute, Art. 7).

Thirdly, some of these instruments explicitly stipulate that the regional organisations shall enjoy treaty-making capacity under international law. The RACVIAC Agreement bestows legal capacity for conclusion of international agreements with the states and international organisations (Art. 20.1), whilst in the case of the Western Balkans Fund it is envisaged that it shall enjoy full legal personality necessary for the fulfilment of the aims associated with its activities (Western Balkans Fund Statute, Art. 37). The latter may be interpreted as granting also capacity under international law if so required for the exercise of the Fund's activities. The regional organisations are also empowered to conclude the Host Country Agreement with the State where their headquarters are located which are a specific type of international agreements needed for facilitating the functioning of international bodies (See: ReSPA Agreement, Art. 3(2); RYCO Agreement, Art. 3).

The constituent instruments provided a solid ground for intergovernmental cooperation and are the examples of the concerted actions of governments, third parties and other international organisations. They establish the permanent and stable international frameworks for interaction of the involved parties. Besides defining mainly the institutional framework and objectives of the organisations, some of these agreements also laid down more substantial goals and legislative development that should be done by the parties, most notably it is the case with the CEFTA2006 Agreement, Treaty Establishing the Energy Community and Treaty Establishing the Transport Community. Although their conclusion represents a first step in institutionalising regional cooperation, the major focus of this paper is on the agreements that bring some more tangible results to the process of cooperation by setting policies.

4. AGREEMENT SETTING POLICIES AND COORDINATION OF GOVERNMENTAL ACTIONS

The number of policy areas covered by regional cooperation has increased over the years, and the positive developments in one area led to the initiation of new cooperative processes or to deepening the existing ones in other areas. The formal tools for furthering cooperation upgraded from the political declarations and planning

documents adopted by the regional organisations to the conclusion of the international agreements that define the concrete international obligations of the parties to achieve certain political objectives.

In the paragraphs below the author will analyse the four agreements concluded by the parties from the Western Balkans, under the umbrella of the Berlin process, in order to tackle some economic, communication and movement issues: roaming agreement, recognition of qualifications agreements and movement with the IDs agreement.[6] The following points of particular significance for the functioning of the regimes established by these agreements will be particularly assessed: their purpose and objectives, necessary legislative adjustments by the parties, procedures and bodies for coordinating their implementation, and other rules relevant to the functioning of the agreements' regime.

4.1. Purpose and Objectives of the Policy Setting Agreements

The Agreement on the Price Reduction of the Roaming Service in Public Mobile Communication Networks in the Western Balkans Region of 4 April 2019 (hereinafter: Roaming Agreement) is concluded pursuant to the Multiannual Action Plan on Regional Economic Area and its digital agenda (pp. 4-5)[7] and its purpose is the reduction of the prices of roaming services for the full coverage of all end users in the region which means that the roaming charges shall follow the *home-like rule* as of 1 July 2021 (Roaming Agreement, Art. 1) after the defined transitional period.[8]

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[6] The Agreement on the Price Reduction of the Roaming Service in Public Mobile Communication Networks in the Western Balkans Region of 4 April 2019; Agreement on Freedom of Movement with Identity Cards in the Western Balkans of 3 November 2022; Western Balkans Agreement on the Recognition of Higher Education Qualifications of 3 November 2022; and Agreement on Recognition of Professional Qualifications of Doctors of Medicine, Doctors of Dental Medicine and Architects in the Central European Free Trade Agreement Context of 3 November 2022 were signed by Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia and Kosovo* (This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence).

[7] It is stated within the title on digital transformation: "*Under the digital Agenda, the WB6 will support a regional approach to foster intergovernmental cooperation in digital matters and facilitate the integration within the European Digital Single Market. To this end, the digital agenda aims at: digital infrastructure development and improved regional connectivity; harmonized spectrum policies; coordinated roaming policies towards a roaming free region; enhanced cyber security, trust services and data protection; cooperation in policies that stimulate data economy; upgraded digital skills and accelerated digitization and uptake of smart technologies in our region*" (Multiannual Action Plan on Regional Economic Area, pp. 4-5).

[8] Article 5(1) lays down that "*with effect from 1 July 2021, roaming providers in the Western Balkans region shall not levy any surcharge in addition to the domestic retail price on roaming customers in the Western Balkans region for any regulated roaming calls made or received, for any regulated roaming messages sent and for any regulated data roaming services used, including MMS messages, nor any general charge to enable the terminal equipment or services to be used abroad*." However, the roaming providers are allowed to a fair use policy with a view of preventing *"abusive or anomalous usage of regulated retail roaming services"* (Roaming Agreement, Art 5(1)). A transitional regime – between 1 July 2019, as the start of application, and 30 June 2021 was laid down in order to allow the signatories to make all the preparatory steps. However, certain ceilings for the roaming supercharges applied during the transitional regime were also set (Roaming Agreement, Art. 2 and 3), thus also limiting the roaming prices during the transitional period.

The facilitation of the movement within the area will be established by the Agreement on Freedom of Movement with Identity Cards in the Western Balkans of 3 November 2022 (hereinafter: FM Agreement). Although the power to control borders was seen as one of the major prerogatives of a sovereign state, this changed over time and many systems liberalising the border crossing were developed in different parts of the world, particularly in Europe (Karakoç Dora & Botic, 2022, pp. 5-9) and by this agreement the concerned government actually follow the other European countries.[9] As for the scope of the FM Agreement, it regulates the right to entry, transit, exit and short stay[10] of the natural persons who are the holders of ID cards of the Parties,[11] and it also removes any visa regime that may exist between the Parties (Art 3(II)) without prejudice to the effect of any previous arrangement and does not prohibit any new such arrangement that is more beneficial to the natural persons falling within the scope of application of this Agreement (Art 3(III)).[12]

The Western Balkans Agreement on the Recognition of Higher Education Qualifications of 3 November 2022 (hereinafter: HE Agreement) is furthering cooperation within the Common Regional Market and aims at improving academic mobility and recognition of higher education qualifications.[13] The HE Agreement applies to the recogni-

[9] The idea of introducing a unified system of border crossing with the identity cards instead of passports, stems from the Open Balkan meeting held in Novi Sad in 2019 (Đukanović & Đorđević, 2020, p. 604). Already at the 2020 Sofia Summit of the Berlin Process, the readiness to conclude a multilateral agreement enabling the border crossing with the use of identity cards within the Western Balkan area was confirmed and it resulted in signing the FM Agreement at the Berlin Summit in 2022. Preamble of the FM Agreement, *inter alia*, reads: *"Taking into consideration the Western Balkans Leaders Declaration on the Common Regional Market – A catalyst for deeper regional economic integration and a stepping stone towards the EU Single Market, adopted at the Summit, of the Western Balkans leaders under the framework of the Berlin Process, held in Sofia on 10 November 2020…".*

[10] The short stay is defined as a stay of *"not more than 90 days in any 180 days period which entails considering 180 days preceding each day of stay"* (FM Agreement, Art. 2, Item 5)).

[11] For the exercise of the stipulated rights, the holder of ID card has to meet the conditions set out by the FM Agreement which relate to the possession of a valid document, with possible exceptions in line with the Party's legislation; there should not be an entry ban ordered by one of the Parties; and the person in question should not be considered as a threat to public order, security, or public health or for other defined reasons under the rules of the receiving Party (Art. 4). If these conditions are not met, any Party is allowed to refuse entry to the concerned person or to revoke her/his right to transit or stay (FM Agreement, Art. 5).

[12] Worth noting is also the Agreement on conditions for free access to the Labour Market in the Western Balkans that was concluded within the Open Balkan Initiative by three countries (Serbia, Albania and North Macedonia). This agreement, although limited to the three parties, may be considered in the connection with the FM Agreement, as a kind of its furthering to the labour area in addition to the free movement. Basically, the text envisages the right to equal access to the labour market and defines certain procedures. However, Ristovski and Kacarska assess that this agreement does not provide for an immediate access to the employment rights, but it defines certain internal procedures (2022, p. 9).

[13] The higher education qualification has been defined as *"any degree, diploma or other certificate issued by a competent HE institution of one of the Parties attesting the successful completion of a study programme offered by an accredited institution."* (HE Agreement, Art. 2(II)). The HE Agreement does not derogate any other current or future agreement or arrangement concluded between some of the Parties of this agreement, which is more favourable to the interested persons, i.e. natural persons or holders of higher education qualifications (Art. 1(V)). This clause of *"deux vitesse"* cooperation effectively facilitates deeper connections between the Parties if they want to pursue such links.

tion of higher education qualifications; continuation of studies; access to non-regulated labour market and shortened and other education courses qualifications acquired at the accredited public higher education institutions of the Parties (Art. 1(I)-(II) and Art. 3) with the possibility for extending its application to the accredited private higher education institutions established in the Parties upon the written consent of all the Parties (HE Agreement, Art. 12).

Similarly to the previously mentioned, the Agreement on Recognition of Professional Qualifications of Doctors of Medicine, Doctors of Dental Medicine and Architects in the Central European Free Trade Agreement Context of 22 November 2022 (hereinafter: PQ Agreement) is focussed on the limited number of the regulated professions and recognition of their qualifications. Unlike other agreements, this one was linked to the CEFTA in parallel to the implementation of the CRM with a view of ensuring the mobility of certain type of professionals (doctors of medicine, doctors of dental medicine and architects),[14] as well as with a view of aligning the respective legislation with the Directive 2005/36/EC on the recognition of professional qualifications.[15]

As demonstrated above, the overall purpose and objectives of these agreements, albeit they cover different policy areas, can be resumed as the intention of the parties to reduce the existing impediments in order to provide better connection of businesses and citizens in the region by facilitating the communication (e.g. reducing and eliminating the roaming charges), free movement (enabling the use of IDs for border crossing) and access to the labour market, thus movement of persons (creating special rules for recognition of higher education and professional qualifications).

4.2. Legislative Alignment Pursuant to the Policy Setting Agreements

One of the features of these agreements is the requirement for aligning the national legislation of the signatories either with the EU acquis and standards or harmonising the existing regulations with the agreements themselves.

Pursuant to the Roaming Agreement, the signatories agreed to adopt or amend their relevant legislation/regulation by 1 July 2019 and align it with the relevant EU rules on consumer protection. The legislation and regulation on fair use policy, implementation of a sustainability derogation mechanism, and the transparency requirements, shall be uniform and enacted by 31 December 2020 (Roaming Agreement, Art. 6). This provision explicitly lays the obligation for legal alignment with the relevant EU rules and standards, as well as the achieving the uniformity of the legislation and regulations adopted by the signatories.

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[14] The holders of the subject qualifications are considered as the service providers (see for instance PQ Agreement, Art. 14) for the purpose of the implementation of this agreement.

[15] The purpose of the Directive 2005/36/EC is to establish rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession (Art. 1).

The HE Agreement, on its own accounts, stipulates that the recognition shall be conducted in line with the rules that are in force in the respective Party and the correspondence of the qualifications which shall be evaluated and recognised according to the right acquired in the Party where the qualification was obtained; there will be certain level of flexibility in recognising the qualifications which means that only substantial differences could lead to non-recognition and it sets the maximum time limit for the relevant institutions of the Parties to respond – seven days plus additional seven days in the case of additional investigations (Art. 2(II)). The decisions on the request for enrolling a study programme will be made in accordance with the internal rules of the concerned higher education institution in the respective Party and thus the principle of institutional autonomy has been enshrined in the HE Agreement (Art. 5). This agreement apparently respects the existing national regulations, however the parties will have to align their implementing rules with the principles defined by the HE Agreement, particularly when it comes to the deadlines and principles governing the recognition procedures.

The PQ Agreement lays down the rules on automatic recognition of evidence of formal qualifications obtained within its parties which enable the holders of these qualifications to perform the profession for which they are qualified, if the minimum requirements, related to the training are met (Art. 1.1). The recognised qualifications shall allow the natural persons holding them to obtain access to the profession in the receiving party under the national treatment, i.e. "*under no less favourable conditions as its natural persons*" (PQ Agreement, Art. 4) which is aligned with the effects of recognition as defined by the Directive 2005/36/EC.[16] The automatic recognition of qualifications shall be possible if the minimum conditions related to the respective training, as defined in the annexes to the PQ Agreement, are satisfied (Art. 6). The three months' deadline for deciding on any request for recognition of the subject qualification in the first instance (Art. 9), the subsequent appeals procedure conducted by a body different to the one that was deciding in the first instance (Art. 10), as well as the necessary documents relevant for the recognition procedure (Art. 11) have been defined by the PQ Agreement. The PQ Agreement (Art. 19) stipulates the legal harmonisation of obligations of the parties which shall adopt the regulatory framework for implementing this agreement within the transitional period of eighteen months since the entry into force of this agreement. The parties are also obliged to notify the Joint Working Group on the undertaken measures. This agreement focussed on the obligation of harmonising the relevant national rules and regulations with a view of facilitating both substantial and procedural rules for recognising the concerned professional qualifications.

Given the fact that these agreements set a number of objectives for their parties, as well as the principles governing their own implementation, the parties have to ensure their proper implementation by amending their legislative and regulatory framework in the given areas.

[16] Article 4(1) of the Directive 2005/36/EC reads as follows: "*The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.*"

4.3. Procedures and Bodies for Coordinating the Implementation and the Role of the Regional Organisations

Since the analysed agreements are setting the rules and procedures that require mutual coordination between the parties, the role of specially dedicated bodies for ensuring their proper implementation is a crucial element of these agreements. The Roaming Agreement envisages a body composed of the representatives of the Regulators of the Signatories that shall enable implementation of the stipulated obligations within the agreed deadlines (Art. 7). Some concrete tasks falling within this coordination are also defined: costs for implementing the agreement are to be covered by the Regulators (Art. 8); regular exchange of information related to the agreement's implementation (Art. 9); regular annual meetings with a view of identifying priorities, mutual consultations, and defining common positions towards the relevant organisations (Art. 10).

The FM Agreement stipulates that coordination shall be performed by the Commission, composed of two representatives of each Party, that shall organise, monitor and coordinate all the activities connected to the implementation of the Agreement. The Commission shall decide by consensus of all the Parties and shall be supported by the RCC in its operations (FM Agreement, Arts. 8-10). The Commission can also serve as the framework for discussing and agreeing upon any protocol on the related additional questions that may appear after the conclusion of this Agreement (Art. 11(II)) and for setting disputes in connection with the implementation and application of the Agreement (Art. 12).

For the sake of facilitating the implementation of the HE Agreement and coordination among the Parties, a Joint Commission on Recognition of Higher Education Qualification was established composed of three representatives per a Party and its operations shall be coordinated with the RCC and Education Reform Initiative of Southeast Europe (Arts. 6-7). The main responsibility of the Joint Commission will be annual reporting to the Parties on the implementation of the HE Agreement (HE Agreement, Art. 8(II)) and the dispute settlement in relation to the implementation of the HE Agreement (Art. 13). Some other functions were laid down *exempli causa*.[17]

The PQ Agreement lays down a robust system for administrative cooperation through the Joint Working Group on Recognition of Professional Qualifications and defines some measures with a view of enabling transparency of relevant information for the functioning of this special qualifications recognition system. The Joint Working Group is mandated to facilitate and oversee the implementation of the PQ Agreement and to ensure that the relevant information (related to legislative framework and procedures regulating the recognition) and administrative support are provided (Art. 16). The Parties are also obliged to provide all the necessary administrative support and facilitate

[17] Article 9 of the HE Agreement also lays additional functions: facilitating cooperation and communication among the quality assurance agencies and cooperation of relevant institutions through the regional recognition database; addressing the issues stemming from the substantial differences in relation to the recognition of qualifications; and analysing other issues related to the recognition processes and proposing the common actions to the Parties. An important segment of its responsibility is maintaining and updating the list of the accredited higher education institutions of the Parties (HE Agreement, Art. 10).

the data exchange (Art. 18). In this respect, the PQ Agreement stipulates the obligation to notify the Joint Working Group on their educational programmes for the regulated professions and this list shall be maintained by both the CEFTA and RCC Secretariats (Art. 17). Any dispute in relation to the PQ Agreement has to be resolved in accordance with the CEFTA 2006 Dispute Settlement Mechanism (Art. 24). Any additional parties may accede to the PQ Agreement if they are also the CEFTA members. These provisions on the dispute settlement and enlarging the scope of parties also denote a more direct link of this Agreement with the CEFTA and its institutional and procedural framework.

As demonstrated above, the defined coordinating mechanisms have important tasks for facilitating the implementation of the agreements. These bodies are also relying on the support by the relevant regional organisations, the RCC, Education Reform Initiative of South-Eastern Europe and CEFTA, as the scope of their activities may coincide with a more general coordinating role of these organisations performed in the context of regional cooperation. Although there are already some regional organisations covering these areas of cooperation, the functioning of the special bodies based on these agreements should not be seen as duplicating the structures. Namely, these bodies have precisely defined mandates and tasks in connection with the implementation of these agreements, whilst the regional organisations perform a wider set of coordinating tasks. The roles of these structures should be considered complementary and mutually supportive.

4.4. Other Relevant Rules

The practice of treaty conclusion in international law is to define some important rules governing the treaties in question such as the rules on their entry into force and the function of depositary, amendments and withdrawal procedures.

The Roaming Agreement entered into force on the date of signing, i.e. 4 April 2019, while its application started as of 1 July 2019 (Art. 14). The entry into force on the signing day was used in order to ensure expedient application of the Agreement and not to have delays that could be caused by the lengthy ratification procedures by the parties. The Roaming Agreement stipulates rather simple rules on the withdrawal (six months notification) and without any preconditions,[18] while it defines more strictly the conditions for its revision (changes of the EU regulations, further alignment of the maximum mobile termination rates, and wholesale charges for the regulated roaming services).[19]

The other three agreements concluded in 2022 contain rather elaborate procedures of ratification, acceptance or approval before its entry into force. They become effective on the thirtieth day upon the deposition (North Macedonia is denoted as depository) of the third formal notice of the relevant instrument for those Parties that have deposited their instruments, while for each Party depositing such instrument after the third

[18] Article 11(1) of the Roaming Agreement: *"Each Signatory may withdraw from the Agreement six months after the delivery of notification to the other Signatories."*

[19] Article 11(2) of the Roaming Agreement: *"The Agreement may be subject to review if the relevant EU regulation is amended and/or if it is necessary to further align the maximum mobile termination rates and/or wholesale charges for the regulated roaming services in order to achieve the objectives set out in Article 1 paragraph 2."*

formal deposition, the Agreement becomes effective on the thirtieth day after such deposition is made (FM Agreement, Art. 13; HE Agreement, Art. 14; PQ Agreement, Art. 21). The fact that the agreements become effective, for those parties that ratified them, after at least three parties deposited their formal instruments is favouring the entry into force at the earliest possible date without the need to wait for all the six parties to accomplish their internal procedures.

The FM Agreement and HE Agreement stipulate that they can be amended according to the same procedures as necessary for their conclusion (i.e. ratification, approval or acceptance in accordance with the legal requirements of the Parties) and with the consent of all Parties (FM Agreement, Art. 11(I); HE Agreement, Art. 11), whilst the Parties can withdraw at any time if they deliver a formal notification to the Depository with the effect of withdrawal of 30 days after the relevant notification is made (FM Agreement, Art. 14; HE Agreement, Art. 15).

Unlike the other agreements, the PQ Agreement prescribes an elaborated procedure for its amending. The interested party may submit the formal proposals for changing the text through the written notification to the Depositary which has to transmit it to the Joint Working Group. The latter shall adopt the amendments by consensus and transmit them to the CEFTA body responsible for trade in services (from the agreement text it is not clear if it is only for the informative purposes or any formal decision by the relevant CEFTA body is expected). Once adopted, the amendments have to be transmitted to the parties for the ratification procedure or approval and, for the entry into force, the amendments have to undergo the same procedure that is required for the entry into force of the PQ Agreement (Art. 22). The unilateral withdrawal from the PQ agreement requires a formal notification to the Depositary that takes effects six months after the notification (Art. 23).

5. CONCLUDING REMARKS: ASSESSING THE EFFICIENCY OF THE LEGAL TOOLS USED FOR ADVANCING REGIONAL COOPERATION

This article explor two types of international agreements concluded within the process of regional cooperation in Southeast Europe and the Western Balkans: agreements that are constituent instruments of the regional intergovernmental bodies, on the one hand, and four regional agreements setting concrete policies in the given areas, on the other hand. The two types of agreements represent the expression of multilateral international legal commitment for pursuing regional cooperation and coordinate national policies pursuant to the defined objectives of cooperation. From the formal side, these agreements are multilateral, regional treaties, concluded by a limited number of parties, and they contain all the relevant elements required for their adequate implementation as established in the international practice. It is also possible to detect a certain pattern that preceded the conclusion of the agreements – the policy objectives were confirmed in political statements or declarations, mainly within the Berlin process, then transposed into the strategic and planning documents of the regional organisations, most notably that of the RCC, and finally elaborated in the form of legally binding international agreements. Their conclusion is certainly a step forward in the process of regional cooperation.

The constituent instruments and the policy setting agreements are mutually interconnected in the manner that the former established the regional organisations that supported drafting and conclusion of the latter. Furthermore, the regional organisations are expected to actively support the implementation of the latter type of agreements through interaction with the bodies created for oversighting and coordinating their implementation. As demonstrated above, the existence of the bodies created by these agreements should not be perceived as creating parallel structures to the existing regional organisations, but they should be rather seen as complementary and mutually supportive interaction between the intergovernmental and governmental actors. However, the course of implementation will demonstrate the full effect of such solutions.

While the constituent instruments are mostly focused on defining the functioning and mandate of the regional organisations, the policy-setting agreements tend to lay down concrete obligations for their parties and to define concrete policy objectives to be achieved through their implementation, including also duty to amend the existing legislative and regulatory framework, as the case may be. As for the substance of the explored agreements, they do not seem to establish regional integration in the regulated areas. As explained by Jacqué, integration would require the processes to be managed by a single institution (2015, p. 36) and the common exercising of the given number of competencies in the defined policy fields (Compare: Simon, 2001, p. 92). Obviously, this is not the case with these agreements because they rather require harmonising the internal legislative frameworks of the parties and also coordinating their administrative practices relevant to their subject matter than setting a single legal framework. Unlike the structures that resulted from the integration processes, these agreements rely on the intergovernmental approach and coordinating mechanisms composed of the representatives of the parties that decide by unanimity or consensus.

Overall, it is possible to conclude that setting the policy objectives by the international agreements, albeit within the limited number of areas, can serve as the solid basis for furthering regional cooperation between the interested parties. These agreements somehow serve as the justification for the operation of different regional organisations that facilitated also their conclusion and led to creating diplomatic and political climate supportive to furthering cooperation even through the formal tools of international law. If the implementation of the examined policy setting agreements proves satisfactory, this practice may potentially generate a *'spill over'* effect in the future to other policy areas that are subject of regional cooperation and further strengthen the role of regional organisations in leading the process of regional cooperation.

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INSTITUTIONAL FRAMEWORK AND INTERNATIONAL ENVIRONMENTAL ORGANIZATIONS FOR SUSTAINABLE DEVELOPMENT*****

Sustainable development must be supported by strong and well-organized institutions. Institutions that control the rationality of use and the degree of depletion of resources constitute the necessary framework for achieving sustainability. Some countries have adequate institutional frameworks that enable the effective implementation of sustainable development goals, while other countries direct their activities towards its establishment. An important factor in the implementation of the European Green Deal, which can be defined as a set of political initiatives of the European Commission with a comprehensive goal of climate neutrality as well as a catalyst for an inclusive and just transition, is the institution's legal competence. In this sense, the paper will analyse institutional support for sustainable development. The subject of research are international organizations operating in the environmental protection sector.

Keywords: sustainable development, institutional framework, international organizations, environmental protection.

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1. INTRODUCTION

A well-coordinated institutional framework is necessary to achieve sustainable development goals. Institutions that control the rationality of use and the degree of depletion of resources constitute the necessary framework for achieving sustainability. Some countries already have adequate institutional and coordination frameworks that they are further improving and adapting to effectively support the implementation of sustainable development goals, while other countries are developing new institutional and coordination frameworks to better support the implementation of sustainable development goals (United Nations Development Programme, 2017, p. 7). In this context, the question that arises is to what extent underdeveloped countries contribute to their backwardness with outdated legal frameworks and weak institutions that become limiting factors (Ostojić & Maksimović, 2021, p. 219). The European Green Deal is the EU's sustainable development strategy for the 21st century, a roadmap for the sustainability of the European Union economy by turning climate and environmental challenges into opportunities. The European Commission defines the European Green Deal as "a new growth strategy to transform the European Union into a fair and prosperous society, with a modern and competitive economy that uses resources efficiently, with net emissions of greenhouse gases equal to zero by 2050, and economic growth that is separated from the exploitation of resources" (European Commission, 2019, p. 2). It covers a broad range of fields, e.g. climate neutrality, energy transition, transition to a circular economy, zero pollution strategy, farm-to-fork strategy, sustainable transport, etc. In addition to the level of legal competence of the institutions, especially the European Commission, policy priorities, financial resources and international cooperation are important for evaluating the performance of the European Green Deal. It is evident that the institutions that have been assigned strong mandates will be more decisive in defining the global goals of the new development strategy, but also in negotiations with partners in the international sphere. Therefore it can be concluded that the degree of legal competence entrusted to institutions to a significant extent also determines the importance of policies related to the European Green Deal (Siddi, 2020, p. 10). In the following chapters, the institutional framework for sustainable development will be presented.

2. INSTITUTIONAL COORDINATION MECHANISMS FOR ACHIEVING SUSTAINABLE DEVELOPMENT GOALS

European Green Deal is an integral part of the Commission's strategy to implement the United Nation's 2030 Agenda and the sustainable development goals (European Commission, 2019, p. 3). The 16th Sustainable Development Goal (SDG16) is to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" (United Nations, 2015, p. 25). Inclusive institutions enable the security of private property, an impartial legal system and public services that enable equality in exchange and contracting (Ostojić & Petrović, 2019, p. 313). One of the criticisms of the objective

defined in this way is that there is no explicit reference to internationally recognized political and civil rights norms (Zamfir, 2022, p.1). Declaration of the high-level meeting of the General Assembly, which paved the way for incorporating the rule of law into the Sustainable Development Goals (SDGs), points out that the rule of law applies equally to all states and international organizations. Respect for the rule of law and justice, which is the main guide for the implementation of their activities as well as for the legitimacy of their actions, is one of the development priorities (United Nations, 2012a, p. 1). Fair, stable and predictable legal frameworks are important preconditions for sustainable and equitable development, increasing employment opportunities, investment growth, as well as for encouragement of entrepreneurship. In this regard, the United Nations Commission for International Trade Law, the main United Nations legal body in the field of international trade law, established by the United Nations General Assembly by its resolution 2205 (XXI) of 17 December 1966, has made significant progress in the modernization and harmonization of international trade law (United Nations, 2022, p. 15).

The United Nations document "The Future We Want" emphasizes the importance of strengthening an inclusive, transparent and efficient institutional framework for sustainable development that should integrate the three dimensions of sustainable development- economic, social and environmental, and as such represent a means of achieving sustainable development (United Nations, 2012, p. 19). Also, a more effective institutional framework for sustainable development should follow the Rio Declaration on Environment and Development and be based on Agenda 21 and the Johannesburg Plan of Implementation and its goals on an institutional framework for sustainable development, such as commitment to sustainable development, promoting the rule of law and strengthening government institutions, ensuring coordination and monitoring, provision of adequate financial and technological resources and capacity-building programs, especially for developing countries to enable the implementation of Agenda 21, achieving effectiveness and efficiency through limiting the overlap of activities of international organizations, enabling the active participation of civil society and other relevant actors in the process of implementing Agenda 21 to achieve a higher degree of transparency, as well as strengthening international cooperation (United Nations, 2002, p. 65). Special emphasis is put on more intensive cooperation within and between the United Nations system, international financial institutions, the Global Environment Facility and the World Trade Organization.

The Commission for Sustainable Development established by the UN General Assembly in December 1992 to effectively monitor the results of the United Nations Conference on Environment and Development, with role, functions, and mandate adopted in General Assembly resolution 47/191, should also contribute to the integration of the three dimensions of sustainable development, monitor the progress of the implementation of Agenda 21, as well as the implementation of recommendations and commitments contained in the Rio Declaration (European Parliament, 2012, p. 23).

Unlike at the international level, strengthening the institutional framework for sustainable development at the national level implies "promotion of coherent and coordinated approaches to institutional frameworks for sustainable development at all national levels, including through, as appropriate, the establishment or strengthening of existing

authorities and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws“ (United Nations, 2002, p. 71). All countries should promote sustainable development at the national level by, *inter alia*, enacting and enforcing clear and effective laws that support sustainable development and strengthening fair administrative and judicial institutions (United Nations Department of Economic and Social Affairs, 2012, p. 5). Developing countries, as well as transition countries, should improve national institutional arrangements for sustainable development. Depending on the national priorities of each country, national strategies for sustainable development, if possible, could be formulated as poverty reduction strategies that integrate the economic, social, and environmental dimensions of sustainable development. To ensure a focus on sustainable development policies, the establishment and continuous improvement of sustainable development councils and/or coordination structures at the national level is of particular importance (Cordonier Segger, Khalfan & Nakjavani, 2002, p.144).

3. INTERNATIONAL ORGANIZATIONS AND ENVIRONMENTAL PROTECTION

The urgency of solving problems related to the environment has influenced the scientific research community to raise new questions, improve acquired empirical knowledge, introduce new theoretical concepts and understandings, but also improve the methodology of research on institutional dimensions. Efficiently managing the environment means innovating the decision-making process, as well as improving principles, procedures and rules (Biermann, Siebenhüner & Schreyögg, 2009). Particular attention is given to institutions at the international level that diagnose, analyze, manage and evaluate the consequences of global environmental changes that manifest in the form of deterioration of the quality of the environment. As some authors say (Lenz & Söderbaum, 2023, p. 899) international organizations seek to improve their legitimacy and governance competence through public communication and institutional and behavioural change. The term international organizations refers to "international governmental organizations or organizations with universal membership of sovereign states that are established by treaties that provide legal status and that, as subjects of international law, are capable of concluding agreements among themselves and with member states" (Amici & Cepiku, 2020, p. 7-8).

Under the General Data Protection Regulation, an international organization is an organization and its subordinate bodies governed by public international law or any other body that is set up by, or on the basis of, an agreement between two or more countries (Kuner, 2018, p. 10). According to the definition of The Max Planck Encyclopedia of Public International Law, the four constitutive elements of the international organization are as follows: the formal basis is a treaty; the members are states (and possibly also other subjects); it has its own organs and institutional structure distinct from its member states; and it possesses an international legal personality (Kolb, 2012).

By comparing the previously mentioned two definitions of international institutions, a significant difference can be seen, since the General Data Protection Regulation

definition is broader and does not state that international institutions have their own bodies, or institutional structure different from their member states, or international legal subjectivity. This further implies the conclusion that considering only such broader definition of international institutions, a body established by two or more countries could be considered an international institution even if it is not regulated by international public law (Kuner, 2018, p. 11).

International institutions were founded with the aim of contributing to the collective solution of development problems and certainly, among them, the United Nations with 193 member states should be highlighted. Further in the text, the focus of the analysis will be on international environmental institutions. As early as 1991, Boyle discussed emerging international environmental institutions and emphasized the importance of international institutions, considering them an indispensable factor in the development and implementation of environmental protection rules and standards. In this regard, it is essential to enable these institutions to function effectively (Boyle, 1991, p. 245). Even then, he studied various techniques available to international institutions to bind their members to their decisions on issues of global importance, avoiding the emergence of conflicts between states. As changes in the global environment follow changes in legal instruments and institutions, the authors will analyze how international environmental institutions function, what benefits they provide and what are the goals of their establishment.

3.1. United Nations Framework Convention on Climate Change Secretariat (Climate Change Secretariat)

The United Nations Framework Convention on Climate Change Secretariat was established in 1992 when countries adopted the United Nations Framework Convention on Climate Change (UNFCCC). Its mandate is to ensure the implementation of the Convention, the Kyoto Protocol and the Paris Agreement providing technical expertise and climate change analysis in order to respond to the consequences and threats of climate change. United Nations Framework Convention on Climate Change emphasizes the importance of limiting greenhouse gas concentrations in the atmosphere to a level that would "prevent dangerous anthropogenic interference with the climate system". This can be achieved by ensuring that ecosystems naturally adapt to climate change over a period of time, sustainable economic growth and development without jeopardizing food security goals (United Nations, 1992, p. 4).

The goal of the Paris Agreement is also to strengthen the response to global climate change in order to achieve one of the main goals of sustainable development, which is the eradication of poverty and zero hunger. The Paris Agreement foresees how climate-resilient development can be achieved: limiting the increase in temperature in this century below 2 degrees Celsius above the pre-industrial levels, but with the aspiration to define the targeted increase in temperature even more restrictively and constrain it to 1.5 degrees Celsius; adapting to the harmful effects of climate change as successfully as possible; mitigating the negative consequences of climate change; developing low greenhouse gas emissions in a way that does not endanger food production. (United Nations, 2016, p. 4).

The Kyoto Protocol proposes the improvement of energy efficiency in the propulsive sectors of the economy, the reduction of greenhouse gas emissions, sustainable forest management and afforestation, sustainable agricultural production, greater reliance on renewable energy sources, the development of new technologies that favor environmental protection, the abolition of all forms of financial incentives in sectors that pollute the environment with emissions of harmful gases, sustainable transport as well as efficient waste management (United Nations, 1998, p. 2). What can be concluded as common to all three mentioned agreements is the achievement of sustainable development by directing activities towards low-carbon emissions and reducing the carbon footprint. It is also important to limit the negative human impact on the environment. Pollution, deforestation, burning of fossil fuels, and overpopulation of the planet cause consequences for climate change, poor water and air quality and soil erosion.

Since 1995, the UNFCCC Secretariat has been institutionally connected to the United Nations. On the other hand, the Secretariat does not represent a segment of any of UN's special departments, nor is it incorporated into the management structure of any of the United Nations programs (United Nations, 2021, p. 1). The legal personality of the Secretariat is a particularly important issue. Namely, the Secretariat's legal personality is not clearly defined at the international level, since it has not been granted the appropriate privileges and immunities necessary for the effective performance of its functions under the Convention, including immunity from legal proceedings. Also, regardless of the fact that there is an institutional connection with the United Nations, the legal regime of the United Nations cannot apply to the Secretariat (United Nations, 2021, p. 2). After the offer was accepted for the Government of the Federal Republic of Germany to host the Secretariat of the Convention in 1996, the Government of the Federal Republic of Germany, the United Nations and the Secretariat of the UNFCCC signed the Headquarters Agreement. Consequently, the Convention on the Privileges and Immunities of the United Nations and the Vienna Convention on Diplomatic Relations apply *mutatis mutandis* to the UNFCCC Secretariat in Germany. This further led to the fact that the Secretariat in the host country "possess the legal capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings" (United Nations, 2021, p. 2). It is important to emphasize that the specificity of the Secretariat's legal status did not raise doubts as to its effectiveness in performing its functions.

The UNFCCC Secretariat consists of numerous departments that contribute to the implementation of its work program. The Adaptation Division was created with the aim of strengthening adaptation, improving resilience and reducing vulnerability to climate change. It consists of three subdivisions: Review, Response and Vulnerability subdivision. The Administrative Services, Human Resources, and Information and Communication Technology division deals with operational issues concerning conferences and meetings, intergovernmental processes, related institutions and bodies (United Nations, 2020, p. 3-5). The Department of Communication and Engagement provide relevant information and notices about the Secretariat's activities related to climate change issues to the Parties to the United Nations Framework Convention on Climate Change and other interested parties as well as the public. The responsibility of the Intergovernmental Support

and Collective Progress division is to ensure that the subsidiary bodies of the Convention, the Kyoto Protocol and the Paris Agreement function in a way that will enable progress in the climate process, while The Legal Affairs division provides independent legal services for the implementation of all obligations under the aforementioned three agreements (United Nations, 2020, p. 10-13). The Mitigation division should enable the achievement of the goals related to limiting the increase in temperature through joint action of the Parties to the United Nations Framework Convention on Climate Change. The organizational structure of the UNFCCC Secretariat also consists of Means of Implementation division, Transparency division, Operations and Programmes Coordination division, Conferences division and Executives division (United Nations, 2020).

UNFCCC Secretariat provides services to the Conference of the Parties, Subsidiary Bodies, the Bureau and other bodies established by the Conference of the Parties. As stipulated in Article 8 of the Convention, the Secretariat provides support and assistance to Parties, especially in underdeveloped regions, facilitates negotiations and meetings (the specific task includes the preparation of official documentation for the Conference of the Parties and Subsidiary Bodies) and cooperates with other organizations with a similar mission such as the Global Environment Facility (GEF), United Nations Environment Program (UNEP), Intergovernmental Panel on Climate Change (IPCC) and others. The Executive Secretary heads the UNFCCC Secretariat (the Executive Secretary is appointed by the Secretary-General of the United Nations in consultation with the Conference of the Parties) and proposes the program budget every two years (UNFCCC, 2006, p. 36).

3.2. United Nations Environment Programme

United Nations Environment Programme (UNEP) was founded as a subsidiary organ by United Nations General Assembly resolution 2997 (XXVII) of December 15, 1972, after the first UN Conference on Human Environment to "meet the urgent need for a permanent institutional arrangement within the United Nations system for the protection and improvement of the environment". The mandate of the UNEP Governing Council was formulated as "international cooperation in the field of the environment and providing general policy guidance for the direction and coordination of environmental programs within the United Nations system" (Desai, 2015, p. 4). At the first session of the Governing Council, the main problems for human health, well-being and quality of life that require priority solutions were defined: water and air pollution; soil degradation and food contamination; deterioration of the marine environment. As a result, the mentioned problems implied the proposal of certain actions in the fields of economy, trade, energy and human settlements (Johnson, 2012, p. 40). UNEP has been assigned a significant role in catalyzing and developing international environmental law, which was best seen in the numerous Multilateral Environmental Agreements, as well as in the adoption of some soft law instruments, such as guidelines (Desai, 2015, p. 4). However, despite this, UNEP became marginalized in other areas of environmental policy creation, due to its organizational structure, insufficient funding, lack of political trust of some of the important member states of the United Nations, as well as due

to lack of stronger support from non-governmental organizations. Factors that thwarted the strengthening of the role of UNEP in the field of the environment include the establishment of the World Commission on Environment and Development as an independent body with a unique ecological mandate; the fact that the organizer of the Stockholm Conference was chosen as the Secretary General of the UN Conference on Environment and Development (UNCED) instead of a representative of UNEP; the decision that the UNCED should report to the General Assembly, whereas previously this was the role of UNEP (Conca, 1995, p. 451). However, what strengthened UNEP's position was the compilation and presentation of the report "Environmental Perspectives to the Year 2000 and Beyond" which, in the light of General Assembly Resolution 38/161, reflects the intergovernmental consensus on the growing environmental challenges up to the year 2000 and beyond and discusses and analyzes the instruments of environmental action, as well as the role and importance of institutions whose focus is on important environmental issues (UNEP, 1988). This document is also considered the trigger for the United Nations Conference on Sustainable Development (Rio+20) which in 2012 defined the measures for the implementation of sustainable development and influenced the strengthening of UNEP's mandate. The enhancement of UNEP's position to a United Nations body that helps governments address national, regional and global environmental challenges is best illustrated by paragraph 88 of the document "The Future We Want": UNEP receives adequate and increased funding from the regular budget of the United Nations, leads efforts to formulate United Nations strategies on the environment and has an enhanced voice and ability to fulfil its coordination mandate within the United Nations system (United Nations, 2012, p. 23-24).

Today, UNEP is presented within the United Nations system as the basic body of environmental protection activities and leading environmental authority, which is fully justified, since it develops environmental laws and policies both at the regional and global levels, defines the global agenda for the environment and sets goals, programs, policies and action plans responding to the growing challenges in environmental protection. Also, based on the assessment of the current state and quality of the environment, it creates and develops regional and international legal instruments and policies for implementation and enforcement. UNEP also provides support to United Nations member countries by assisting in the development of their national legal frameworks for the implementation of Multilateral Environmental Agreements (Desai, 2022, p. 1). This help is reflected in the fact that they are provided with training and technical assistance in defining and preparing project proposals, legal harmonization, reporting, etc.

UNEP's areas of activity are Climate change, Resource efficiency, Disasters and conflicts, Environmental governance, Harmful substances and hazardous waste, and Ecosystem management (UNEP, 2010). UNEP is making efforts to raise public awareness of the importance of the green transition process toward a green and socially inclusive global economy, the importance of using renewable energy sources, as well as understanding climate science. In countries affected by crises and conflicts, it conducts environmental evaluations and provides guidelines for the implementation of the legislative and institutional framework for improved environmental management. In addition,

UNEP facilitates easier management and restoration of ecosystems through the Global Program of Action for the Protection of the Marine Environment from Land-based Activities (UNEP, 2018, p. 2). It supports governments to develop and improve processes, programs, policies and laws, and establish institutions that pave the way for sustainable patterns of development. UNEP directs its engagement to ensure that contaminated waste and chemicals are used in ways that have minimal negative impacts on the environment and human health, as evidenced by the Strategic Approach to International Chemicals Management - SAICM, a policy framework for international action on chemical hazards whose secretariat is hosted by UNEP (UNEP, 2006, p. 11). On the other hand, The Marrakech Process is a global multi-stakeholder process to support the implementation of sustainable consumption and production, which is also one of the UNEP's strategic environmentally friendly production and consumption of limited natural resources and "doing more with less" (UNEP, 2011, p. 9).

Currently, UNEP supports its 193 Member States and works through seven Headquarters divisions, six regional offices, five sub-regional offices, six country offices, and three liaison offices (MOPAN, 2021, p. 19). The International Ecosystem Management Partnership in Beijing, the World Conservation Monitoring Centre in Cambridge and the Copenhagen Climate Centre are UN Environment Programme collaborative centers of excellence (MOPAN, 2021, p. 20). UNEP cooperates with many global environmental bodies such as the World Health Organization, the United Nations Industrial Development Organization, the Organization for Economic Cooperation and Development, the Food and Agriculture Organization of the United Nations and the United Nations Development Programme (UNDP). With the aforementioned organizations, it manages specialized centers, programs and initiatives such as: Climate and Clean Air Coalition, Climate Technology Centre and Network, Finance Initiative and the Green Growth Knowledge Platform, Regional Seas Programme and Reducing Emissions from Deforestation and Forest Degradation (UNEP, 2023).

The Secretariat of Governing Bodies and Stakeholders is responsible for supporting the Governing Council (United Nations Environment Assembly) and its subsidiary inter-sessional bodies (including the Committee of Permanent Representatives) and consists of two units: the Governing Bodies Unit and the Civil Society Unit (UNEP, 2018a, p. 3). UNEP reports to the United Nation General Assembly through the Economic and Social Council - a central forum for discussing international economic and social issues, encouraging international cooperation, as well as formulating political recommendations (Aeschlimann, 2021, p. 14). As the leading global environmental authority and the highest political forum on environmental issues, the United Nations Environment Assembly assesses UNEP's progress and determines its specific development priorities and meets every two years, while the Committee of Permanent Representatives meets more frequently (four times per year) (Das, 2020, p. 603). By General Assembly resolution 2997 (XXVII), the Executive Director of UNEP is responsible to the Secretary-General. The General Assembly elects the Executive Director for four years. The Executive Director enables leadership in environmental policy in the world community, provides support to UNEP in the process of implementing activities for environmental

protection in the world, defines ways to address emerging global environmental issues in collaboration with governments and intergovernmental bodies, scientific institutions, the private sector and community groups, promotes partnerships with other United Nations bodies, manages the Environmental Fund and reports to the Governing Council on environmental issues and participates in the Administrative Committee for Coordination (Ivanova, 2012, p. 577).

3.3. Global Environment Facility

The Global Environment Facility (GEF) was founded in 1989 at the annual meeting of the Board of Governors of the World Bank and the International Monetary Fund, when it was proposed to create a fund of voluntary grants for the purpose of solving environmental problems as an innovative initiative. The mandate of the GEF was directly related to the promotion of sustainable development in the early 1990s (Chazournes, 2005, p. 193). Since three institutions with a similar mission of preserving and improving the quality of the environment had already been established - the World Bank, UNEP and the United Nations Development Programme (UNDP), in 1991, agreements on cooperation between the GEF and the aforementioned three institutions were defined, and they were given the role of implementing agencies. It is interesting to point out that the GEF was established on a special legal basis. Namely, the Global Environmental Facility was originally established at the International Bank for Reconstruction and Development as a pilot programme and a response to global environmental challenges. In 1992, the Participants of the GEF established the necessary restructuring of the Facility, which was referred to in Agenda 21, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity (GEF, 2015, p. 12). The issue of restructuring was the topic of meetings of GEF participants in Geneva in 1994 when the Instrument for the Establishment of the Restructured Global Environment Facility was adopted by representatives of 73 States, as well as by three implementing agencies (the World Bank, UNDP and UNEP) by resolution or decision of its competent bodies and following its rules of procedure and regulations (GEF, 1994, p. 4; Clémençon, 2006, p. 50). Being a part of the World Bank system (which has not changed since the pilot phase), the GEF's autonomy and independence were confirmed by obtaining political legitimacy and establishing a functionally independent secretariat, while at the institutional level, the GEF is the result of the joint action of the World Bank and the United Nations (represented by UNDP and UNEP). However, from a strictly formal point of view, only the World Bank had the legal capacity to establish this mechanism, while the inclusion of UNDP and UNEP was only driven by political reasons, indicating the willingness of these institutions to cooperate (Chazournes, 2005, p. 196).

The Global Environmental Facility makes efforts and contributes to climate protection and the conservation of natural resources, serving as the financial mechanism for a number of environmental conventions that create new and improve existing partnerships at the national, regional and global levels, applying the principle of sectoral integration and systemic approaches to financing projects and programs choosing the

best and the most profitable initiatives (Anjanappa, 2022, p. 1). The main areas towards which it directs its investments are climate change, conserving biodiversity, international waters, land degradation, persistent organic pollutants and ozone depletion. The Global Environmental Facility, as an operating entity of the Financial Mechanism of the United Nations Framework Convention on Climate Change, the Least Developed Countries Fund (LDCF), the Special Climate Change Fund (SCCF), and the Green Climate Fund (GCF) were designated to serve the Paris Agreement, which confirmed the role of the GEF in solving the issue of climate change as part of the Financial Mechanism of the Convention (United Nations, 2021a, p. 10).

The GEF organizational structure includes the Council as a main governing body, the Assembly which reviews and evaluates the operation based on reports submitted to the Council, the Secretariat, which coordinates the overall implementation of activities, Scientific and Technical Advisory Panel, which provides scientific and technical advice on policies, operational strategies, programs and projects, the Implementing and Executing Agencies, which provide operational support, and an Independent Evaluation Office, which is headed by a Director who reports directly to the Council and coordinates a team of specialized evaluators (Rosendal & Andresen, 2011, p. 1910).

4. CONCLUSION

The institutional apparatus should provide support in the implementation of activities related to ecological, economic and social dimensions of sustainable development. Environmental issues are included in the activities of a wide range of international organizations. Raising awareness of the importance of nature conservation and prioritizing climate change, carbon emissions, deforestation, land degradation, and biodiversity has been influenced by the growth of international environmental conventions, funds, programs and donors. As their number grows, so does the degree of fragmentation, which ultimately makes it difficult to coordinate and harmonize the financing of environmental activities at the global level. Some of the key recommendations for improving the institutional framework for sustainable development are changes in international agreements in the field of environmental protection, introduction of new regulations in the international management of the concept of sustainability, better integration of sustainable development policy into the United Nations system, strengthening of the national sustainable development management system, strengthening public-private partnerships. Directives, regulations, strategies and action plans related to the European Green Deal will continue to be developed and adopted in the coming years.

The adequacy of the institutional framework depends on the type, organizational structuring and functioning, business model, and the degree of connection of institutions oriented towards achieving sustainability. It can be noted that the process of institutional arrangement and adaptation of existing institutions and the creation of new ones in the field of environmental protection is constantly present, which completes the structure of institutions.

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ENFORCEABILITY OF AUTONOMOUS BANK WARRANTIES, IN THE PERIMETER OF BUSINESS-TO-BUSINESS LOANS

The paper focuses on the problematics of the enforceability of autonomous bank warranties and security agreements, accompanying B2B loans, which continuously raised multiple interrogations for legal practitioners. Firstly, the paper approaches the enforceable character of the non-jurisdictional title materialized as a bank guarantee, which is not expressly regulated under European Contract Law. The salient question arises as to whether, under the current provisions of Romanian Law, particularly in the light of the provisions of Article 120 of Governmental Extraordinary Ordinance no. 99/2006, the fiduciary guarantee contracts, concluded by a credit institution, could constitute enforceable titles. Secondly, specific attention is devoted to the issue of identifying enforceable autonomous bank guarantees as an extrinsic enforceability not being incidentally mirrored in the main legal relationship, particularly of the bank credit agreement. Thirdly, the paper examines whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified by the autonomous bank guarantee, to be conjugated with their irrevocable specificity, which would be established between the main contract (as the generator of the executability of the guaranteed bank loan) and the considered personal guarantees (passive solidarity of debtors) as accessories of the B2B credit agreement. Under the current jurisprudence, it remains crucial to establish the autonomous nature of the payment warranties, especially for the autonomous counter-guarantee, as suretyship varieties where the guarantor undertakes to fulfil the debtor's obligations in the hypotheses that the latter fails to perform.

Keywords: enforceability, autonomous bank warranties, B2B loans, creditors, security agreement, suretyship.

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1. INTRODUCTORY REMARKS

Accompanying B2B loans, the autonomous credit warranties continuously raised practical interrogations for legal practitioners, in terms of their enforceability under the current Romanian Civil Code provisions, and implicated vivid debates, several of which are mostly common to other legal systems, such as the French Contract Law.[1] The given French Contract Law was an inspiring source for the Romanian legislator[2]. The paper examines whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified by the autonomous bank guarantee, to be conjugated with their irrevocable specificity, which would be established between the main credit contract[3] (as the generator of enforceability of the guaranteed bank loan) and the considered personal guarantees (passive solidarity of debtors) as accessories of the B2B credit agreement.

The legal issue, as it has been formulated, is linked to the assessment of the enforceability of the autonomous warranty, as resulting from the corroborated interpretation of the provisions of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006, and of Articles 2279 and 2321 of the Romanian Civil Code.

Firstly, it is worth noticing that the relevant legal provisions are those of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 on credit institutions and capital adequacy, according to which the credit contracts,[4] including immovable or movable property, or personal guarantee contracts, concluded in favor of a bank creditor, constitute enforceable titles[5]. Secondly, the provisions of Article 2279 of the Romanian Civil Code, concerning the taxonomies of personal guarantees also became incidental. They envisage that personal guarantees include sureties, autonomous guarantees, as well as other specific guarantees provided in accordance with the regulations on conventional warranties, as described in Article 2321 of the Romanian Civil Code.

The dilemmatic nature of the legal issues is attributable to the applicable Romanian Civil Code provisions. Under them, the character of the non-jurisdictional enforceable title of the autonomous bank guarantee has not been expressly recognized by the

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legislator, provoking interrogations regarding whether such a character could be inferred implicitly, from an extensive interpretation (thus including autonomous bank guarantees) of the notion of 'personal guarantee' referred to in the text of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 on credit institutions and capital adequacy or, alternatively, from an extensive interpretation of the notion of 'extended credit securities'. In order to extract the enforceability of the autonomous bank guarantee from its (possible) assimilation (strictly under the aspect of the 'intrinsic' enforceability) to the credit titles, it is worth considering that provisions of Article 640 of the Romanian Code of Civil Procedure stipulate that the bills of exchange, promissory warranties, and other credit securities constitute enforceable securities if they meet the conditions set forth by specific regulations. It seems that the assimilation of the autonomous bank guarantees to personal guarantees would lack pertinency, as their conceptual regimentation in the category of credit titles is equally inadequate. In order to assess the eventual non-enforceable character of autonomous bank guarantees, it is worth recalling that, an extended understanding of the notion of 'personal guarantee' is based on the interpretation of the mentioned legal provisions which has their starting point in their economic functions, since the autonomous bank guarantees were not expressly included by the legislator in the category and were omitted from the taxonomy of non-jurisdictional enforceable titles.

Thirdly, the relevance of Decision no. 43/2021 of the Romanian High Court of Cassation and Justice – Panel on clarifying certain legal matters must also be emphasized, since by that decision, the Supreme Court ruled that the letter of guarantee issued by a credit institution presents the valences of an enforceable title, yet it gains such valences only if it has been issued in order to guarantee a credit agreement contracted by a bank creditor.

The paper argues that approaching the issue whether from the corroborated interpretation of Article 2279 and Article 2321 of the Romanian Civil Code, the enforceable nature of the letter of bank guarantee can be assessed depends on whether, in hypotheses when the autonomous bank guarantee would be correlated to performing obligations generated by a B2B credit contract, the banks issuing the autonomous bank guarantee may be considered to be the debtor of the payment obligation on the creditor's request. However, provisions of Article 120 of Governmental Extraordinary Ordinance no. 99/2006 stipulating that credit contracts, including the fiduciary guarantee contracts, concluded by a credit institution, constitute enforceable titles were designed to be incidental in situations where the credit institutions would be defined as creditors. Congruently, the phrase 'including the personal guarantee contracts, concluded by a credit institution' induces an intrinsic association by virtue of the accessory relationship established between the credit contracts (representing non-jurisdictional enforceable titles) and personal guarantees attached to the credit contract. The latter are considered to stand as non-jurisdictional enforceable titles in favor of the bank creditor, by 'contaminating' their performance with the intrinsic enforceability of the credit contracts. Therefore, these guarantees (except in the case of mortgages) will not be enforceable based on the extrinsic enforceability of personal guarantees.

Nevertheless, the extension of the enforceability of the bank credit agreement, in order to include autonomous guarantees would be blocked or obstructed by their autonomous nature. In the absence of an accessory relationship that would be established between the main contract (as a generator of the obligations whose execution is guaranteed)[6] and the typical personal guarantees (passive solidarity)[7], the latter could not be accessories of the 'basic contractual relationship' or of the 'main contractual relationship', extracted from the credit agreement. Therefore, as it will be argued in the following paragraphs, from the perspective of the autonomy of bank guarantee letters (including the causal personal guarantees) the distinction between the enforceability of the credit agreement and the enforceability of the autonomous guarantee operates in cases in which the autonomous guarantee was correlated with the bank credit contracts or other types of credit agreements.

2. REGULATORY FRAMEWORK ON THE ENFORCEABILITY OF THE AUTONOMOUS WARRANTIES

Saliently, the provisions of Article 120 of the Governmental Extraordinary Ordinance no. 99/2006 could not be interpreted in an extensive manner, as to include in its substantial field the hypotheses of contracting the autonomous guarantees, in which case the relation of accessory with the 'main contract' would be absent and as such will not have a legal relevance. Regarding the legal nature of the basic contract, it must be observed that, between the basic contract and the autonomous bank guarantee, there is not an accessory relationship to be established, and aspects such as the ones seen through the lens of 'extrinsic enforceability' (enforceability of the adjacent contract based on the enforceability of the main contract), are not applicable to the autonomous guarantees. Thus, the extrinsic enforceability of credit warranties cannot be incidental, or separated from the enforceability[8] of the main legal relationship, namely the bank credit agreement.

Consequently, as the paper will argue in the following paragraphs, the only possible version to identify intrinsic enforceability of autonomous bank guarantees remains the intrinsic enforceability deduced from the nature of the claim and the certainty of the creditor's right, as guaranteed by the autonomous bank guarantee, respecting the premises described in Article 632, paragraph 2 of the Romanian Code of Civil Procedure. According to said provision, certain documents constitute enforceable titles. As it has been rightly pointed out in the specialized literature in the case of non-jurisdictional enforceable titles, an indispensable prerequisite is the one referring to intrinsic elements which would allow the creditor to initiate enforcement measures in the event of non-payment. [9]

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[6] Goicovici, J. 2020. Perspectives on the Evolution of the Vendor's Warranty against Eviction in Roman Law. *SUBB Jurisprudentia,* 65(4), pp. 327-365.

[7] Goicovici, J. 2022. *Dreptul relațiilor dintre profesioniști și consumatori.* Bucharest: Hamangiu, pp. 217-223.

[8] Țiț, N.-H. 2023. Controverse referitoare la chemarea în judecată a altei persoane care poate pretinde aceleași drepturi ca și reclamantul. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi – Stiinte Juridice*, 69(1), p. 24.

[9] 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.

It is worth emphasizing that, in order to establish the certainty of the debt, in the absence of which the non-jurisdictional enforcement title would be inexistent, the creditor's claim for payment is assessed when its undoubted existence results from the enforceable title in an ostensible manner. The same applies to the analysis of the intrinsic conditions of the non-jurisdictional enforceable title.

Among these prerequisites, the assessment of the certainty of the creditor's claim, which remains problematic in the case of the autonomous types of guarantees, is seen through the lens of the essential elements of the creditor's rights, waiving the possibility of invoking exceptions and defences based on the clauses extracted from the main contract (the credit agreement), given the autonomous nature of the guarantee. Neutralizing the exceptions arising from the legal relationship between the guarantee assignor and the beneficiary of the autonomous guarantee (the clause waiving the possibility of invoking the exceptions from the main contract) is not equivalent in any situation to a clause consecrating the certainty of the (guaranteed) claim. The two types of contractual provisions do not only present different legal objects (their causality being differentiated) but also generate dual effects, if not antagonistic or diametrically opposed then at least distanced on the spectrum of contractual effects. The issuer of the autonomous guarantee does not assume the certainty of the guaranteed debt. Therefore, the creditor is expected to prove the existence of the right of payment originating in the credit agreement.

The enforceability derived from the quality of the creditor's rights[10] and respectively, from the nature of the 'main' contractual relationship characterizes bank credit contracts under the current provisions of Romanian law. Namely, it recognizes the existence of non-jurisdictional enforceable titles[11] in view of the importance played by these types of contracts in the economic plan or through the lens of the stimulating effect that bank credit has on economic activities, including it as a catalyst for the consumption of products or contracting services by consumers. The enforceability derived from the quality of the bank creditor's rights operating in the field of banking financial services is reserved only for the bank credit agreement and its accessories (ancillary personal guarantees). That type of enforceability would not be extensible, by analogy, in the absence of permissive legal provisions, to cases located at the opposite pole, in which the bank takes the position of the debtor within the framework of an autonomous guarantee. In the latter cases, it is compulsory to assess the enforceability derived from the certainty of the claim, in the content of the non-jurisdictional enforceable title.

Similarly, it must be pointed out that the autonomy of the bank guarantee (in any of its sequential versions, namely the 'first demand guarantee'[12], 'guarantee of performance', 'documentary guarantee' etc.) has direct implications only on the debtor's possibility of invoking the exceptions and defences derived directly from the 'basic' contrac-

[10] Țiț, N.-H. 2020. Considerations regarding the Interpretation of Art. 713 Para. (3) of the Civil Procedure Code. *Analele Universitatii din Bucuresti: Seria Drept*, 2020(1), pp. 25-37.

[11] *Ibid.,* p. 34.

[12] Ignacio Hernández Meni I. 2021. La virtualidad de la cláusula de pago a primer requerimiento para definir la naturaleza de las garantías autónomas. La problemática de la calificación jurídica. *Revista de Derecho Civil*, 8(4), pp. 125-159.

tual relationship. Also, such autonomy has implications on the significance of certain and indisputable character of the guaranteed claim.

On the other side of the controversy, as it has been already pointed out on grounds for enforced performance, it appears from the provisions of Article 632, paragraph 2 of the Romanian Code of Civil Procedure that[13], the certain nature of the creditor's claim is seen as being an indispensable requirement for the autonomous guarantees to constitute enforceable titles.

The inadequacy of admitting the enforceability of autonomous bank guarantees or the (non)recognition of non-jurisdictional enforceable title is also directly correlated to the objective manner of interpreting provisions of Article 2321 of the Romanian Civil Code. According to those provisions, the issuer of the autonomous guarantee cannot oppose to the beneficiary the exceptions based on the pre-existing obligations assumed by the debtor and cannot be held to payment in the case of creditor's manifested fraudulent conduct. As it has been emphasized, the issues of invoking the creditor's manifested abusive conduct and ostensible fraud in the matter of the autonomous bank guarantee continue to raise questions for legal practitioners, partly fueled by the laconism of the legal texts regarding the forms of abuse committed by the beneficiary of the bank guarantee. The questions are also brough up regarding the cases of fraudulent collusion between the interests of the beneficiary of the bank guarantee and the issuer of the autonomous guarantee.

It is also worth noticing that provisions of Article 2321 of the Romanian Civil Code associate the impossibility of invoking the exceptions derived from the initial contractual bond with the possibility of refusing to perform the payment, based on the fraudulent nature of the payment request, thus creating premises for the incidence of a payment refusal, as a blocking mechanism when the creditor was suspected of apparent fraudulent conduct.

The aforementioned provisions of Article 2321 of the Romanian Civil Code stipulating that the debtor cannot be held to payment in case of the creditor's abusive conduct or obvious fraudulent conduct raised polemical comments, which were non-conciliatory. Suspending the performance of the obligation of payment[14] in the case of autonomous guarantees remains a possible solution only to the extent that the creditor's manifested abuse or fraud is proven to affect the legitimate interests of the signatory party of the autonomous guarantee. However, the elements that describe creditor's fraudulent conduct are not easy to determine. It was highlighted that the creditor's fraud or abusive conduct is intertwined with the lack of good faith of the creditor who invokes the guarantee with full knowledge of the fact that the conditions of the guarantee are not met. It must also be observed that admitting that the beneficiary of an autonomous guarantee is entitled to rely on the payment request would depend on the existence or the extent of the debtor's obligation.

[13] Țiț, N.-H. 2020. The Fate of the Bail Paid for the Suspension of the Enforcement of the Title, under the Conditions of Art. 638 Par. (2) C. Pr. Civ. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice*, 66(1), pp. 83-96; Țiț, N.-H. 2018. *Încuviințarea executării silite*. Bucharest: Universul Juridic, pp. 83-87.

[14] Țiț, N.-H. 2021. Protection of Residence in Enforcement Proceedings. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice,* 67(2), pp. 105-118.

Thus, the request for payment addressed to the guarantor, seen through the lens of the autonomous guarantee, will be considered inadmissible when it is simultaneously characterized by the awareness of the beneficiary of the autonomous guarantee of the absence of the right to payment. This interpretation confirms a previous jurisprudential direction based on which it was held that the beneficiary of an autonomous guarantee is deprived of the right to payment, and the latter's request for payment will be considered manifestly abusive when the prerequisites of the autonomous guarantee failed to exist due to the beneficiary's culpable intervention. For the issuer of the autonomous guarantee (the debtor in the main contractual relationship), the performance of the obligation may be revocable, to the extent that the latter has already made the payment, and the subsequent debtor may subsequently resort to an action in regress for the restitution of the payment, the effectiveness of which may be blocked by the potential insolvency of the debtor.

Simultaneously, in the field of autonomous guarantees, the manifestly fraudulent nature of the creditor's request may result from fraudulent collusion between the interests of the issuer of the autonomous guarantee and those of the beneficiary of the autonomous guarantee. Regarding the specificity or the inadequacy of the creditor's request, manifested in the context of soliciting payment addressed to the issuer of the autonomous guarantee, it should be noted that the 'unconditional payment' which characterizes the autonomous guarantee mechanism, can be refused in situations of manifested fraud, as it is configured in the text of Article 2321, paragraph 3 of the Romanian Civil Code. In a moderate (quasi-restrictive) interpretation of the legal provisions, the following jurisprudential hypotheses apply to cases of abusive request emitted by the beneficiary of the autonomous guarantee:

(a) the situation in which the beneficiary of the autonomous guarantee formulates a request for payment based on the guarantee for performance, in the context in which the creditor has previously certified the compliance and performance of the debtor's contractual obligations, as generated by the main agreement;
(b) when there is, on the part of the guarantee, a beneficiary who is requesting the payment, a unilateral act of recognition of the culpable non-performance of its obligations in the main contractual relationship; and
(c) when the beneficiary of the autonomous guarantee has expressly agreed with the initial debtor (the issuer of the solicitation based on the autonomous bank guarantee) that a request for payment would not be subsequently issued.

3. ASSESSING THE LEGITIMACY OF THE ISSUER'S REFUSAL OF PAYMENT

The interpretive correlations to the performance of the main contractual obligations are maintained in cases when the exceptions regarding impossibility of invoking the refusal of payment by the issuer of an autonomous guarantee are applied. Similarly, the bank guarantee of payment on first demand, as well as the bank guarantee on conformity of performance, maintain their autonomous character in relation to the contractual

premises between the main debtor and the beneficiary of the autonomous guarantee, in contrast to the benchmarks that would have intervened in the framework of classic personal guarantees. The rejection of the beneficiary's payment request on grounds directly related to the latter's manifested fraudulent conduct[15] remains a valid option for the issuer of the autonomous guarantee, if the issuer does not invoke exceptions based on the main contractual relationship (thus respecting the autonomous nature of the guarantee). The issuer may resort to invoking personal exceptions,[16] since the beneficiary's fraudulent conduct was manifested against the latter's patrimonial interests. As the beneficiary's obvious fraudulent conduct in requesting the payment directly targeted the guarantor, the latter's refusal to pay represents the expression of a minimum caution that must be shown, both by reference to the issuer's economic interests and by reference to the B2B credit relationship with the issuer (the debtor in the main contractual relationship), which can signal to the issuer the existence of justified reasons for payment refusal. The rejection of the payment request is subject to judicial assessment in terms of establishing the pertinent nature of the payment refusal, implicitly or explicitly assessed and constitutesproof of fraud committed by the payee.[17] While invoking the manifested fraudulent conduct of the applicant, the guarantor would not be able to connect the fraudulent conduct aimed at harming the latter's economic interests with aspects derived from the development of the main B2B contractual relationship. On the contrary, as illustrated by decisions of jurisprudence, a certain degree of interweaving persists between the effects of the main B2B contract and the legitimacy of the payment refusal issued by the signatory of the autonomous guarantee.

Comparatively, the aforementioned situation may be exemplified by an issued order for emitting an autonomous guarantee to guarantee the performance of the obligations assumed by a B2B credit agreement, so called the underlying agreement [18]. This is especially applicable to hypothesis when the credit agreement had been supplemented by an amendment that increased the amount of the available credit line, which contained a clause regarding the autonomous guarantees issued to cover the risk of non-payment in respect of the additional credit line. The latter becomes applicable for any debits assumed by the beneficiary of the autonomous guarantee, including the complementary amounts from the credit contract which were made available to the debtor in the main B2B contract. Following the negotiations between the B2B parties to adjust the clause regarding the autonomous guarantee due to the increased value of the credit agreement, the beneficiary of the autonomous guarantee who issued a payment request may face the refusal of payment issued by the guarantor/issuer of the autonomous guarantee. The issuer's payment refusal may be considered unfounded, since the premises of stipulating the clauses of the autonomous guarantee do not result in the limitation of the payment

[15] Lasbordes-de Virville, V. 2021. *Droit des contrats spéciaux*. Bruxelles: Bruylant, pp. 217-226; Mainguy, D., 2022. *Contrats spéciaux*. 13th ed. Paris: Dalloz, pp. 181-194; Puig, P. 2019. *Contrats spéciaux*. 8th ed. Paris: Dalloz, pp. 319-327.

[16] Gorlier, V. 2021. *Le droit des contrats spéciaux*. Paris: Ellipses, pp. 183-196.

[17] Quiquerez, A. 2022. *Droit bancaire*. 2nd ed. Paris: Gualino, pp. 246-253.

[18] Lasbordes-de Virville, V. *op. cit*., p. 228.

commitment strictly at the level of the credit supplement granted to the main debtor, nor could such a limitation result implicitly from the clauses of the autonomous guarantee[19].

Congruently, in the context of the autonomous documentary guarantee, the guarantor is not required to honor the request for payment unless it appears from the verification of the documentation submitted by the beneficiary of the guarantee that the complete and adequate prerequisites are met, according to the principle of documentary rigorousness characterizing the taxonomy of autonomous guarantees. The guarantor's obligation of prudence and vigilance is limited to the verification of the documents presented by the beneficiary of the payment and to their confrontation with those enumerated in the text of the autonomous guarantee. In other words, the formal control of the documentation is, in principle, sufficient for making the decision to authorize the payment. The autonomous nature of the guarantee by reference to the basic B2B contract is tempered by the prohibition of the beneficiary's fraudulent conduct. Yet, the refusal of payment based on suspicions of abuse or fraud remains 'exceptional', following a strict interpretation of these notions. In order to illustrate such a hypothesis, one may recourse to the case where the beneficiary intends to invoke the autonomous guarantee while clearly exceeding the limits of the credit line for which it was established. Thus, if the purpose of establishing the autonomous guarantee was represented by the coverage of a particular, specific risk of non-performance, which was delimited in a precise manner in the content of the main contract, the autonomous guarantee cannot be unilaterally extended by the payment request issued by the beneficiary of the guarantee[20] to cover other situations of non-performance initially omitted from the main contract. Similarly, the beneficiary of the autonomous guarantee who issued a payment request addressed to the guarantor for a value that is disproportionately excessive,[21] as compared to the value of the beneficiary's claim from the main B2B contract, may be held liable for fraudulent conduct.[22]

4. INTRINSIC ENFORCEABILITY *VERSUS* EXTRINSIC ENFORCEABILITY OF AUTONOMOUS GUARANTEES

As opposed to the situation of personal guarantees, the enforceability of suretyship agreements derives from the enforceability of the main bank credit contract. Therefore, in the case of autonomous bank guarantees, there is an extrinsic (ancillary) enforceability to be retained. Simultaneously, the substantial impediments deduced from

[19] Țiț, N.-H. 2021. The Active Role of the Judge in Identifying and Classifying Acts and Facts Brought to Trial. Some Considerations. *Romanian Review of Private Law*, 2021(1), pp.176-177.

[20] Ansault, J.-J. and Picod, Y. 2022. *Droit des sûretés*. 4th ed. Paris: Presses Universitaires de France, pp. 314-323; Aynès, L., Aynès, A. & Crocq, P. 2022. *Droit des sûretés*. 16th ed. Paris: L.G.D.J., pp. 117-124; Cabrillac, M., Cabrillac, S., Mouly, C. and Pétel, P. 2022. *Droit des sûretés*. 11th ed. Paris: LexisNexis, pp. 296-238.

[21] Hausmann Ch. & Torre Ph. 2018. *Les garanties de passif*. 5e éd. Paris: Edition Formation Entreprise, pp. 118-124; Hélaine, C. & Tafforeau, P. 2023. *Droit des sûretés: sûretés personnelles et réelles*. 2nd ed. Bruxelles: Bruylant, pp. 162-167.

[22] Aynès, L., Gautier, P.-Y. & Malaurie, P. 2022. *Droit des contrats spéciaux*. 12 ed. Paris: L.G.D.J., pp. 351-359; Bénabent, A. 2021. *Droit des contrats spéciaux civils et commerciaux*. 14th ed. Paris: L.G.D.J., pp. 267-272; Boustani-Aufan, D. 2022. *L'essentiel du droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 284-292.

admitting non-jurisdictional enforceable titles of autonomous guarantees are seconded by a suite of formal impediments, arising from the absence of substantial formalism in this perimeter, starting from the incidence of consensually agreed clauses between the B2B parties.

It must also be noted that the intrinsic nexus between enforceability[23] and the certainty of the beneficiary's rights was emphasized in the perimeter of the autonomous guarantees. Nevertheless, structurally, the autonomous bank guarantee generates a payment obligation that is different from the obligations generated by the initial contractual relationship, thus enshrining a distinct right to claim the payment from that of the creditor in the primary B2B contractual relationship. It was highlighted that, from a substantial perspective[24], the enforceable title represents the embodiment of a civil obligation[25], being fulfilled in the enforcement procedure in accordance with the provisions of Article 628, paragraph 1 of the Romanian Code of Civil Procedure. In these cases, the factor that determines the existence of the enforceable title is represented by the primary contractual relationship.

Interconnected to the point of an (imperfect) overlap, the notions of 'first demand guarantee' and 'compliant performance guarantee' might be difficult to disentangle in practice. On the other side, as pointed out above, the issue of invoking fraudulent conduct in the matter of enforcing the autonomous guarantees continues to raise questions for legal practitioners, fueled in part by the laconism of the legal texts regarding the forms of abuse committed by the beneficiary of the guarantee or, as the case may be, with regard to the cases of fraudulent connivance between the beneficiary of the guarantee and the issuer of the order to constitute the autonomous guarantee (fraud against the private interests of the signatory of the counter-guarantee)[26]. The said matter is approached in the text of Article 2321 of the Romanian Civil Code. The doctrinal discussions are fueled especially by the interpretation of the third paragraph of Article 2321 of the Romanian Civil Code, according to which the issuer cannot oppose to the beneficiary the exceptions based on the pre-existing obligation or contractual relationship assumed by the issuer of the guarantee and cannot be held to payment in case of the beneficiary's couplable request for payment or obvious fraudulent conduct.

It is important to note that the text of Article 2321 of the Romanian Civil Code associates the impossibility of invoking the exceptions derived from the initial contractual relationship and the possibility of refusing payment based on the abusive or fraudulent nature of the

[23] Țiț, N.-H. 2020. The (In) Applicability of the Provisions of Article 127 of the Code of Civil Procedure in Determining the Competent Court to Solve the Request for Approval of Forced Execution. *Romanian Journal of Compulsory Execution*, 2020(3), pp. 58-71.

[24] Țiț, N.-H. 2022. A Potential Legality Problem of the Enforcement Procedure: The Prorogation of Jurisdiction in the Case of the Bailiff. *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi – Stiinte Juridice,* Vol. 68(1), pp. 145-163; Țiț, N.-H. 2021. Certain Aspects Regarding the Parties' Agreement in Civil Procedure. *Challenges of the Knowledge Society,* 14(1), pp. 305-310.

[25] Țiț, N.-H. 2021. Extension of Legal Pursuit - An Incidental Execution? *Romanian Review of Private Law*, 2021(2), pp. 254-268.

[26] Țiț, N.-H. 2021. The Active Role of the Judge in Identifying and Classifying Acts and Facts Brought to Trial. Some Considerations. *Romanian Review of Private Law*, 2021(1), pp. 174-199.

payment request in an expression that, using the game of conjunction, creates the premises of a mandatory procedure concerning the guarantee of performance upon the beneficiary's request. The procedural effects and the obligatory effects of the issuer's refusal to pay to seem to describe the procedural tandem in which the exception of fraudulent conduct would serve as a mechanism by which the signatory of the guarantee would be able to reject the request for payment formulated by the beneficiary of the autonomous guarantee, while preserving the autonomous nature of the guarantee by reference to the main contractual relationship the performance of which is subject to the autonomous guarantee.

Nonetheless, the taxonomy of autonomous bank guarantees comprises two seemingly overlapping legal figures, which are merely distinguishable: the autonomous guarantee of 'payment on first demand' and the guarantee of 'compliant performance', while the differentiation of the two mechanisms generates difficulties for legal practitioners. In situations when the autonomous guarantee refers to the 'unconditional payment', the mechanism describes the autonomy of the guarantee by referring to the debtor's exceptions based on the primary contractual relationship; both types of autonomous bank guarantees, the payment guarantee at the first request and the guarantee of compliant execution have an autonomous nature. Thus, payment cannot be conditioned by referring to exceptions derived from the main contract or from the contractual B2B relationship established between the beneficiary of the autonomous guarantee and the issuer of the order establishing the autonomous bank guarantee, as that is a characteristic that both types of the mentioned autonomous guarantees share.

5. SUSPENDING OF PAYMENT IN THE CASE OF AUTONOMOUS GUARANTEES

The suspension of payment in the case of autonomous guarantees remains possible only to the extent that the beneficiary's manifest abuse or manifest fraud is proven. Yet, the conceptual elements that describe this mechanism are, most often, not easy to determine in practice, as it was highlighted that the beneficiary's fraudulent conduct may be intertwined with invoking the guarantee when the specific prerequisites are not met[27]. As held in jurisprudence, the request for payment addressed to the guarantor in the perimeter of the autonomous guarantee will be considered abusive when it is simultaneously characterized by the awareness of the beneficiary of the autonomous guarantee of the absence of its right to payment[28] and by the issuer's knowledge of the latter's fraudulent intent. Confirming a previous jurisprudential trend in which it was held that the beneficiary of an autonomous guarantee is deprived of the right to payment, and the latter's request for payment will be considered manifestly abusive when the prerequisites for which the guarantee was agreed failed to be met due to the beneficiary's intervention through an action or omission which was imputable to the beneficiary[29]. Therefore, the

[27] Farhi, S. 2022. *Droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 271-289.

[28] Denis, P. 2022. *Contrats spéciaux*. Paris: Anthemis – Commission Université Palais, pp. 312-339.

[29] *Ibid.*, p. 347.

signatory of the autonomous guarantee or the issuer of the payment order generating the guarantee, who possesses the quality of debtor in the primary contract[30] may resort to a redress mechanism for the restitution of the payment, the factual effectiveness of which may be blocked by the possible insolvency of the payee.

Similarly, in case of autonomous guarantees backed by (autonomous) counter-guarantees, the manifestly abusive nature of the beneficiary's request for payment requires proving the existence, at the time when the request for payment under the autonomous counter-guarantee was issued, of a fraudulent collusion between the interests of the first-rank guarantor (the beneficiary of the autonomous counter-guarantee) and the beneficiary of the first-rank guarantee (the issuer of the order for generating the guarantee), or of fraud aimed at damaging the patrimonial interests of the subsequent rank guarantor[31] (the signatory of the bank letter of counter-guarantee).

Regarding the specific elements of the fraudulent conduct manifested in the context of the request for payment addressed to the signatory of the counter-guarantee, it should be noted that the 'unconditional payment' which is a characteristic of the autonomous guarantee mechanism can be refused in situations of manifest abuse or manifest fraud, as configured in the text of Article 2321, paragraph 3 of the Romanian Civil Code.

There are potential discrepancies when it comes to the possibility of invoking the refusal of payment by the signatory of an autonomous guarantee, which is based on the exceptions extracted from the main contract. Despite them, the interpretive correlation with the performance of the main contractual obligations would be maintained, both for the bank guarantee of payment on first demand, as well as for the guarantee of compliant performance, which maintains their autonomous character in relation to the contractual premises between the main debtor and the beneficiary of the autonomous guarantee, in contrast to the benchmarks that would have intervened in the framework of classic personal guarantees. When refusing the payment request for the beneficiary on grounds directly related to the beneficiary's manifest fraudulent conduct, the signatory of the autonomous guarantee would not resort to exceptions based on the main B2B contractual relationship, although a certain degree of interweaving persists between the effects of the main contract and the legitimacy of the refusal to pay issued by the signatory of the autonomous guarantee[32].

Fraudulent collusion or connivance between the beneficiary of the autonomous guarantee and the issuer of the guarantee may justify a payment refusal, according to the provisions of Article 2321 of the Romanian Civil Code, which perfectly respects the symmetry with the counterpart provisions on the guarantor's right to reject the payment in case of manifest fraud on the part of the beneficiary or of collusion with the issuer of

[30] Goicovici, J. 2021. The Distributive Classification versus the Homogeneous Classification and the Negotiating Authorisation in the Field of Commercial Agency Contracts. *Romanian Review of Private Law*, 2021(1), pp. 361-383.

[31] Goicovici, J. 2015. Garanţiile ascendente, în reglementarea Noului Cod civil. *Curierul Judiciar,* 2015(3), pp. 135-138.

[32] Simler, Ph. 2015. *Cautionnement: garanties autonomes, garanties indemnitaires*. 5th ed. Paris: LexisNexis, pp. 74-83.

the order establishing the guarantee's interests. Since, for the guarantee issuer, it might be difficult to determine if it was a deliberate, intentional omission on the beneficiary's part, or the latter's conduct was characterized by unjustified negligence[33] in performing the contractual obligations, the mechanism of the manifest fraud reprisal is apparently difficult to decipher[34]. Defined as representing malicious collusion between the patrimonial interests of the contractual parties or defrauding the legitimate interests of a third party, the collusion of interests has not been expressly mentioned by the Romanian legislator as a legitimate reason for the refusal of payment issued by the signatory of the counter-guarantee[35]. Yet, it implicitly represents one of the hypotheses in which the issuer of the counter-guarantee can refuse payment if the premises for a legitimate refusal are substantially met[36].

While the reprisal of the creditors' abusive exercise of payment rights in the perimeter of autonomous bank guarantees is not subject to a specific regulation, general provisions are derived from the text of Article 15 of the Romanian Civil Code, according to which no right can be exercised pursuing the aim of harming or damaging another party's legitimate interests or in an excessive and unreasonable manner, contrary to contractual good faith. On the other hand, similar solutions may be extracted from the provisions of Article 1353 of the Romanian Civil Code, according to which the creditor who causes damage to third parties while exercising the rights is liable for repair requests unless his/her rights were not exercised in a manifest couplable manner. It was emphasized that the exercise of a right within the mentioned limits protects the holder against any responsibility for the damages that it could cause, while the exercise in an abnormal manner, by diverting the right from its typical, legitimate purpose, constitutes an abuse of right, with the consequence of the obligation to repair the damage thus caused to other parties, either through the mechanism of contractual liability or through the prism of tort liability[37].

When it comes to the manifestation of the abusive nature of the payment request addressed by the beneficiary of an autonomous counter-guarantee in practice it was held that, in this regard, the creditor's couplable conduct materialized in addressing the payment request to the second guarantor (the signatory of the counter-guarantee) cannot result exclusively from the manifestly abusive nature of a similar payment request addressed to the primary guarantor. Rather, it involves proving the existence, at the time of issuing the request for the counter-guarantee payment, of a collusion between the legitimate interests of the first-rank guarantor (beneficiary of the autonomous counter-guarantee) and

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[33] 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.

[34] Goicovici, J. 2015. Culpa creditorului în moderarea prejudiciului, conform Noului Cod civil. *Analele Universității de Vest din Timișoara-Seria Drept,* 2015(1), pp. 24-35; Goicovici, A. J. 2014. *Creditele pentru consum si de investitii imobiliare. Comentarii si explicatii.* Bucharest: C.H. Beck, pp. 81-89.

[35] Legeais, D. 2022. *Droit des sûretés et garanties du crédit.* 15e éd. Paris: L.G.D.J., pp. 216-219.

[36] International Chamber of Commerce (I.C.C.). 2022. Pratiques internationales standard relatives aux garanties sur demande. Soumises aux RUGD 758 - Version bilingue anglais-français.

[37] Wéry, P. 2020. *Les rapports entre responsabilité contractuelle et responsabilité extracontractuelle.* Wavre: Anthemis, pp. 78-82.

the beneficiary of the first-rank guarantee. While the guarantor may resort to personal exceptions, the issuer of the autonomous guarantee cannot resort to any of the exceptions deduced from the primary contractual relationship that generated the guaranteed obligation. Neither the nullity of the primary contract nor its resolution or termination, nor the non-compliant performance of the primary obligations can be invoked in order to justify a payment refusal. However, as a corrective (or counteracting) element of equity, the guarantor can reject the beneficiary's payment request in case of manifest fraud on the part of the beneficiary or of unjustifiable collusion with the issuer of the guarantee's patrimonial interests.

In the cases of superposing the effects of an autonomous counter-guarantee over those of an autonomous (primary) guarantee, it would be taken into account that the counter-guarantee has an autonomous nature, both in relation to the substantial contractual nexus from which the principal debtor's obligation was generated, as well as in relation to the first-rank guarantee. Consequently, in order for the payment request addressed to the second guarantor under the counter-guarantee to be considered abusive, it is necessary to simultaneously prove the fraudulent conduct committed by the beneficiary of the counter-guarantee (the first-rank guarantor), as well as the existence of fraudulent collusion between the primary guarantor and the beneficiary of the primary guarantee. The excessive nature of the payment request made by the beneficiary of the first-rank autonomous guarantee (resulting from the instrumented evidence) does not directly contaminate the autonomous nature of the payment request made by the beneficiary of the counter-guarantee, the latter being inadmissible only if fraudulent collusion between the legitimate interests of the primary guarantor and those of the beneficiary of the primary guarantee is proven.

Similarly, it was held that the guarantor (of secondary rank, based on the counter-guarantee) who complied with the request for payment formulated in good faith (not having a fraudulent character and not being based on a manifest abusive exercise of payment rights) cannot request the restitution of the payment, on the grounds that there is a case of non-performance of obligations by the debtor from the contract in which the guaranteed obligation originates.[38] In principle, the counter-guarantor who made the payment has a right of regress[39] for the recovery of the amount paid, against the primary guarantor (who, in turn, has a right of recourse against the issuer of the autonomous guarantee).

6. CONCLUSIONS

The autonomous guarantee of payment at the first request implies the existence of the guarantor's commitment to make the payment independently from the development of the effects of the basic B2B contract. The guarantor would not be able to challenge

[38] Aynès, L. Gautier, P.-Y. and Malaurie, P. 2022. *Droit des contrats spéciaux*. 12 ed. Paris: L.G.D.J., pp. 412-426; Boustani-Aufan, D. 2022. *L'essentiel du droit des contrats spéciaux*. 4th ed. Paris: Gualino, pp. 118-126.

[39] Mégret, G. 2011. *Les recours du garant. Contribution à l'étude du cautionnement et de la garantie autonome en droit interne*. Marseille: Presses Universitaires d'Aix-Marseille, pp. 91-103.

the request for payment on the basis of the exceptions extracts from the main contract. Thus, the autonomy of the letter of bank guarantee by reference to the contractual or substantial source of the guaranteed obligation, together with its corollary – the non-enforceability of the exceptions derived from the primary legal relationship – justifies the retaining of the guarantor's liability to pay. Congruently, the guarantor will be required to make the payment up to the concurrence of the amount established by the parties, without being able to oppose the beneficiary of the payment of any of the exceptions deduced from the clauses of the primary contract, the effects of which are indifferent in terms of performing the autonomous guarantee, with the notable exception of cases of fraudulent conduct imputable to the payment requester.

When transposing these conceptual benchmarks for the case where the first-ranking guarantor benefits, in turn, from an autonomous counter-guarantee, it should be noted that the beneficiary's obviously fraudulent conduct might manifest collusion between the interests of the first-ranking guarantor who takes advantage of the counter-guarantee, and the patrimonial interests of the issuer of the abusive payment request, addressed to the guarantor from the autonomous counter-guarantee. Nevertheless, resorting to evidentiary efforts of assessing the couplable nature of the beneficiary's request for payment remains crucial, in the hypotheses in which the issuer of the autonomous guarantee invokes the non-performance of obligations by the debtor from the B2B contract in which the guaranteed obligation originated. The identification of enforceable autonomous bank guarantees, the enforceability of which might be incidentally mirrored in the prerequisites of the primary contractual relationship, might present practical difficulties for the beneficiary of the autonomous guarantee. It depends on the non-fraudulent character of the beneficiary's payment request whether it remains possible for the enforceability deduced from the intrinsic value of the debt specified in the autonomous guarantee to be conjugated with the irrevocable nature of the autonomous guarantee. Similarly, the issuer's rejection of the payment request remains admissible in cases of fraudulent collusion between the legitimate interests of the primary guarantor and those of the beneficiary of the autonomous guarantee.

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INTELLECTUAL PROPERTY RIGHTS IN THE METAVERSE

The contribution is examining the exciting technological phenomenon of the metaverse through the lens of Intellectual Property Rights (IPR) and their potential application in this virtual ecosystem. More precisely, the focus of the paper is on three types of Intellectual Property Rights – Copyright, Patents and more extensively Trademarks. Firstly, the author offers some definitions and pinpoints the main features of the emerging virtual realities, as well as clarifies their interplay with blockchain technologies. Also, she underlines the flexibility of IPRs and the intangible nature of their protected subject matter, which makes it easier to extend the implementation of their legal norms from the real world to the realms of the metaverse. Further, the paper explores for each of the three IPRs the potential to contribute to the development of the metaverse and its economy, e.g. through the creation of virtual works of art and trading with "art NFTs"; registering Patens for hardware systems and devices that enable access to the metaverse (e.g. AR or VR glasses), and creating, trading and protecting through Trademarks virtual goods, which represent intangible twins of their branded real-life products.

Keywords: Intellectual Property, metaverse, NFT, copyright, patent, trademark.

1. INTRODUCTION

During the COVID-19 pandemic, a myriad of very common and everyday activities such as visiting a museum or a gallery, buying clothing at the store and showing them off in a public setting, going to a concert, travelling, and doing a sightseeing tour, collaborating on a project with your co-workers etc. became impossible due to worldwide lockdowns and safety restrictions. Physical distancing became the new social norm and affected many aspects of our lives. This was particularly the case for people whose professions are based on interhuman connections and whose income relies to a major extent on implementing in-person events – such as musicians (EUIPO, 2022a). For many people, the first ever encounter with the concept of the metaverse, if it was even popularized as a term

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at the time, in fact, happened during the pandemic. It occurred through a series of virtual musical events, which took place in 2020 and 2021 in the virtual reality of the video game Fortnite (Ariana Grande and Travis Scott) or the metaverse Roblox (LiL Nas), with more than impressive audience numbers of 78 million for Grande and nearly 46 million for Scott (Mirrorworld, 2022; EUIPO, 2022a). However, some artists tested the "virtual-tour waters" even before, such as Marshmello in 2019 (Mirrorworld, 2022).

Due to the lack of social interaction, the curiosity for the potential of virtual worlds rose during those years, coupled with the enthusiasm for cryptocurrencies and non-fungible tokens or NFTs. With all those elements combined, virtual ecosystems started to develop. Virtual goods as digital twins of real-life (branded) products were created, cryptocurrencies were being used as the means of their payment on the virtual marketplaces, NFTs were minted on the blockchain, which referred to those goods or digital works of art, new software applications for the metaverse were implemented, and innovative hardware devices were introduced to enhance the merging of the real and the virtual words.

And then came the legal issues. While these arose in many areas of law, the present paper aims to examine the interplay between three particular Intellectual Property Rights - copyright, patents and trademarks - and the metaverse. Similar to the Internet, which was in the period of its emergence wrongfully considered ungovernable and lawless, the metaverse also does not represent a "virtual Wild West". The question is, however, to what extent the legal norms of Intellectual Property drafted for the real world can be applied in the metaverse and which particular challenges does this technological phenomenon pose on copyright, patents and trademarks.

2. WHAT IS/ARE METAVERSE(S)?

Despite the fact many connect the term "metaverse" with the change of name of the company Facebook to Meta (Meta, 2021), this expression was coined long before. It was first used in the science fiction novel "Snow Cash" (Goodreads) from 1992, written by Neal Stephenson (Kaulartz, Schmid & Müller-Eising, 2022, p. 522; Uhlenhut & Bernhardt, 2023, p. 139). Even though the year of the book publication belongs in the era of Web 1.0 (Ro, Brem & Rauschnabel, 2018, p. 171), Stephenson had a vision of how Internet might evolve into a sphere based on virtual reality. The etymology of the phrase "metaverse" is based on the Greek word "*meta*", which means "after" and the Latin word "*universus*" (Uhlenhut & Bernhardt, 2023, p. 139), which means "whole" or "turned into one". Furthermore, although this concept became a catchphrase in recent years, many are unaware that already since 2003 and the introduction of the 3D virtual world "Second Life" (Second Life), we had the opportunity to "dive into" the predecessor of the metaverse of today (Uhlenhut and Bernhardt, 2023, p. 140; EUIPO, 2022a). The participants of this - what was back then considered only to be - a game, were able to create their own virtual reality, in which they would e.g. participate and interact with each other as avatars, buy and trade virtual goods and pay them with a virtual cryptocurrency "Linden Dollar" (Uhlenhut &Bernhardt, 2023, pp. 139 *et seq.*).

We might get lost in search of its definition, as metaverse is a rather new technological phenomenon, which is still in development and there is in fact no unanimous and, in particular, no generally applicable legal definition of the term. Some call it a new phase in the evolution and development of the Internet (Dietsch, 2022, p. 378; Tann, 2022, p. 1645), others even label it as its successor (Uhlenhut & Bernhardt, 2023, p. 139), while some define it as a virtual space, where users, without leaving the comfort of their home, can interact with each-other in multitude of ways, such as shopping, gaming, collaboration etc. (Park, 2022, p. 1).

Nevertheless, what we can agree on is that metaverse is a rather broad concept, characterized by several definable features, including Virtual Reality, Virtual Assets, Digital Identities (avatars or digital twins) and Interoperability, and which can be more or less prominent depending on the type of metaverse (Kaulartz, Schmid & Müller-Eising, 2022, pp. 522 *et seq.*).

Furthermore, metaverse can be operated in a centralized (e.g. Second Life) or a decentralized (e.g. Decentraland) manner (Uhlenhut & Bernhardt, 2023, p. 140), it can be accessed through a browser (2D), or by means of Virtual Reality (hereinafter: "VR"), or Augmented Reality (hereinafter: "AR") glasses (Ro, Brem & Rauschnabel, 2018, pp. 170 *et seq.*; Dietsch, 2022, pp. 279 *et seq.*), as well as with the help of so-called haptic, or VR- suits and it could be openly accessible to everyone or just a particular group of users (Kaulartz, Schmid & Müller-Eising, 2022, pp. 522 *et seq.* and 525).

Finally, it's important to underline that the metaverse it's not (yet) a single phenomenon, but there are currently many existing metaverses, which are not connected with each other, and their number is constantly increasing (Uhlenhut & Bernhardt, 2023, pp. 139 *et seq.*; Kaulartz, Schmid & Müller-Eising, 2022, p. 524; Ćeranić Perišić, 2022, p. 638).

3. VIRTUAL GOODS/SERVICES AND NFTs

From the perspective of Intellectual Property Rights (hereinafter: "IPR" or "IP"), in particular, the use of virtual goods/services, as well as non-fungible tokens (hereinafter: "NFT") in the metaverse, which fall into the metaverse feature of Virtual Assets, carries a lot of weight. Nevertheless, before we begin discussing the specific scenarios and issues that occur in virtual reality regarding individual types of IPRs, it is of important to clarify the above-mentioned categories and the distinction between them.

Virtual goods (and services, as applicable) are intangible goods, which can be inspired by or represent a truthful digital replica of their physical counterpart (e.g. a virtual car, or a piece of clothing for an avatar, which also exists in the real world), but can also be fully an expression of their creator's imagination and solely have a digital existence (Tann, 2022, p. 1645). Furthermore, not all virtual goods used in the metaverse are authenticated by NFTs and they don't have to be, but they can (Tann, 2022, p. 1645). In case they are, the "trading" of those goods uses blockchain technology as an instrument, which supports the transactions on the online marketplace within a particular metaverse.

When it comes to NFTs, it is important to underline the difference between the NFTs themselves on the one hand, which represent "unique digital certificates registered in a

blockchain, which **authenticate** digital items" and the particular digital item (e.g. virtual good or a digital work of art) to which the NFT refers to, and is distinct from the NFT (EUIPO, 2022b), on the other. They are not one and the same. The non-fungibility of the token is based on the fact that they are not exchangeable with tokens of the same kind (Grieger, von Poser & Kremer, 2021, p. 406), unlike e.g. crypto-currencies. Finally, it needs to be pointed out that there are several attributes not substantially assigned to these cryptographic units of data (Ramos, 2022, p. 1), only some of which we will clarify later in the context of metaverse and copyright.

4. METAVERSE AND IPRs

The concept of dealing with and awarding protection to something that is intangible (i.e. immaterial), which constitutes one of the main features of the metaverse and the virtual markets in the context of virtual assets, is rather "old news" for IPRs, such as copyright, patents, trademarks or industrial designs. For more than 300 years, the purpose of IPRs has been to safeguard the intangible creations of the human mind. Therefore, it is a natural consequence that IPRs are playing a pivotal role in shaping the metaverse realm (Uhlenhut & Bernhardt, 2023, p. 146), but also that the participants in this virtual reality will need to respect IPRs just like in the real world (Ramos, 2022, p. 2).

As is the case with the Internet, in the metaverse as well there is no legal vacuum (Uhlenhut & Bernhardt, 2023, p. 141) and it is without a doubt that IPRs enjoy protection also in virtual reality, particularly due to their above-mentioned nature (Ramos, 2022, p. 2). However, it is necessary to establish - and that will probably be the role of courts – how to apply the existing national and EU IP norms to the circumstances that occur in the virtual sphere. Nevertheless, one might argue that despite their adaptable nature and the similarity of the subject matters they protect, with the virtual assets dealt with in the metaverse, IPRs would still need to undergo a certain reform, in order to be applicable in the metaverse. That might even be true. However, we can hardly expect some radical interventions in the existing legal framework. While the IPRs have throughout their history been continuously challenged by technological advancements – from the printing press, radio and television broadcasting, the photocopying machine, digital technologies, and the Internet, the existing IP principles and legal provisions were always able to accommodate such developments, without the need to "reinvent the wheel" each time (EUIPO, 2022a).

4.1. Metaverse and copyright

Case law (Urteil des Landgerichts Köln, 2008, p. 535) confirming that works that are eligible for copyright protection can also be generated in the virtual space, like in the metaverse game "Second Life", is already in place.

Digital (or virtual) art and the online market for such art is not a novelty introduced by the birth of the metaverse but has been a rather profitable business (Papastefanou, 2022, p. 344) for decades. The emergence of digital technologies resulted in the digital format

becoming the predominant form of expression for different categories of copyrighted works. Consequently, the marketplaces within particular metaverses can also include the trade of digital or digitized works of art – in the sense of them being "digitally born" (originally created in the digital format and even in the metaverse itself) or representing digital twins of physical works from the real world (Papastefanou, 2022, p. 344).Unlike the physical art, where a lot of the market value of the actual work is vested in the fact that there is only one unique piece of it (an original), or an explicitly limited number of pieces of that work, which is/are authenticated by its author's signature, this does not apply to digital art. Every digital file of that work of art is the same and it can be usually very easily (also illegally) reproduced, once the work is online (Garbers-von Boehm, Haag & Gruber, 2022, p. 18). That is when the so-called "art NFTs" come into play and connect the metaverse marketplaces with the blockchain economy, in the way that they attempt to resolve the problem of the lack of "uniqueness" of digital art (Papastefanou, 2022, p. 344). Namely, through the connection of the file of the digital work of art to the unrepeatable and unique token, a public perception is created that the latter file can be considered an "original (file)", which increases its value due to this new-won "uniqueness" (Garbers-von Boehm, Haag & Gruber, 2022, p. 17). However, as a matter of fact, this "uniqueness" is nothing more than a matter of impression, since the category of "digital original" is somewhat of an oxymoron (Papastefanou, 2022, pp. 344 *et seq*).

Although the hype around the so-called "Art NFTs" is still very much ongoing, one needs to bear in mind that the acquisition of the NFT only gives one the power to dispose of the token itself, but not necessarily also the right to the digital asset that the token is referring to (Kaulartz, Schmid & Müller-Eising, 2022, pp. 527 *et seq*.; Hugendubel & Dönch, 2022, p. 454). In case the asset represents a digital work of art protected by copyright, the NFT "owner" also, as a rule, obtains no copyright by the act of creation, or the "purchase" of the NFT at stake. Finally, the connection between the NFT and the digital artwork itself is more trust-based than actually technical or legal and it is built on the perception and mutual trust within the NFT communities (Papastefanou, 2022, p. 347). Hence, the spirit of idealization surrounding the potential, capabilities, and attributes of "art NFTs" and NFT markets, did not necessarily take into consideration the technical and in particular the legal limitations related to this technological phenomenon (Papastefanou, 2022, p. 342).

Several potential issues related to "art NFTs" from the copyright perspective are being discussed, particularly the legal implications of the technical steps that accompany the process of "minting", or the creation of the "art NFTs". Then, regardless of whether the digital file of the work of art (the source), to which the new "art NFT" is going to refer to, is stored on the blockchain (which is rarely the case), or in a repository outside of it, this act of storing represents a reproduction of the work, which is an exclusive economic right of the author (Garbers-von Boehm, Haag & Gruber, 2022, pp. 31 *et seq*.). Consequently, as a rule, only the authors or third authorized parties are entitled to create such NFTs, or otherwise there is a copyright infringement, which can thus also take place on the metaverse marketplaces.

4.2. Metaverse and patents

When it comes to the topic of this particular IPR, metaverse-related patent filings stand at the forefront of the discussion. Patents give their owners a set of exclusive rights to economically exploit the protected inventions and thus incentivize further innovation, but also play an important role in the stimulation of technological progress through the dissemination of technical information. Again, patent legislation also extends its application to the realm of the metaverse. Therefore, inventions developed, and patents obtained for use in the metaverse will need to meet the same protection requirements as the ones for the real world, i.e. novelty, inventive step and industrial applicability (European Innovation Council and SMEs Executive Agency, 2022).

The metaverse represents an emerging technological phenomenon, the borders, applications and manifestations of which we are yet to grasp. Filing patents for metaverse-related inventions represents a strategic step for visionary companies, which are brave enough to act as "first movers" and, despite the (economic) risks, attempt to secure their position and obtain priority in shaping and influencing the form and content of the virtual realities (Caulder, Kovarik & Benham, 2022). Consequently, future-oriented technology companies, such as Roblox, Nvidia, Epic Games, Microsoft, IBM, Unity, Apple and of course, Meta have long begun applying for patent protection regarding metaverse technologies (Caulder, Kovarik & Benham, 2022). The latter include software inventions (where the relevant patent legislation allows it) and inventions of hardware systems and devices (headsets, suits, displays, cameras, user control interfaces etc.) related to the above-mentioned AR, VR, but also mixed reality (hereinafter: "MR") and extended reality (hereinafter: "XR") (Caulder, Kovarik & Benham, 2022; De Pablo, 2023; European Innovation Council and SMEs Executive Agency, 2022; Zodieru & Gelfound, 2023; Gerratana, 2023). The goal of the metaverse-related hardware innovation is partially focused on removing real-life difficulties when accessing virtual realities, which at this point still determines metaverse as a niche technological concept. They include e.g. the reduction of the weight and bulk of VR/AR/MR/XR kits for the users to be able to wear them for longer periods of time and introducing means in these kits that prevent e.g. motion sickness etc. (De Pablo, 2023). When it comes to patenting software-based inventions, e.g. the ones implementing processes that are new, or perhaps also already known in the real world, it is important that they also entail metaverse-specific problem solutions, in order for them to qualify for obtaining patent protection (Gerratana, 2023).

From January 2020 to May 2022 there have been 4,670 metaverse-related patent applications filed at the United States Trademark and Patent Office (hereinafter: USPTO) (Cryptoflies, 2023). The surge of metaverse-patenting is mostly related to the United States of America and China as a runner-up, but not necessarily to Europe, mostly due to the lack of patentability of computer programs per se (De Pablo, 2023). Notwithstanding, a computer program-based invention, which displays technical application or implementation, could potentially obtain patent protection in Europe as well (European Innovation Council and SMEs Executive Agency, 2022).

One of the most prominent examples of patents in relation to metaverse and the supporting blockchain technology is related to the project "CryptoKicks" and it's a patent owned by the company Nike for the "system and method for providing cryptographically secured digital assets" (Patent No. US 10, 505,726 B1, 2019). According to the published patent, when a consumer buys a genuine pair of shoes ("kicks"), a digital representation of a shoe may be generated, linked with the consumer, and assigned a cryptographic token (an NFT), where the digital shoe and cryptographic token collectively represent a "CryptoKick". Consequently, the invention enables the connection between a physical pair of sneakers, and their digital representation (virtual good), which can be worn by the buyer's avatar in virtual reality (De Pablo, 2023) - the Nike-created metaverse called "Nikeland". In a sense, the "CryptoKick" NFTs also serve as certificates of authenticity for the physical shoes (Hugendubel & Dönch, 2022, p. 452; European Innovation Council and SMEs Executive Agency, 2022).

Notwithstanding the latter, there is a number of questions that the virtual reality of the metaverse poses before the patent law, e.g. the legal regime of inventions created in the metaverse by an avatar, the conflict between the territoriality of patent protection and the ubiquity of the metaverse (European Innovation Council and SMEs Executive Agency, 2022), the assessment of novelty in the context of metaverse (Nega, 2023) etc., which are yet to be answered.

4.3. Metaverse and trademarks

The last, but certainly not the least interesting IPR, which is of particular significance in the context of the metaverse, is trademark. Unlike with regard to works of authorship, which are created in the domain of literature, science and art, where the focus is on the author as the original copyright holder and his/her connection to the work, or patents where the legal systems award protection to inventors to promote further innovation and publication of technical information, with trademarks we find ourselves primarily in the arena of commercial activities of subjects, who use their trademarks as identifiers in market competition. A trademark is at the same time an instrument of business and a right that protects a sign, which serves to distinguish goods or services of one participant in the economic life from the same, or similar goods or services of other participants.

Initially, when introducing trademark rules, the national and EU-legislator had only in mind the identification and distinction of physical goods (and services), which are available on the real or the digital market (e-commerce), without anticipating the creation of the metaverse as a completely independent, virtual market of intangible goods. Hence, the emergence of the metaverse introduced several very new and controversial dilemmas. For example, in the event that virtual goods/services in some way contain a trademark of an entity, that has not given its consent for the use of that trademark in those goods/services, does this represent a trademark violation, even though the trademark protection only applies to physical goods/services? A similar question arises also in the context of NFTs when someone creates an NFT and the virtual goods or services

to which that NFT refers, or the NFT itself, involve a trademark of a third person, who is not the "owner" of the NFT in question. Furthermore, does the trademark protection from the real world, which is acquired for physical goods and services, in general, extend to the virtual environment and virtual goods and services? Finally, is it a prerequisite for establishing trademark violation in the metaverse, that the trademark holder himself already operated in the virtual market in the same sector as the unauthorized trademark-NFT creator, or the creator of virtual goods/services including his trademark? And many, many more.

The mentioned dilemmas did not seem to negatively affect the metaverse economy. According to the latest data, the revenue in the metaverse Virtual Assets market is projected to reach US$ 2.45 billion in 2023 and the number of users in this market is expected to amount to 38.56 million by 2030 (Statista). It is of importance to underline that this economy is being implemented with the support of other technologies, in particular blockchain technology, which enables the acquisition and trading of virtual goods (and services) in the virtual marketplaces that exist within metaverse platforms. Furthermore, these goods (e.g. clothing, cars, real estate) and services (e.g. in the field of education or tourism) are being paid in cryptocurrencies (Uhlenhut and Bernhardt, 2023, p. 140), thus the metaverse and the blockchain economy are vitally intertwined.

4.3.1. The scope of trademark protection in the metaverse

Many companies have discovered and recognized the virtual reality world as a new business opportunity. The latter is, in particular, the case with cosmetic, entertainment fashion and sports fashion (e.g. Nike and Converse) industry, where the garments are offered either solely as virtual clothing for the avatars (so-called "skins"), or as so-called "phygitals" (Prior, 2021), i.e. as a combination of a physical good (e.g. a pair of shoes) for the real person and the respective virtual good for his/her avatar in the metaverse (Uhlenhut & Bernhardt, 2023, pp. 140 *et seq.;* Park, 2022, p. 1). A number of renowned fashion companies, such as Hugo Boss, Tommy Hilfiger, Versace and Levi's recently filed trademark applications at the USPTO to enter the metaverse, offer virtual goods, but also virtual spaces where brand-lovers can socialize and establish communities and also participate in virtual fashion shows, such as Decentraland's Metaverse Fashion Week (Cryptoflies, 2023).

However, there are also other companies, that have not (yet) shown interest in expanding their business activities to the metaverse, which some third parties recognized as an opportunity to use those branded products in the metaverse to their gain, like in the case of Hermès (Eshaghian, 2023), or even to try and obtain trademark protection in bad faith for themselves, as it was the case with Gucci and Prada (Uhlenhut & Bernhardt, 2023, p. 143; Park, 2022, p. 2). This poses the question, to what extent can someone else's trademark be freely used in connection to a virtual good or an NFT referring to that good? Since there is a myriad of potential applications for a trademark in the virtual sphere, there is no clear answer to that question and only the future case law on this issue will provide us with some clarity.

However, in the context e.g. of gaming, there are already to an extent some principles established by courts (Uhlenhut & Bernhardt, 2023, p. 143; Körber & U-Ju, 2007, pp. 613, 615; Ramos, 2022, p. 3). According to the latter, the target users of a computer game, which e.g. includes a computer-simulated replica of a model vehicle that actually exists in reality and carries the trademark of the manufacturer, will actually not assume that this virtual vehicle stems from the original producer, but only perceive it as an expression of a truthful virtual representation of reality. Furthermore, like in the case of the use of the Humvee military vehicle in the video game "Call of Duty", the goal of the game manufacturer was not to use the trademark, but to display a realistic virtual replica in the game setting, which includes also a truthful virtual simulation of the vehicle (including the trademark it carries). Therefore, such use was established by the United States District Court of the Southern District of New York to have artistic value and to fall under fair use. Hence, there was no trademark infringement.

However, it is questionable if this principle can also be applied to the case of virtual goods and trademarks in the metaverse. The marketplaces, in particular of the open metaverse platforms, are based on a different approach by the relevant public, in the sense that the participants in the virtual reality are searching out, purchasing and trading virtual goods, exactly because they represent a counterpart of the branded physical good of a particular manufacturer (Uhlenhut & Bernhardt, 2023, p. 144). Perhaps one that they desire and would like to buy in the real world but cannot afford, or plainly cannot even have access to, due to its exclusivity. Consequently, virtual products carrying strong trademarks can be viewed as status symbols as much as their counterparts from the real world (Uhlenhut & Bernhardt, 2023, p. 141).

Furthermore, there is another reason for the distinction regarding the approach to the use of branded virtual goods in plain virtual computer games, on the one hand, and in the metaverse-type virtual realities on the other. Specifically, it lies in the demarcation between these two types of virtual worlds based on their characteristics (Dietsch, 2022, p. 380). Whilst virtual computer games usually display the elements of closed virtual worlds (so-called "Theme parks" and "Mashup Systems"), metaverses are open virtual realities, which can be internalized (e.g. Second Life) and are classified as so-called "Walled Gardens", or externalized, and fall into the category of so-called "Sandboxes" (e.g. Decentraland) (Dietsch, 2022, pp. 380 *et seq.*; Radoff, 2022). Both "Walled Gardens", in which the users can participate in designing the virtual world by e.g. creating new content (even new virtual goods), but the economy of the world (e.g. rules, currency and purchasing) is controlled by the platform's creator and "Sandboxes", as platforms that can be altered and redesigned by users and shared also outside of this system, have the potential of harbouring real markets within these virtual worlds (Dietsch, 2022, pp. 380 *et seq.*; Radoff, 2022). Furthermore, when we consider that transactions related to virtual goods in the metaverse are based on the use of cryptocurrencies and also often the use of blockchain technology by means of NFTs identifying these goods, it is clear that virtual markets have an enormous economic impact. The latter is a feature that makes them different from virtual computer games and justifies a different legal approach toward the use of trademarks in the metaverse.

4.3.2. Similarity between virtual and physical goods

When entering the virtual market, cautious trademark owners from the real world should as soon as possible seek trademark protection for corresponding virtual goods. It is questionable whether the effects of trademark protection for tangible goods and for services provided in the physical context can without reservation be expanded also to the virtual reality. Furthermore, one could argue as to whether there is even similarity between physical goods and real-life services and their virtual counterparts (Uhlenhut & Bernhardt, 2023, p. 145) and whether a likelihood of confusion between the real-life trademark and identical or similar signs used on virtual goods/services can be established (Park, 2022, p. 3).

As some authors point out (Tann, 2022, pp. 1646 *et seq.*), a vast number of elements were examined in order to establish the existence of that likelihood, or a lack thereof, such as the relevant public, similarity of goods with regard to their distribution channels, promotion, designated use and business practice, show that there even might not be one. Although the examination result will most certainly be case-dependent, in general, the analysis shows (Tann, 2022, pp. 1646 *et seq.*) that the relevant public displays a higher level of attention when buying virtual than real goods, that virtual goods have different distribution channels than their physical counterparts and that those two categories don't substitute each other regarding the designated use. Nevertheless, similar platforms are used for the promotion and marketing of both virtual and real goods and due to new business practices of companies, which tend to extend their real-life business to virtual markets and corresponding expectations of the public to find virtual twins of their physical products, the conclusion is that there is a level of similarity between virtual and material goods; however it is considered to be weak (Tann, 2022, pp. 1647 *et seq.*). In other words, trademark owners need to enhance their trademark portfolios with a set of separate trademarks for the virtual counterparts of the goods and services they offer in the real world. Otherwise, they might find it difficult to protect themselves from the use of those real-life trademarks on virtual goods and services by third parties in the metaverse.

The latter should not however necessarily be a problem for owners of well-known marks, since they only need to show the likelihood of association or the mental link between their trademarks and the signs used on virtual goods/services (Park, 2022, p. 3; Tann, 2022, pp. 1649 *et seq.*).

4.3.3. Registration of trademarks for the metaverse

Notwithstanding the latter, several issues arise also when a trademark application is sought in connection to virtual products used in the metaverse. One of them is, for example, comparable to patents, the principle of territoriality of trademarks, which poses the question of which territories trademark protection for virtual goods/services be sought, in order for it to enjoy protection in the (worldwide) metaverse (Uhlenhut & Bernhardt, 2023, pp. 144 *et seq.*). Finally, there is also the dilemma of which class(es) of goods and services should a "metaverse-trademark" be applied for.

The metaverse-enthusiastic companies have in the early stages of "metaverse-oriented" trademark filing identified class 9 to be the most applicable for the virtual goods (downloadable virtual goods, namely computer programs) and classes 35, 36, 41 and 42 for the virtual services (Park, 2022, p. 2; Hugendubel & Dönch, 2022, p. 456). Hence, it was inevitable that, under the onslaught of trademark applications for virtual goods and services (as well as NFTs), the competent regional administrative bodies and international organizations needed to respond quickly to the needs of the market and adjust their rules.

Regarding the Nice Classification (WIPO, 2023), the commission of experts, composed of representatives of all the countries that make up this international agreement, and responsible for updating the classification, which is published every year in the form of new versions and every three years in the form of new editions (WIPO), didn't wait very long with its reaction. The new, 12th edition of the Nice Classification, which is effective from January 1, 2023, includes changes in classes 9, 41 and 42. What is interesting is that virtual goods and services are not classified in the same classes as their physical counterparts (Uhlenhut & Bernhardt, 2023, p. 141), but in the three above-mentioned classes. So, for example, luggage and leather clothing and footwear, which are classified in class 18, when in a virtual format (so-called virtual fashion), are not in that class, but in class 9. That class has been updated to include "downloadable digital files which can be authenticated by non-fungible tokens". In other words, these are virtual products that are linked or identified by NFTs. Furthermore, the goods that in the earlier edition of the classification were qualified as "downloadable computer software for managing crypto-currency transactions using blockchain technology" have been redefined to "downloadable computer software for managing crypto-asset transactions using blockchain technology", which clearly extends this class to other types of crypto assets, such as NFTs. In addition, class 41 now includes "providing of online virtual guided tours", which may be an activity/service relevant to activities in the metaverse, and class 42 has been comparably expanded with respect to virtual services, so that instead of "crypto-currency mining/crypto-mining" now the term "crypto asset mining/crypto-mining" is used.

On the EU level, the European Union Intellectual Property Office (hereinafter: EUIPO), as an EU- executive body responsible for the registration of the supranational EU-Trademark, which exists parallel with the national trademark systems of the Member states, also adjusted its Examination Guidelines in 2023 (EUIPO, 2023, 6.25). The goal of this amendment was to accommodate the need of right-holders to protect their trademarks in the virtual world and to unify and regulate its approach to the classification and qualification of NFTs and virtual goods and services in this context. In general, the position of the EUIPO is that the terms "downloadable goods" and "virtual goods" lack clarity and precision and must be further specified (indicate which goods they refer to, e.g. downloadable goods, namely, downloadable multimedia files in class 9, or retail of virtual clothing in class 35 (EUIPO, 2023, 6.25). The term "NFT" as such is not considered by EUIPO to be acceptable and must also further specify the category (asset) to which it refers to (e.g. downloadable digital art, authenticated by an NFT in class 9) (EUIPO, 2023, 6.25; Tann, 2022, p. 1645).

5. FINAL REMARKS

Who would have thought that what at first glance seems only like a futuristic "make-believe world" (Park, 2022, p. 1) could have so many legal implications and raise a vast number of legal questions? This is true both for IPRs, but perhaps even more in relation to other legal fields, which are unfamiliar with the concept of protecting and dealing with intangible subject matter. There are many more dilemmas to come since the trajectory in which the metaverse will develop is still rather open. Also, its mainstream success is very much dependent on the possibility for its potential participants to use it on a mass scale (Kaulartz, Schmid & Müller-Eising, 2022, p. 522). This accessibility was not necessarily given when it comes to 3D virtual realities, due to the inadequacies and the prices of the hardware devices (e.g. AR/VR/MR glasses and haptic suits), but this can significantly change in early 2024, once a brand-new Apple product enters the market. In the Fall of 2022 Apple announced the development of its own mixed reality headset (Gerratana, 2023) and at the beginning of June of 2023 the Apple Vision Pro was introduced to the broad public (Apple, 2023). The latter represents an expression of spatial computing technology, it blends the digital and real world and supports both AR and VR applications (Cross, 2023). Since Apple is by now known to be able to boost new product categories (Sorkin *et al.,* 2023), this new headset might just be the catalyst for precipitating technological development in this field and could even conventionalize the use of such headsets. Finally, when we look at this new development from an IP perspective, it is noteworthy that Apple has filed over 5000 (metaverse-related) patent applications in connection to this headset (Cross, 2023).

Although many would be happy about it, as elaborated in this contribution, the metaverse by no means represents a lawless sphere (Kaulartz, Schmid & Müller-Eising, 2022, p. 531). In particular, the IPRs find it easier to achieve transferability and applicability of their legal norms to virtual realities. However, the enforcement of IPRs in the metaverse, due to its ubiquity, will be a separate challenge (Uhlenhut & Bernhardt, 2023, p. 146). The further developments in this field and the legal responses to it remain to be seen – from a real, or a virtual desk.

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WAIVER OF MORAL RIGHTS IN COPYRIGHT LAW: WHAT BANGLADESH CAN LEARN FROM THE UK APPROACH?

The provisions pertaining to moral rights were included in the copyright law of the United Kingdom (UK) as a consequence of the enactment of the Copyright, Designs and Patents Act 1988 (CDPA). The UK has included a comprehensive waiver of the moral rights clause in CDPA, although the Berne Convention provides no definitive guidance on this issue. In contrast, the Copyright Act of Bangladesh, enacted in 2000, has a provision for moral rights compliant with the Berne Convention. While Bangladesh has maintained full compliance with the Berne Convention in regard to moral rights, the Copyright Act, 2000 contains no specific provision regarding the waiver of moral rights. There is no doubt, however, that the explicit clause addressing the waiver of moral rights in the UK's copyright legislation offers authors and publishers significant benefits. Because retaining ambiguity or grey areas in the law, such as Bangladesh's copyright statute, might generate unnecessary confusion and impediments to the author's freedom of choice. From this perspective, this article will attempt to analyse the UK's approach to waiving moral rights, given that both countries share exact origins in copyright legislation. This article will also discuss whether the possible insertion of a waiver provision to the copyright statute of Bangladesh will be advantageous and beneficial to authors and publishers.

Keywords: copyright law, Bangladesh, the UK, moral rights, waiver.

1. INTRODUCTION

According to copyright law, it is crucial to recognise that the author and copyright owner have distinct legal positions, as the author of a copyrighted work does not always retain the copyright. Even the licensed user of a copyrighted work also has some rights and obligations. In copyright law, an author with copyright ownership gets two types of rights: economic rights and moral rights (World Intellectual Property Organization,

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2016). Usually, an author could straightforwardly transfer or assign the economic rights of the work to anyone under copyright law (Rosati, 2021). With economic rights, a person could be the economic beneficiary of the work and be referred to as the copyright owner, whereas the moral rights remain with the author.

Moral rights permit authors to be in charge of how their creation is treated and presented by any licensed or unlicensed user (Rosati, 2021). Due to ownership or licence, an author may not have the right to enjoy the economic benefits of his or her work, but he or she has the right to intervene if he or she discovers a violation of the moral rights of that work. Most countries in the world enacted their copyright law so that the author or copyright owner could effortlessly transfer or assign their work to another person. Besides the author, the publishers and other copyright holders enjoy economic rights with limitations since the moral rights are in the author's hands.

The legal system of copyright has provided fundamental protection to the authors through the doctrine of moral rights. Nevertheless, this protection sometimes creates issues for copyright owners and publishers. In some circumstances, the publisher/copyright owner could demand to modify the author's writing, but they cannot do it since the authors could use their power of moral rights to impede them from doing such a thing. Waiving moral rights could be a solution to this issue as this step will ensure that the author and publishers are in a balanced position in the aspects of bargaining. However, the Berne Convention is silent on the issue of waiving moral rights (Harding & Sweetland, 2012).

Waiving moral rights from copyright work could make it more valuable to the publishers as they would get freedom. Countries that follow the civil law system do not permit the author to waive their moral rights; however, most common law countries are interested in giving the authors the power to waive their moral rights (Almawla, 2012). In Bangladesh, the legal system's structure follows the common law system, and the legislation on copyright law is Copyright Act, 2000. Copyright Act, 2000 acknowledges the author's moral rights in section 78, but unfortunately, there is no clarification on whether the author can waive the moral rights (Siddique, 2021).

The global situation, on the other hand, is not ambiguous. The United Kingdom explicitly permits the waiver of moral rights in their copyright legislation, and authors have the advantage of this provision. A relative study would help Bangladesh to determine how they should deal with this provision and whether to insert it into Bangladesh copyright law. Keeping a grey area in the legislation is not helpful for the system; it creates superfluous uncertainty. The authors of Bangladesh also require the freedom of choice, and this silence impedes their liberty. Undoubtedly, some lawyers may argue that authors are not well-versed in their copyright rights, and this grey area could protect those authors.

This paper will primarily analyse the history and approach of the UK regarding the concept of moral rights as well as waiving moral rights. Also included is a discussion on the moral rights provision of Bangladesh's copyright law. Since both countries share exact origins in copyright legislation, this article will also discuss whether the possible insertion of a waiver provision to the copyright statute of Bangladesh will be advantageous and beneficial to authors and publishers. In addition, this paper will discuss what Bangladesh can learn from the UK response to this issue.

Considering the aforementioned issues, the second chapter of this paper will examine the historical development of moral rights. The second chapter will begin the discussion of the main aspects of this paper and will show the relationship between the notion of moral rights and the author's waiver of moral rights. The third chapter will include perspectives from the United Kingdom and Bangladesh on the waiver of moral rights, as well as how these two countries' legislation incorporated this concept. The fourth chapter will provide a general conclusion based on the arguments presented in the preceding chapters. The fourth chapter will also conduct a reasonable analysis of the waiver of moral rights provisions between UK and Bangladesh copyright law.

2. HISTORICAL DEVELOPMENT OF MORAL RIGHTS

In simplified terms, moral right is a concept that asserts there is a bond between the author and his work. When an author creates any work, a special bond develops and remains permanently (Zemer, 2012). There is currently a well-established position in the copyright law regime for the protection of moral rights (Takenaka, 2013). At this time, the scope of this concept is frequently the subject of scholarly discussion. Prior to the past 200 to 300 years, proponents of this concept battled greatly to establish it in the eyes of the law (Takenaka, 2013).

2.1. Concept of Moral Rights

The author's own interests are central to the concept of moral rights. The concept of moral rights recognises the unique rights that arise for a work's author or creator as a result of its authorship or creation (Lee, 2001). Typically, such rights are devoid of economic interests and remain with the author/creator even after the transfer of copyright ownership (Lee, 2001). Nowadays, authors/creators also use their moral rights to obtain economic gains. There are two categories of moral rights that continental European nations commonly acknowledge:

Right of Attribution: Also known as a right of paternity. This could also be considered the author's right to be recognised in connection with his or her creations, with the expectation that they will be recognised for their unique aesthetic qualities (Marvin, 1971).

Right of Integrity: An author has this right when he or she objects to or denounces any interference with the work they created. For instance, if the publisher or editor decides to make any changes to the author's original version (Dworkin, 1994).

2.2. Origin of the Concept of Moral Rights

Although the exact origin of moral rights remains a matter of scholarly controversy, it is generally agreed that they originated in nineteenth-century continental Europe (Rajan, 2011). The development of this doctrine has two different schools, French and German (Rajan, 2011). The French school was more grounded in practice and less so in theory, whereas the German school was more theoretically robust but unsupported

by statutes and court decisions (Strömholm, 1983). However, it is somewhat less well-known that moral rights were discussed in UK court during the middle of the eighteenth century and the concept was proposed by English attorneys in two separate cases, but the court rejected it due to political and practical considerations (Rajan, 2011).

The idea of moral rights became popular throughout Europe in the nineteenth century. In 1828, a statute in Russia established the author as a separate legal entity, and in 1911, a historical modification of the country's copyright law acknowledged authors' moral rights (Rajan, 2006). Some scholars, such as Elena Muravina, identified moral rights as a fundamental principle in the copyright laws of Russia (Rajan, 2011). Nonetheless, it cannot be denied that continental Europe, and in particular France and Germany, hold a distinctive place in the history of moral rights. These two countries allowed the idea of moral rights to thrive and spread because of their progressive policies. However, it is also true that there were disparities among the schools of thought, and these divisions are rooted in the legal system (Rajan, 2011).

Because, in France, they separated the moral rights from the economic rights of the author and governed these two rights separately (Rajan, 2011). However, traditional German law viewed moral and economic rights as inseparable, hence governing them together as though they were two sides of the same coin (Rajan, 2011). The ideas of two distinct schools cannot be disregarded because they have contributed significantly to the evolution of the idea of moral rights in the present day. "Droit moral", which literally translates to "moral rights", was the French term for this concept (DaSilva, 1980). The French judiciary had a crucial role in the development of the concept, despite France being a civil law jurisdiction (where legal standards are typically affirmed by the civil code rather than judge-imposed precedents) (Marryman, 1976). Furthermore, several academics have argued firmly that the concept of moral rights was established in its entirety by the French judiciary (Marryman, 1976). Though it may term as "doctrine" but this concept was enhanced in France as a right of author instead a rule of law (Katz, 1951).

2.3. Early Position of the United Kingdom

Instead of giving ideological appreciation for the author, the foundation of copyright law in the United Kingdom grew out of responsiveness to the monetary value of an author's creation (Harding & Sweetland, 2012). Before adopting the moral rights concept, courts in the United Kingdom largely depended exclusively on legal concepts such as defamation, the right of privacy, and the law of contracts (Rigamonti, 2006). As mentioned earlier that, at the very premature stage UK court rejected the concept of moral rights (Patterson, 1968). In the year of 1769, UK court recognised the concept of moral rights in a case (*Millar v Taylor*, 1769). However, in 1775, the recognition got rejected in a subsequent ruling by UK court in another case (*Donaldson v Beckett*, 1774). When the rest of Europe embraced the new concept of moral rights then, what might have prompted the UK to take such an unusual stance? In the case that this question arises, it could be intriguing to examine UK's early stance on this concept.

According to Mira T. Sundara Rajan, two significant reasons exist behind this position (Rajan, 2011). The first is that the UK did not recognise moral rights in their copyright laws until 1988. The UK usually follows their copyright laws when it comes to copyright issues, and the fact that this idea is not in the laws could be a reason to avoid it (Rajan, 2011). The second one is that the UK was not ready to adopt an alien legal concept; since the concept of moral rights was an idea of French law, the UK was not ready to adopt it in a straight way (Rajan, 2011). However, it is not only a matter of translating legal provisions into English; it also involves adopting the cultural and legal perspectives of the country in question. Significantly, the legal and social culture of the United Kingdom was not very writer-friendly (Rajan, 2011).

To hold this argument of Mira T. Sundara Rajan, English writer W. Somerset Maugham states, "I knew that with his perfect sense of social relations he had realised that in English society as an author I was not of much account, but that in France, where an author just because he is an author has prestige, I was" (Maugham, 2003). Apart from the comments of the authors, in terms of the willingness, France shows a better interest and willingness to protect the moral rights of an author, on the other hand, the UK was not enough interested in establishing the moral rights till the year of 1988. Because, in that year, the UK produced a new legislation for copyright and included the concept of moral rights.

2.4. Development of International Law

The idea that thrived as moral rights in France was universally recognised in international documents in 1928 at the Berne Convention for the Protection of Literary and Artistic Works (Ong, 2003). Article 6bis of the Berne Convention encompasses the idea of the concept without using the term "moral rights". Article 6bis of the Convention requires signatory states to provide a minimum degree of legal protection compatible with all of its provisions.[1] Professor Ricketson asserts that Article 6bis of the Berne Convention empowers a creator/author to object to any additions, deletions, or modifications to his/her work (McCartney, 1990). In the Paris text[2], the first part of Article 6bis identifies and protects

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[1] Berne Convention for the Protection of Literary and Artistic Works, Article 6bis:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

[2] Berne Convention for the Protection of Literary and Artistic Works 1886 got Revised at Paris on the 24th July 1971.

most essential two types of moral rights: right of attribution and right of integrity (Harding & Sweetland, 2012). The second part of the article expressly standardise the duration of these rights (Fernández-Molina & Peis, 2001). Moreover, the third or last part of this article regulates the application of those rights (Fernández-Molina & Peis, 2001).

Article 6bis of Berne Convention (Paris text), that talks about how long moral rights last has been one of the most controversial points (Fernández-Molina & Peis, 2001). Please keep in mind that the term of protection for moral rights was not addressed in the original 1928 text. In this light, at the Brussels Conference (in 1948)[3], many suggestions were put in place to ensure better protection of authors' moral rights (Fernández-Molina & Peis, 2001). Please note, however, that all of them were rejected on the grounds that they did not pertain to private law but rather public law (Fernández-Molina & Peis, 2001). At a final point, in the year of 1971, in the round of Paris Revision, all reached a consensus regarding this issue, recognising the possibility of upholding the author's attribution right and integrity right after death and at least until the other significant right, namely economic rights, expired (Fernández-Molina & Peis, 2001).

However, this Berne Convention was not the first Convention that recognised moral rights. The Convention between the United States and Other Powers on Literary and Artistic Copyright 1910 first enshrined moral rights in their articles, but the Berne Convention rapidly became the most significant source of the concept of moral rights. Apart from this huge development, there are two other international instruments where moral rights have been enshrined: 1948 Universal Declaration of Human Rights (UDHR)[4] and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR)[5] acknowledged moral rights which are a tiny improvement in front of the development happened in the year of 1928 through Berne Convention in terms of the international protection and recognition (Rigamonti, 2006). However, it is an intriguing fact that one of the most important agreements, Trade-Related Aspects of Intellectual Property Rights (TRIPS), (which is much more persuasive instrument than Berne Convention) makes no mention of the moral rights concept. Such exclusion illustrates that inclusion of moral rights concept is not recommended by TRIPS (Kilian, 2003).

2.5. Waiver at the Early Stage

At the early stage, when the concept of moral rights was developing in France, the legal system was strict about the waiver of moral rights. In that era, authors were not permitted to waive their moral rights because it was believed that such rights are perpetual, inalienable and imprescriptible (Rajan, 2011). As this approach was chosen from the start by the French administration in regards to this concept, the sector is now prepared to operate with moral right as a significant fact. In contrast, the UK has included moral rights in its copyright law, but has also included a waiver mechanism. Although many

[3] Berne Convention for the Protection of Literary and Artistic Works 1886 got Revised at Brussels on the 26th June 1948.

[4] Universal Declaration of Human Rights 1948, Article 27(2).

[5] International Covenant on Economic, Social, and Cultural Rights 1966, Article 15 (1)(c).

scholars are opposed to the waiver approach because they believe it could be used as a weapon of occurrence by creating inequality in the negotiation process (Vaver, 1999).

As stated previously, France demonstrates a greater concern and desire to safeguard the moral rights of an author at this early period of development; hence, France avoids implementing the waiver of moral rights because it could lead to undesirable consequences. From the outset of the ideology, it was possible that the purchaser or publisher would be the more powerful party in a contract involving copyrighted material. As a result, the author's bargaining position was typically weak, and the purchaser could pressure the author into agreeing to a waiver clause (Rajan, 2011). In this age, however, a different viewpoint emerged, namely that an author can make his or her work possibly more valuable and worthwhile to a publisher by agreeing to a waiver clause. Several countries have embraced this stance because they view the copyright issue in a more economical approach, arguing that it offers both sides to an author–publisher contract equal bargaining power (Rajan, 2011).

3. APPROACH OF THE UNITED KINGDOM & BANGLADESH

As already mentioned, the concept of moral rights has been recognised in a number of European countries from the very beginning, although the United Kingdom initially forbade its establishment on its territory. The United Kingdom's position has shifted since it signed the Berne Convention, which gradually persuaded it to include a section protecting moral rights in its Copyright Act. According to the theory behind the present UK copyright law, when a writer releases his book to the public, it becomes a commodity that can be bought and sold (Kilian, 2003). Which is validated by the initial part of the UK Copyright, Designs, and Patents Act (CDPA).

Section 1 of the CDPA states "copyright is a property right", making it apparent that, from the UK's perspective, copyright is primarily an economic right tied to the property (Kilian, 2003). Waiver of moral rights is thus more in line with the stance of UK copyright law. However, the term "property right" is not used in the definition of copyright in the Copyright Act, of 2000 (Bangladesh law on copyright). Meaning that the UK's approach to determining copyright may not be adopted by Bangladesh. Thus, it appears that protecting the works of art is given greater consideration under Bangladesh's copyright legislation than the economic benefits.

3.1. The Inclusion of Moral Rights in UK Copyright Law

An out-of-the-ordinary custom developed as a result of the French Revolution – "The most sacred and legitimate, the most unchallengeable and personal of all the properties is the oeuvre; the fruits of a writer's thought"[6] (Holderness, 1998). The end result is a legislative framework in which "the author, a real person, has intellectual rights [in the work] and in consequence is sovereign in deciding its expression, disposition and

[6] Original text by Isaac René Guy le Chapelier (1791): "la plus sacrée et la plus légitime, la plus inattaquable et la plus personnelle de toutes les propriétés est l'ouvrage, fruit de la pensée d'un écrivain".

distribution. Authors further have 'moral rights', to protect their good name, their reputation and their works; the fact that these things are integral to the act of creation justifies these rights being perpetual and inalienable"[7] (Holderness, 1998). In contrast, the United Kingdom first dealt with the legal protection of moral rights in 1928, when it accepted Article 6bis of the Berne Convention (Kilian, 2003).

Despite being a part of the Berne Convention (at Rome in 1928), moral rights were not incorporated into UK copyright law. There were others who felt that the UK at the time did not do enough to safeguard the author's creative thought, instead only protecting the commercial value of the author's name and reputation (Marvin, 1971). The United Kingdom finally changed its intellectual property law i.e., copyright law with a new Copyright, Designs and Patents Act 1988 (CDPA). Copyright legislation in the United Kingdom finally includes precise words recognising the moral rights of authors and writers. The CDPA produced two latest rights for the UK, rights of attribution and integrity (Section 77 & 80).

3.2. Moral Rights Provision in UK Copyright Law

The CDPA offer authors the right of identification through section 77. Section 78 states that, the right of identification is applicable exclusively where it has been declared in written form in the artistic work or in an assignment or license covering the work. In accordance with section 79, the CDPA removes the right of identification from several works. In section 80, the right of integrity is expressed as the author's right to object to derogatory treatment of work. In section 81, CDPA described the exceptions of the right of integrity. According to section 84, the author has some additional rights regarding false attribution of work. Section 87 has provided the provision regarding consent and waiver of moral rights.

3.3. Waivability of Moral Rights in the UK

As was previously said, although the UK acknowledged the provisions on moral rights protection in 1928 at the Rome revision of the Berne Convention, the UK did not solely incorporate any form of moral rights provision in their domestic law until the year of 1988. The entire statute is written with a great deal of precision and attention to technological detail (Dworkin, 1994). Moreover, Chapter IV of the same Act on the moral rights is no exception. The intellectual property scholars have found many limitations on the component of the UK in the matter of moral rights. Davies & Garnett states that the entire chapter on moral rights is formatted as if this provision has been submitted or disseminated to the entire legal community with the statement "the unhealthy child of the Berne Convention" (Davies & Garnett, 2010).

[7] Original text by Becourt Daniel (1990): "L'auteur, personne physique, jouit de prérogatives d'ordre intellectuel et, à ce titre, décide en maître souverain de la réalisation et de l'achèvement de son oeuvre ainsi que de sa divulgation. Il dispose, en outre, de prérogatives d'ordre moral, destinées à protéger son nom, sa qualité et son oeuvre, tous éléments inhérents à la création, justifiant que ce droit soit édicté comme 'perpétuel' et 'inaliénable'."

Pay particular attention, and bear in mind the common law doctrine of implied waiver and contractual waiver, to the following discussion and considerations. Even though section 87(2) says that the waiver must be in writing and signed instrument, section 87(4) makes it clear that nothing in Chapter IV can stop a "contract or estoppel" from working in the case of an informal waiver. From this, it is clear that an author could waive his or her moral rights by using traditional process of contract or estoppel, even if the contract does not meet the formality requirements of section 87 (Brown-Pedersen, 2018). Consequently, there is a significant deficiency in this CDPA's protection of authors' moral rights because explicit guidance is inadequate about the applicability of informal waiver in copyright situation. In spite of the fact that the section 87 waiver does not necessary always violate the Berne Convention, it makes such violations easier to commit and offers only a minimal degree of protection to moral rights. It has been regarded in the debates that have taken place in the Parliament as being "totally against the spirit of the Berne Convention" (Hansard HL Deb., 25 February 1988; Hansard HC Deb., 28 April 1988).

3.4. Concept of Moral Rights in Bangladesh

The concept of Moral Rights is in the Copyright Act of Bangladesh. As British ruled this country till 1947, the legal approach of Bangladesh is quite comparable with United Kingdom. Formerly a part of the Indian subcontinent, Bangladesh came under British dominion after the East India Company, with whom it had been trading, seized administrative control of the region in 1757. Copyright laws was first enacted in India in 1847, with the passage of the Copyright Act, 1847, in reaction to similar legislation in England in 1842 (Dureja, 2015). The Indian Independence Act of 1947 established India and Pakistan as sovereign states, and East Pakistan was the name Pakistan gave to the land that is now Bangladesh. The Imperial Copyright Act, of 1911, and the Copyright Act, of 1914, as the existing legislation, continued as the law of each of the new dominions in accordance with section 18 of the Indian Independence Act, 1947.

The Copyright Ordinance, of 1962 replaced the earlier Copyright Act of 1914 and this statute was applicable in the whole country including East Pakistan (Bangladesh). After attaining independence in 1971, Bangladesh adopted Pakistan's Copyright Ordinance, 1962. Section 62 of the Copyright Ordinance, 1962 included a section titled "Author's Special Rights", which represents the author's moral rights. Through 1999, the Copyright Ordinance, of 1962 was in effect. A new copyright legislation, the Copyright Act, of 2000, was later approved by parliament in 2000 with provisions linked with international standards and which also gives nearly the same protection for moral rights as the Copyright Ordinance, of 1962. Even though the provision is not stated in detail, the Copyright Act kept the concept of moral rights in section 78. To indicate the moral rights, section 78 of the Copyright Act, of 2000 uses the same term "Author's Special Rights".

Furthermore, it should be noted that the moral right has been granted to authors/writers regardless of whether or not they own the copyright to the work. Authors/writers in Bangladesh are thus further afforded the protection of moral rights in two categories:

the rights of attribution and integrity. Section 78 of the Act made it possible for the author to retain authorship of his/her work, allowing the author to select how his/her name should be associated to the work. According to this section, the author has the absolute right to be credited as the original creator of his work. In addition, this section permits the author to seek redress if his or her identity as the creator of a creative work is misappropriated.

3.5. Waivability of Moral Rights in Bangladesh

It is absolutely factual that the Act of Bangladesh linked to copyright, the Copyright Act, 2000 appears like does not purposefully declare or clarify any particular terms on the waiver of moral rights. Consequently, there is currently no clear legal precedent in Bangladesh on this essential issue. Therefore, it is unclear if moral rights may be waived, according to the legislative body's position. In addition, it is necessary to keep in mind that nations that follow the common law system have the option of either the theory of implied waiver or waiver by contract. In some common law jurisdictions, such as the United Kingdom and New Zealand, formal and informal waivers of moral rights are expressly permitted.

Alternatively, the Chinese copyright law does not expressly or specifically recognise the waiver of moral rights, but finds this idea permissible since it is not contrary to public policy.[8] Regarding the waiver, the situation in India, the neighbouring country, is nearly identical. However, the higher judiciary of India has some remarks regarding the position on moral rights waiver. The Delhi High Court in a case ruled that a deliberate waiver was not against public policy and voluntariness had to be ascertained based on the evidence available on record (*Sartaj Singh Pannu v Gurbani Media Pvt. Ltd. & Another*, 2015). Despite the fact that this ruling is not directly applicable to Bangladesh, the High Court of India's remark may be useful in evaluating the acceptable position regarding the waiver of moral rights in the absence of specific regulations.

3.6. Recent Case on Moral Rights Waiver in Bangladesh

A recent case involving copyright issues has gained notoriety in Bangladesh. The lawsuit involves the well-known "Masud Rana" novel series, which was published by Sheba Prokashoni and written by Kazi Anwar Hossain (Cultural Correspondent, 2020). However, Sheikh Abdul Hakim served as the ghostwriter for this series. This book was written by Mr. Hakim on behalf of Kazi Anwar Hossain, and this series was published under his name (Kazi Anwar Hossain). According to Kazi Anwar Hossain, Mr. Hakim was compensated for his job by Mr. Anwar. In addition, Mr. Hakim had no objections to Mr. Anwar publishing it under his own name. Sheikh Abdul Hakim, however, filed a lawsuit with the Bangladesh Copyright Office against Mr. Anwar, asserting that he should be credited as the author of the "Masud Rana" book series (Staff Correspondent, 2020).

Abdul Hakim said that he had authored 260 books from the "Masud Rana" novel series, and the case became intriguing as it relates to the correct transfer of economic

[8] Copyright Law of the People's Republic of China, 1990

rights of copyrighted content and the waiver of moral rights (Staff Correspondent, 2020). As in this case, Mr. Anwar would be entitled to remedy if he had entered into an agreement with Mr. Hakim on the waiver of his moral right to this copyrighted material. After a year of inquiry, the copyright office of Bangladesh found in favour of Mr. Hakim. Therefore, according to the copyright office, Mr. Hakim will get the compensation as the legitimate author of 260 novels in the "Masud Rana" series that he authored (Sun Online Desk, 2020).

4. CONCLUSION

Without any doubt, there are philosophical, practical, and political hurdles to overcome when attempting to incorporate international obligations or customs into domestic legislation. The inclusion of Article 6bis of the Berne Convention in the CDPA by the United Kingdom gives credibility to this argument since it has had a profound effect on the restrictive interpretation given on the waiver of moral rights. However, it is important to note that the UK has a significant international commitment to offering robust moral rights protection to UK citizens as a Berne Convention member state. The preceding study shows that the UK is not currently meeting these commitments to the best of its capacity. In the words of McCartney, the rights provided for are "[…] well below the Berne Convention standard" (McCartney, 1990).

In the meantime, there is a lack of action in Bangladesh regarding moral rights despite international commitment. It is possible to occur because of how the Copyright Act, of 2000 addresses the moral rights concept, which might give the impression to those involved with the copyright problem in Bangladesh that an author's only rights are economic ones. For instance, The Copyright Act, of 2000 does not use the phrase "moral rights" but instead refers to them as "special rights", consequently, this renders the moral rights less apparent to the general public. The CDPA contains a lengthy chapter on moral rights, titled "moral rights", which makes the provision more accessible to the public. In addition, such a complete provision improves comprehension of such a complex issue.

The Copyright Act, of 2000 says nothing about any kind of waiver of moral rights, but the author could use the general contract law provision to waive his/her moral rights, which may not be a well-protected process for authors/creators because the author/creator usually holds less power in a business transaction with the publisher. A straightforward example is inexperienced creative artists or writers who want to get their work published by a major publisher, and in such a case, the involved publisher may put more pressure on the unknown/inexperienced author to give up all rights (Brown-Pedersen, 2018). In such instances, a well-protected framework might shield the new artist/author/creator from exploitation, which is not evident in Bangladesh's copyright legislation.

There are indeed apparent issues with the United Kingdom's moral rights protection. Nevertheless, there is unquestionably a provision for this under CDPA if one considers the waiver of moral rights. At the very least, a well-defined (though not well-protected) rule might help to provide a shield for the protection of authors/creators, which is completely absent from Bangladesh's copyright legislation. Consequently, Bangladesh

needs a clearly defined and safeguarded framework for moral rights in the copyright law, one that also contains clear guidelines of waiver for the authors. While drafting these clauses, Bangladesh should keep in mind that the guideline must address every aspect of moral rights waiver (even informal one).

There is an argument to be made here that says that because the Berne Convention and TRIPS served as guidelines for Bangladesh in enforcing the Copyright Act, of 2000, and because neither the Berne Convention nor TRIPS contains any direct wordings regarding the waiver of moral rights, Bangladesh has chosen to maintain wording that is consistent with the Berne Convention. The response would be pretty straightforward: the primary purpose of the Berne Convention is to safeguard the rights of writers and creators against exploitation of any kind. Therefore, the inclusion of a comprehensive provision for the waiver of moral rights to safeguard the author or creator is fully compliant with the Berne Convention. Like many other states that ratified the Berne Convention, the UK included a waiver clause in their copyright Act to ensure compliance with the Convention.

What would be the best approach to waive the moral rights at this period since there is no waiver provision in the copyright law of Bangladesh? This inquiry must be an intriguing one, and Indian case law may be able to shed light on this conundrum (due to the deficiency of legal precedent in Bangladesh), considering India's moral rights provisions are analogous to Bangladesh's, and neither country recognises the waiver of moral rights. In a case, the Supreme Court of India determined whether a person might waive rights granted by the legislation by stating that: "the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy" (*Shri Lachoo Mal v Shri Radhey Shyam*, 1971).

As discussed earlier, this ruling is not directly applicable to Bangladesh, but the Apex Court of India's remark may be useful in evaluating the acceptable position regarding the approach to waiving moral rights. The preceding discussion suggests three guidelines for authors and creators to adhere to while giving up their moral rights: Any waiver must be in writing, be based on reasonable conditions, and not against any public policy.

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MISUSE OF DIGITAL ASSETS: CURRENT LEGISLATION, CHALLENGES AND RECOMMENDATIONS**

In 2020, the Republic of Serbia adopted the Law on Digital Assets (Official Gazette of the Republic of Serbia no. 153/2020). Legal regulation of the issuance, use and circulation of digital assets is present in a very small number of European countries. Although the 2020 European Union Proposal for a Regulation on Markets in Crypto-assets encourages the regulation of the crypto-assets market at the national level of member states, the question can be raised whether the available mechanisms and means are effective enough in preventing the abuse of digital assets and in protecting the integrity of crypto-assets market.

Bearing in mind that the international standards in the field of abuse prevention have been adopted recently, while some are still in the process of being established, we start from the assumption that it will be necessary to additionaly improve both legislation and institutional capacities in the mentioned area at the national level. In the first part of the paper, we first point out the emerging forms of abuse of digital assets, and then we will look at the international standards that define potential prevention mechanisms. After that, the legislation of the Republic of Serbia in the field of prevention of abuses related to digital assets and the crypto-assets market will be analysed. Therefore, the method of content analysis and the dogmatic method dominate in this paper. By applying the mentioned methodology, we try to give recommendations for improving the mechanisms of prevention of abuses at the national level.

Keywords: digital assets, abuse prevention, legislation, challenges, improvement.

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1. INTRODUCTION

The digital asset market has both positive and negative aspects. The positive are reflected in the fact that transactions on the mentioned market are fast, and this enables efficient investment in the economy with great cost savings. At the level of the European Union, digital assets are not regulated by regulations governing the field of financial services. Its issuance, circulation and use were regulated for the first time by the Regulation on Crypto-Asset Markets (MICA Regulation), which was adopted by the Council of the European Union on May 16, 2023.[1] Before its adoption, the operation on digital asset trading platforms was not regulated. This represented a great risk for potential investors, which had negative consequences for the integrity of the capital market.[2] The aforementioned area was regulated in the Republic of Serbia for the first time in 2020 with the adoption of the Law on Digital Assets (*Official Gazette of the Republic of Serbia* no. 153/2020), i.e. three years before the adoption of the regulation at the level of the European Union. The goal of passing both regulations was primarily to improve the functioning of the digital assets market, but also to protect consumers on the capital market and improve fiscal stability. Due to the lack of a unified approach at the level of the European Union, as well as regulations at the national level, the digital assets market seemed like an unsafe area for investment and was suitable for various types of abuse.

Cryptocurrencies were a particular suitable tool for money laundering, not only because they enabled fast transactions at the international level, but also because of the lack of effective control due to the existence of different regulations at the national level (EUROPOL, 2021, p. 10). However, they have also been used for money laundering in connection with several predicate crimes such as fraud of drug trafficking. The EUROPOL report lists money laundering as the main crime associated with the use of cryptocurrencies. In addition, cryptocurrencies are susceptible to other forms of abuse. Namely, apart from being susceptible to theft through various malicious software, they are also used for various extortion schemes (*Ibid.,* p. 11).

In addition, for the benefits of the economy, regulating the functioning of the digital assets market should also contribute to the reduction of tax evasion, because due to the lack of regulation, until the adoption of relevant regulations, transactions made through digital assets, which were otherwise subject to taxation, could be hidden. Therefore, the regulation of the digital property market is of great importance from the aspect of preserving the integrity of public finances.

The legal regulation of the functioning of the digital assets market certainly represents a significant step in the suppression of various abuses that were associated with the said market. However, additional adaptation of both legislation and institutional capacities is necessary to prevent abuses. In particular, it is necessary to take into account the

[1] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:f69f89bb-fe54-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF, (1. 7. 2023).

[2] On abuses on the capital market, see: Kostić, J. 2018. Izazovi harmonizacije krivičnopravne zaštite tržišta kapitala sa pravom Evropske unije – primer italijanskog zakonodavstva, *Strani pravni život*, 62(2), pp. 119-137.

inventiveness of persons who are prone to fraud in this area, and therefore, at the international and national level, the risks of abuse on the digital assets market should be continuously monitored and necessary measures should be taken to reduce them.

In our paper, we start from the assumption that in the Republic of Serbia it is necessary to take additional measures in order to improve the protection of participants in the digital assets market against various types of abuse. That is why in our paper we use the method of analysing the content of various documents, as well as the dogmatic-legal method. This is how we want to point out the need for continuous harmonization of national legislation not only with international standards in the field of prevention of abuses in the cryptocurrency market, but also with the needs of practice at the national level.

2. ABUSE OF CRYPTOCURRENCIES AND MONEY LAUNDERING

Abuses on the cryptocurrency market in the previous period were facilitated by various factors, such as the anonymity and speed of transactions, as well as the possibility of a sudden increase in the exchange rate of cryptocurrencies. It was also conducive for hiding the origin of assets and money laundering. Anonimity also contributed to tax evasion if taxable transactions were carried out through cryptocurrencies. This made it impossible to detect persons committing tax evasion, and therefore it was not possible to apply an adequate sanction (Houben & Snyers, 2018, p. 53).

Some authors believe that crypto-currencies are not completely anonymous, but rather pseudo-anonymous. One of the main reasons for this is the use of blockchain technology, thanks to which data can be changed, while previous versions remain written. This is of course the case when it comes to Bitcoin, the most commonly used type of cryptocurrency. According to those authors, even though bitcoin addresses do not have a registered name, they can be linked to real-life identity, as every investor has an obligation to record his/her personal information before purchasing cryptocurrency. However, the same authors believe that the transparency of cryptocurrency trading is less than the transparency of the exchange that takes place by traditional financial institutions (Novaković, 2021, p. 102), so this circumstance could eventually favor various abuses.

In addition to the above, abuses related to virtual assets were also incited by the fact that market participants are people from different countries, where there are no effective money laundering control, and there is lack of a central intermediary, i.e. issuer (Houben & Snyers, p. 54). Therefore, it was necessary to establish standards at the international or European Union level that would contribute to the harmonization of national regulations governing the digital property market, with the aim of establishing mechanisms for assessing the risk of money laundering and other abuses, and undertaking continuouns control by competent authorities.

The risk of abuses related to digital assets can also be represented by excessively strict regulations that prohibit the establishment of a market in that area or establish strict regulatory control. This is why there is polarization between those who advocate decentralization in the cryptocurrency market and the absence of regulation and those who belive that crypto-assets market regulation can contribute to financial stability (Collins,

2022, p. 8). In our opinion, the capital market should exist, but the regulatory control should be adequate, timely and based on the risk assessment of various types of abuses.

Many institutions and organizations have recently been interested in improving the rules to prevent money laundering as an activity most often associated with cryptocurrencies. In 2018, The Financial Action Task Force (FATF) adopted the first version of risk-based anti-money laundering guidance on virtual currencies and digital assets service providers, which was updated in October 2021. The aim of its adoption was to improve the supervision of the activities of providing services in the cryptocurrency market, as well as their exchange and use. The recommendations of the guidelines should enable service providers for the digital assets market to identify indicators at the national level that indicate the possibility of activities related to money laundering (FATF, 2021, p. 4).

The authors believe that in the future, cryptocurrencies could be used to finance various activities, such as e.g. campaign financing, public procurement or lobbying. When it comes to reporting on such activities, especially when it comes to the public sector, it is necessary to adapt the way of reporting to the nature of cryptocurrencies. The authors state that with some of them, due to the so-called privacy function, it is very difficult to track transactions. One such privacy coin is Monero, which mixes with previous transactions to hide the details of the one currently being executed (Burrus, 2018).

This type of activity has been proven in practice to cover up criminal acts and is often used for money laundering. However, cryptocurrencies are also a convenient tool for concealing corruption. Precisely when it comes to the so-called cryptocurrency mixing, money is transferred to different crypto wallets. For this purpose, a "trusted party" is used to receive money from the original IP address and use an alternative address or address to deliver the funds to the end user (Nicholls *et al.* 2021, p. 163974). Transactions related to some cryptocurrencies such as bitcoin can be tracked, so it is possible to determine from which addresses the transactions were made (Murtezić, 2021).

Misuse of cryptocurrencies is possible in various circumstances, even by persons who should take care of the prosecution of criminal offences and confiscation of illegally acquired property by their execution. Thus, in the "Silk Road" affair from 2013, the US government confiscated the official Bitcoin wallet. Namely, in 2015, it happened that federal agents who were investigating the case diverted part of the cryptocurrencies to their personal digital wallets. The ability to track cryptocurrencies has been greatly hampered by the rapid development of cryptocurrencies and the finding of ways to hide transactions. Coins such as Moneros have a hidden sending address, receiving address and transaction amounts, which is important for conducting criminal investigations (Burrus, 2018). It is the adaptation to the new circumstances that will represent a great challenge both for the legislation of the European Union and for national legislation and practice.

3. FATF RECOMMENDATIONS AND TRANSFER OF DIGITAL ASSETS

Taking into account the increasing prevalence of virtual assets as a means of payment, the FATF issued Recommendation 15, according to which countries should apply at the national level, when transferring digital assets, the same rules and measures that

are normally applied when identifying and assessing risks related to money laundering and financing terrorism. Based on that assessment, it is necessary to take adequate steps to mitigate the risk (FATF, 2023, Recommendation 15, points 1 and 2).[3] According to the aforementioned recommendation, providers of services related to digital assets should be licensed or registered according to the rule in the jurisdiction in which they are created. If the service provider is a natural person, it should be licensed or registered to provide the service at the level of the jurisdiction in which its place of business is located. According to the aforementioned recommendation, providers of services related to digital assets should be licensed or registered according to the rule in the jurisdiction in which they are created. If the service provider is a natural person, it should be licensed or registered to provide the service at the level of the jurisdiction in which its place of business is located. In order to prevent money laundering and terrorist financing, competent authorities at the national level should take necessary measures to prevent criminals or their associates from having management rights, being beneficial owners or having a significant or controlling role in the service provider related to digital assets. Therefore, at the national level, natural or legal persons who perform the activity of service providers related to digital assets should be identified, and that adequate sanctions are prescribed and applied for persons who perform these services without a license or registration (FATF, Recommendation 15, points 3 and 4). At the national level, it's necessary to provide adequate rules for the supervision and monitoring of the work of service providers related to digital assets, in order to reduce the risks of money laundering and terrorist financing associated with it (FATF, Recommendation 15, point 5).

According to the FATF recommendation regarding preventive measures aimed at preventing money laundering and terrorist financing, the so-called travel rules provided for in recommendation 16, also apply to bank transactions. In accordance with that rule, it is necessary at the national level to ensure that service providers related to digital assets obtain and store all necessary and accurate information about the principal and the user, as well as the transfer of virtual assets and make it available as relevant to the financial institution (without delay and in a safe way), as well as to competent authorities (criminal prosecution authorities). It is therefore necessary at the national level to enable service providers related to digital assets to obtain and store relevant information about both the originator of the transfer, and the user of the digital asset, and to provide, if necessary, that information at the request of competent authorities, as well as, if necessary, take measures to freeze and prohibit transactions with certain persons and entities (Recommendation 15, paras. 7 and 8).

Implementation of recommendations, especially the so-called travel rules, represented a major challenge for national jurisdictions. That is why the FATF produced a report on the implementation of recommendation 15 at the national level. According to the report, it seems that it is necessary to improve the understanding of the need to reduce the risk of money laundering and terrorist financing in the cryptocurrency market at the national

[3] FATF (2012-2023), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France. Available at: www.fatf-gafi.org/recommendations.html, (1. 7. 2023).

level, in order to determine the measures for their mitigation based on the assessment. The subject of the analysis, the results of which are presented in the report, was the implementation of recommendation 15 in 98 countries during 2022. Of the mentioned number, only 29 countries have adopted laws prescribing travel rules, while only a few (11 in total) actually apply them in practice. There is a need for improvement both in terms of recognizing the risk of money laundering and in terms of the implementation of preventive measures (FATF, Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Assets Service Providers, 2022: 2 and 10).[4]

According to the FATF Report, decentralized finance (DeFi) as well as unhosted wallets pose a risk of money laundering and terrorist financing. The risks of their use are increasing with the strengthening of preventive measures related to money laundering and financing of terrorism through digital assets. Therfore, in its Report, FATF proposes an adequate assessment of the risks related to the use of decentralized finance and unhosted wallets, the timely taking of measures to mitigate them and the mutual exchange of experiences of different jurisdictions with the global FATF network in order to specifically mitigate the risks of DeFi arrangements (FATF, Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Service Providers, 2 and 10).

However, lately the markets of decentralized finance have been on the rise, which was especially present at the end of 2022 and the beginning of 2023. An increasing number of users and an increase in trade through decentralized finance (DeFi) arrangements was noted in late 2022. However, several jurisdictions noted that DeFi arrangements still do not account for a large percentage of total activity related to digital asset transactions (*Ibid.,* 28).

In addition to the above, non-fungible tokens (NTFs) continue to pose a risk for money laundering and terrorist financing, although some jurisdictions, according to data from the FATF Report, have recorded a reduction in risk in this area after 2021. A problem in practice is the fact that NFTs may in some cases fall under the definition on virtual assets, while others may be considered works of art or collectors' items. Certain NFTs may appear as tokenized versions of physical goods, real estate or precious metals. Therefore, at the national level of all countries that are part of the Global FATF network, an approach should be taken that will allow the interpretation of whether a particular product or service can be qualified as a virtual asset or the provision of services related to virtual assets (FATF, Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Service Providers, 33). According to the data from the Report, the majority of jurisdictions that contain advanced regulations regarding the regulation of digital assets service providers and that have applied the "travel rule" include NFTs under the concept of virtual assets wherever possible (e.g. when used as a means of payment or as an investment vehicle) (*Ibid.*).

[4] FATF (2022), Targeted Update on Implementation of the FATF Standards on Virtual Assets/VASPs, FATF. Available at: www.fatf-gafi.org/publications/fatfrecommendations/documents/targeted-update-virtual-assets-vasps.html (1. 7. 2023).

4. PREVENTION OF ABUSE RELATED TO CRYPTO-ASSETS IN EUROPEAN UNION REGULATIONS

Due to the non-uniformity of regulations at the level of the EU in the field of trade in digital assets there was an opportunity for various abuses, taking into account the decentralization of the market and the quick and simple cross-border circulation of crypto-assets. Therefore, potential investors in the market were exposed to various risks. The aim of adopting the Proposal for a Regulation on markets in crypto-assets at the EU level was to unify regulations and overcome differences at the national level. Bearing in mind the uniqueness of the European capital market, one of the reasons for the adoption of the Regulation was to preserve its integrity by preserving the safety of consumers and investors.[5]

Special measures are foreseen in the area of prohibition of abuse of the crypto-assets market. However, they should be distinguished in relation to measures concerning the suppression of money laundering. Measures concerning the prohibition of market abuse apply to crypto-assets that are traded on a platform operated by an approved crypto-asset related service provider for which a request for determination to trade on that platform has been submitted (Art. 76). Just as when it comes to the conventional capital market, the Regulation prescribes a ban on trading on the basis of privileged information both for one's own account and for the account of third parties. In addition, a person who possesses privileged information about crypto-assets may not on the basis of that information, recommend that another person acquires or sells crypto-assets to which that information relates, nor encourage that person to such acquisition or sale, nor recommend on the basis of that privileged information for another person to cancel or change an order related to that crypto-assets or to encourage that person to cancel or change it (Art. 78). No one who possesses privileged information may disclose such information to another person, except if that information is published within the scope of ordinary work of professional obligations (Art. 79). However, the prohibition of the said behaviour is only related to the protection of the integrity of the capital market, but not to the prevention of other behaviors that constitute abuses related to crypto-assets.

The Regulation also prohibits manipulations in the crypto-asset market, which includes providing false or misleading information regarding the supply, demand or price of crypto-assets, determining or giving prices of one or more types of crypto-assets at an unusual or artificial level, entering into a transaction, issuing a trading order or undertaking some other activity or procedure that affects or is likely to affect the price of one or more types of individual cryptocurrency by applying a fictious procedure or other form of fraud, disseminating information through the media, including the Internet or other means that provide or could provide false or misleading information in connection with the supply, demand or price of a crypto-assets or hold or could hold the price of one or more types of individual crypto-assets at an unusual or

[5] About the Proposal for a Regulation on markets in crypto-assets at the EU see in: Novaković, S. M. 2021. The Reform of the Crypto Licenses System in Estonia and the Regulation on Markets in Crypto-Assets Proposal, *Strani pravni život*, 65(4), pp. 688-690.

artificial level, and when the person who disseminated the information knew or should have known that it was false or misleading. In addition to the above, manipulation in the crypto-assets market is also considered as securing a dominant position in the supply or demand of crypto-assets that has or is likely to have an impact in a direct or indirect way on the purchase or sale price and that creates or is likely to create other unfair trading conditions, as well as issuing orders to crypto-assets trading platforms, including their withdrawl or modification by all available means of trading, disrupting or delaying the functioning of the crypto-assets trading platform or activities likely to have that effect, making it difficult for other persons to recognize real orders on the crypto-assets trading platform or activities that is likely to have that effect, including giving orders that lead to destabilization of the normal functioning of the crypto-assets trading platform, creating a false or misleading signal about the supply or demand or price of crypto-asset, in particular by giving orders to start or worsen a trend or acitivities likely to have such an effect and taking advantage of occasional or regular access to traditional or electronic media by expressing an opinion on a crypto-assets, with a pre-existing view about that crypto-asset, as well as the subsequent realization of profit from the results of the opinion expressed about the price of the crypto-assets, without this conflict of interest being disclosed to the public in a proper and adequate manner (Art. 80). The said provision was intended to suppress the behaviour known as investment fraud. Due to the lack of regulation, the presence of such behaviour acted as a deterrent to potential investors in the crypto-assets market. Therefore, it is necessary to prohibit trade in crypto-assets based on privileged information, as well as manipulation on the crypto-asset market, at the national level, ensure regular supervision by competent authorities, and prescribe adequate sanctions for persons who do not comply with the assigned prohibitions.

In addition to the Regulation on the digital-assets market, the text of the Regulation on travel rules was also adopted at the EU level, which establishes obligations regarding information on persons participating in cryptocurrency transactions, monitoring of fund transfers in any currency, as well as information on publishers and users, and with the aim of prevention, detection and investigation of money laundering and financing of terrorism in which at least one payment, crypto-asset, service provider involved in the transfer of funds or crypto-assets is established on the territory of the EU (Art. 1).[6]

5. PREVENTION OF ABUSE IN CONNECTION WITH CRYPTO-ASSETS IN THE REGULATIONS OF THE REPUBLIC OF SERBIA

In 2020, the Republic of Serbia adopted the Law on Digital Assets (*Official Gazette of the Republic of Serbia* no. 153/2020). According to this law, for the first time at the national level, the issuance of digital-assets and secondary trading of digital assets in the Republic of Serbia, the provision of services related to digital assets, as well as the lien and fiduciary right on digital assets are regulated. By adopting the aforementioned law, an effort was

[6] Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets (recast), Brussels, COM(2021) 422 final. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:08cf467e-ead4-11eb-93a8-01aa75ed71a1.0001.02/DOC_1&format=PDF (21. 7. 2023).

made to prevent abuses on the cryptocurrency market, including money laundering and terrorist financing, as well as to strengthen the integrity of the capital market, as it is possible to issue financial instruments in digital assets. The law defines the concept of digital assets, under which both virtual currencies and digital tokens are classified (Art. 2, para. 1, pts. 2) and 3)). The aforementioned regulation contains provisions prohibiting trade in confidential information, as well as manipulations on the digital assets market, and sanctions are prescribed for persons who do not comply with the prescribed prohibitions. The same approach is in the recently adopted text of the Regulation of the European Union on the digital asset market.[7] However, its provisions do not define non-fungible tokens, DeFi, nor the rules regarding their use. The reason for such an approach is extremely rational, bearing in mind that the mentioned categories were developed only after its adoption. However, given the 2022 FATF Report on the Application of FATF Standards to digital assets and digital assets related Service Providers, it appears that the absence of control and oversight over the use of non-fungible tokens and DeFi may contribute to their abuse. Therefore, in the following period, it is necessary to legally define the mentioned categories and prescribe the way of control and supervision over their use.

The Law on digital assets does not contain provisions regarding the prevention of money laundering and terrorist financing, but contains a reference provision, according to which the provisions of the regulations governing the prevention of money laundering and terrorist financing, as well as regulations, are applied to providers of services related to digital assets which regulate the limitation of the disposal of assets in order to prevent terrorism and the proliferation of weapons of mass destruction (Art. 74). According to the provisions of the Law on Digital Assets, the provider of services related to digital assets is obliged to take actions and measures to prevent and detect money laundering and financing of terrorism according to the provisions of the law governing that area (Art. 75).

According to the provisions of the Law on Digital Assets, the National Bank of Serbia is competent for the adoption of by-laws and supervision over the performance of business and the realization of other rights and obligations related to virtual currencies as a type of digital assets, while the Securities Commission is competent for the adoption of by-laws and supervision over the performance of work and realization of other rights and obligations of the supervisory authority in the part that refers to digital tokens as a type of digital assets, as well as in the part that refers to digital assets that have the characteristics of financial instruments (Art. 10).

In order to enable the implementation of the provisions of the Law on Digital Assets and to prevent various types of abuses related to money laundering and terrorist financing, the National Bank of the Republic of Serbia and the Securities Commission adopted a large number of by-laws in 2021.

The National Bank of Serbia issued the Decision on the conditions and method of determining and verifying the identity of a natural person using means of electronic communication, which regulates the method of determining and verifying the identity of a

[7] Article 140 of the Law on Digital Assets prescribes the disclosure of insider information as a criminal offense, and Article 141 prohibits market manipulation.

person who is a natural person, a legal representative of that party, a party who is an entrepreneur, and a natural person who is a party's trustee, which is a legal entity; the Decision on the implementation of the provisions of the Law on Digital Assets related to the granting of a license for the provision of services related to virtual currencies and the consent of the National Bank of Serbia, the Decision on the closer conditions and the manner of supervision over the provider of services related to virtual currencies and the issuer and holder of virtual currencies; the Decision on the detailed conditions and method of granting and withdrawing consent for the provision of services related to virtual currencies in a foreign country, the Decision on the content and form of records kept by the provider of services related to virtual currencies held by funds, i.e. virtual currencies of users; the Decision on the content of the Register of Service Providers related to virtual currencies and closer to the conditions and manner of keeping that registry, as well as the Decision on the detailed conditions and manner of keeping the Record of holders of virtual currencies and the Decision on the content and form of the record kept by the provider of services related to virtual currencies held by funds, i.e. virtual currencies of users.[8]

The Securities Commission adopted a large number of by-laws in the previous period. When it comes to the prevention of abuses related to cryptocurrencies, the provisions of the Rulebook on Prevention of Abuses in the Digital Token Market are of importance, which more closely define the provisions of the Law on the Prohibition of Publishing Privileged Information and Method of Determination and Verification of the identity of a natural person using means of electronic communication. The Securities Commission also adopted the Rulebook on the content and form of records kept by the provider of services related to digital tokens that holds funds, i.e. digital tokens of the user, the Rulebook on the detailed conditions and method of granting and withdrawing consent for the provision of services related to digital tokens in a foreign country, the Rulebook on the implementation of the provisions of the Law on Digital Assets relating to the granting of a license for the provisions of services related to digital tokens and the consent of the Securities Commission.[9]

However, the adoption of the mentioned regulations in itself is not enough to prevent abuses. Therefore, it is also necessary to improve institutional capacities in order to realize the stated goal. In the coming period, it will be necessary to conduct training for responsible persons and employees of service providers related to digital assets, as well as for employees of supervisory bodies, but also for other institutitons of importance for the prevention of abuses related to digital assets. As for the improvement of legislation, it is necessary to consider the possibility of extending the application of special evidentiary actions prescribed by the Code of Criminal Procedure to criminal offences of disclosure of insider information and manipulation on the digital property market, bearing in mind possible problems that could arise in practice in connection with proving those criminal acts.[10]

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[8] All by-laws of the National Bank of Serbia are published in *The Official Gazette of the Republic of Serbia* no. 49/2021.

[9] All by-laws adopted by the Securities Commission are published in *The Official Gazette of the Republic of Serbia* no. 69/2021.

[10] Special evidentiary actions are foreseen in articles 161-187 of the Code of Criminal Procedure (*Official Gazette of the Republic of Serbia* no. 72/2011…35/2019, 27/2021 – Decision of the Constitutional Court and

In addition, it seems that confiscation of assets resulting from criminal acts representing abuse in the digital property market will aso be a challenge, so it is necessary to consider possible problems that may arise in practice in connection with that issue. The above mentioned issues should be discussed as much as possible, while the legislation should follow the development of practice in the area of the digital assets market and be continuously improved based on the analysis of experiences and the exchange of good practices with other countires.

Providers services related to digital assets face a number of challenges. Therefore, they are obliged to establish, maintain and improve reliable, efficient and complete systems of management and internal controls. Particularly important for the prevention of misuse is the obligation to establish an effective and efficient procedure for identifying, measuring and monitoring risks to which the provider of services related to digital assets could be exposed, especially the risks of money laundering and terrorist financing, as well as for management and reporting about them. In addition to the above, the obligation to establish accounting procedures and procedures for assessing compliance with regulations governing the prevention of money laundering and terrorist financing, as well as other relevant procedures, is of particular importance. Therefore, it is of particular importance that the establishment of such procedures is guided by the adoption of instructions or regulations by the supervisory authorities, in accordance with the provisions of the law (Art. 92 of the Law on Digital Assets).

6. CONCLUSION

In recent years, a great normative step has been taken towards the establishment of the legal framework necessary for the functioning and protection of the crypto-asset market. At the level of the European Union, the text of the Regulation on the digital asset market and the Regulation on "travel rules" which were established by the FATF in order to prevent money laundering and terrorist financing, were recently officially adopted. However, the Republic of Serbia already adopted the Law on Digital Assets in 2020. In this way, it is among the few countries that have regulated the functioning of the digital assets market at the national level. With its adoption, an effort was made to provide effective protection of the integrity of the mentioned market, as well as to prevent tax evasion in connection with certain transactions on the digital assets market, which are subject to taxation according to the current legislation. The national legislation of the Republic of Serbia is largely harmonized with international standards regarding the

62/2021 – Decision of the Constitutional Court. However, although the application of special evidentiary actions would be important for proving criminal acts prescribed by the Law on Digital Property, mentioned evidentiary actions can not be applied to those acts, but only to those provided for in Article 162 of the Code of Criminal Procedure. Therefore, the provision that prescribes to which criminal acts can be applied special evidentiary actions would be amended, so that they will include the new criminal acts prescribed in Arts. 140 and 141 of the Law on Digital Property. On the need to amend Article 162 of the Criminal Procedure Law, see in: Kostić, J. & Jelisavac Trošić, S. 2020. Inadequate Criminal Protection of the Capital Market in the Republic of Serbia. In: Duić, D. & Petrašević, T. (eds.), *EU 2020 – Lessons from the Past and Solution for the Future.* Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, pp. 589-620.

prevention of abuses related to digital assets. However, it is still too early to talk about the results of preventive measures, bearing in mind that the Law on Digital Assets has only been in force for two years.

Bearing in mind that it was adopted before the frequent trading of non-fungible tokens (NFTs), and the use od DeFi, the aforementioned categories are not defined by the Law, nor is the method of control and supervision over their use. Bearing in mind that according to the FATF report from 2022, they are suspectible to abuse due to the lack of supervision and control, in the coming period it will be necessary to define the way of supervision and control over the use and circulation of non-fungible tokens and the functioning of DeFi. Bearing in mind the inventiveness of persons who use the crypto-assets market for various types of abuse, it is necessary to continuously adapt legislation and practice to new circumstances both at the international and national levels. The exchange of experience and the best practice between different countries is of particular importance for undertaking various activities.

When it comes to the prevention of abuses related to crypto-assets, the institutional capacities on which the implementation of legal solutions will depend are also of particular importance. However, it seems that in the coming period, at the national level, training will be necessary for employees in competent courts and prosecutor's offices, as well as employees in digital assets service providers, as well as institutions in charge of supervision and control over their work. However, such training should be continuous and conducted depending on practical needs. That is why it is important that training plans are established at the level of various institutions, and above all at the national level, within the framework of various strategies, that must be attended by employees in order to prevent various abuses related to digital assets.

Although the law prescribes criminal acts that protect the integrity of the digital assets market - disclosure of insider information and manipulation on the capital market, it seems that in the coming period it will be necessary to amend the Code of Criminal Procedure, so that special evidentiary actions could be applied to the mentioned criminal acts which are as well prescribed by secondary criminal legislation, bearing in mind the fact that some forms of those acts can not be proven in any other way than by applying such measures.

The process of confiscation of digital assets will be a special challenge, bearing in mind the need for an urgent and quick reaction due to the possibility of great mobility of such assets. That is why we are sure that additional changes to the national legislation will certainly be conditioned by the needs of practice, and that the weaknesses of the existing solutions will only become apparent in the coming period. In order to monitor digital assets, it will certainly be necessary to hire people who have special knowledge and experience in certain areas.

Bearing in mind that service providers related to digital assets are obliged to assess the risks of money laundering and terrorist financing and take measures to reduce them, it is necessary to adopt guidelines or instructions at the national level by the competent authorities in charge of control and supervision of their work with the aim of a uniformed approach to risk assessment and undertaking adequate measures by all service

providers. However, it is necessary that the implementation of those activities by registered service providers be understood as an obligation and responsibility, and not only as the fulfilment of a formal condition. Therefore, it is necessary to present the consequences of failure to fulfil such an obligation and take adequate measures against irresponsible service providers in the case of abuses that are the result of their failure.

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IMPACT OF URBAN PLANNING AND DEVELOPMENT ON REAL PROPERTY RIGHTS

The process of urban planning and development significantly impacts many areas of modern living. Whether good or bad, urban planning and development leave imprints of economic, environmental, social, political, and legal nature. Well-conducted urban planning and development can serve as a booster for the economy, enabling the construction industry's rise. Environmental protection is quite dependent on urban planning and development being conducted in a manner that is not harmful to the environment. The implementation of social measures like providing affordable housing or enabling rural development also depends on urban planning and development acts. Passing zoning plans and other urban planning and development acts is both a legislative and political process and affects public as well as private interests.

Considering the multilevel effect of urban planning and development, the paper elaborates on the impact of urban planning and development on the private interests of the holders of real property rights. The paper examines the positive and negative effects of urban planning and development on private interest. By examining the positive effects, the paper aims to highlight legal solutions creating an equal opportunity climate for land development, enabling landowners and holders of other real property rights to fully exercise their rights and collect the benefits. The paper also analyses the negative effect on real property rights caused by insufficient, inappropriate, and/or uneven urban planning and development, affording privileged treatments, and other contributing factors. The goal is to pinpoint the legal solutions that have or may contribute to practices with a negative effect on the exercise of real property rights. Finally, the paper examines the clash between public and

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private interests related to urban planning and development and the legislative approach in prioritizing one over the other.

Keywords: property, real estate, construction, urban planning, ownership.

1. INTRODUCTION

The urban planning and development process is not a mere process of conceptualizing the dispersion of rural and urban areas and their inner design and functions. It is a process with a great social and economic impact that can potentially lead to envisioning and providing humane and sustainable living conditions for the human population. This higher goal of urban planning and development requires collaboration between all the concerned parties at all levels nationally and internationally. Interlaced, all-inclusive, and close collaboration in urban planning and development has been pinpointed by experts to be the key instrument for dealing with the challenges that the process of urban planning and development faces in the modern world[1]. The continual growth of the human population, migration within national borders (migration from rural to urban areas), migration beyond national borders, poverty, inequality, insecurity, segregation, and discrimination are some of the most problematic issues that need to be taken into consideration during the process of urban planning and development if this process is to be directed towards improving the human living condition.

2. GLOBALIZATION OF THE URBAN PLANNING AND DEVELOPMENT PROCESS

Considering the overall effect of urban planning and development, the United Nations (hereinafter: UN) has taken steps toward promoting good practices in urban planning and development by adopting agendas and setting up objectives for future urban planning and development. One such document was adopted at the closing of the UN Conference on Housing and Sustainable Urban Development (Habitat III) held in October 2016 in Quito, Ecuador[2]. It is called the New Urban Agenda[3] and its adoption was endorsed by the UN General Assembly at its sixty-eighth plenary meeting of the seventy-first session held on 23 December 2016. The New Urban Agenda is a document that consists of the Declaration on Stainable Cities and Human Settlements for All and the Implementation Plan for the New Urban Agenda. This document is based

[1] Ghazi B., Antonio D., Araujo K., Sylla O., Ochong R. & Rojas Williams S. 2017. *Land in the New Urban Agenda: Opportunities, Challenges and Way Forward*. World Bank Conference on Land and Poverty. The World Bank - Washington DC, March 20-24, 2017. Available at: https://unece.org/sites/default/files/2020-08/LAND%20IN%20THE%20NEW%20URBAN%20AGENDA.pdf (29. 9. 2023).

[2] The Conference, Habitat III – 2016. 2017. United Nations Conference on Housing and Sustainable Urban Development (Habitat III). United Nations. Available at: https://habitat3.org/wp-content/uploads/Habitat-III-the-conference.pdf (29. 9. 2023).

[3] United Nations. The New Urban Agenda 2017. A/RES/71/256. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_256.pdf (29. 9. 2023).

on the concept that urbanization can be used as an instrument for sustainable development in all countries regardless of whether they are developing or developed. Regarding urbanization, the New Urban Agenda lays out standards and principles for urban planning, construction, development, and management of urban areas and their improvements such as inclusivity and equality in the use and enjoyment of cities and human settlements; fulfilment of the social and ecological functions in land use; promotion of civic engagement; promotion of gender equality by enabling full and effective participation and equal rights for women and girls in all fields at all levels of decision making; providing sustainable and inclusive economic growth; providing sustainable and territorial development at all levels; investing in sustainable, safe and accessible urban mobility; and protection of natural resources and minimizing environmental impact.

Following the example of the UN, the European Union (hereinafter: EU) has also adopted a document regarding urban development known as the Urban Agenda for the EU. The Urban Agenda for the EU was set in motion with the Pact of Amsterdam signed at the Informal Meeting of EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam[4] and it was reaffirmed with the Ljubljana Agreement signed at the Informal Meeting of Ministers responsible for Urban Matters on 26 November 2021 held in Brdo pri Kranju, Slovenia[5]. The main objectives of the Urban Agenda of the EU are to increase the effectiveness of EU policies and legislation impacting urban areas by establishing an integrated and coordinated approach in policies and legislation making and to strive to involve urban authorities in the design and implementation of EU policies concerning urban areas. As it is underlined in the Urban Agenda for the EU, this document does not lead to the creation of new EU funding sources nor it imposes unnecessary administrative burdens on EU Member States. The Urban Agenda for the EU is also not intended to affect the current distribution of legal competencies and the existing working and decision-making structures, nor is it intended to lead to the transfer of competencies to the EU level. The Urban Agenda for the EU focuses on advancing the implementation of existing EU policies, legislation, and instruments concerning urban areas, rather than initiating new regulations. The Urban Agenda for the EU aims to enable better funding by identifying, supporting, integrating, and improving existing sources of funding without creating new or increasing existing EU funding concerning urban issues. Another aim of the Urban Agenda for the EU is to enable knowledge exchange concerning urban issues such as the exchange of best practices in urban issues, providing tailor-made solutions to major challenges in urban areas, etc. In addition, the Urban Agenda for the EU provides an initial list of priority themes that include: the inclusion of migrants and refugees, air quality, urban poverty, housing, circular economy, jobs, and skills in the local economy, climate adaptation (including green infrastructure solutions), energy transition, sustainable use of land and nature-based solutions, urban mobility, digital

[4] European Commission. Pact of Amsterdam 2016. Available at: https://ec.europa.eu/futurium/en/content/pact-amsterdam.html (29. 9. 2023).

[5] Ljubljana Agreement 2021. Available at: https://ec.europa.eu/regional_policy/sources/brochure/ljubljana_agreement_2021_en.pdf. (29. 9. 2023).

transition, and innovative and responsible public procurement.[6] The main instrument for putting into practice the objectives of the Urban Agenda for the EU is the establishment of partnerships, one for each of the listed priority themes. The partnerships are given the task of identifying the issues that need to be addressed regarding a particular theme. Participation in the partnerships is on a voluntary basis and they are intended to include representatives of the European Commission, Member States, local authorities, city networks, and others.

What we can gather from the above-mentioned documents regarding urban planning and development is that it is viewed as a human-oriented process directed toward providing benefits for the entirety of the human population in economic, social, and ecological sense. It is a process that transcends national borders and requires the collaboration of all concerned parties so that these higher goals can be achieved. Conceptualizing the urban planning and development process as a human-oriented and inclusive process unavoidably raises the issue of the social responsibility of individuals regarding land use. This issue is directly linked to the rights and responsibilities of landowners and other real property rights holders since they are the ones that directly manage the primary material base for urban planning and development - the land. If the urban planning and development process is to accomplish the higher goals attributed to it, it requires regulation that strikes a fair balance between public and private interests in land development. Striking a fair balance between the public and private interests in regulating the process of urban planning and development means that the regulation needs to have certain qualities. First, it requires regulation that is both accommodating to landowners and other real property rights holders enabling them to pursue their private interests in land development, while promoting socially responsible behaviour in pursuing such interests. Second, the regulation on urban planning and development needs to observe the inclusion principle, meaning it needs to provide all concerned parties with effective instruments for their active participation in the decision-making process regarding urban planning and development. Third, the regulation needs to provide transparency, a proactive approach on the part of public authorities in removing obstacles and solving problems in the process of urban planning development, a constant vigilance of the needs for future urban planning and development, and planning for and providing resources for future urban planning and development goals.

3. MACEDONIAN REGULATION ON URBAN PLANNING AND DEVELOPMENT

North Macedonia, as a Member State of the UN, and an aspiring applicant for membership in the EU, has declared its dedication to upholding the standards and principles adopted by these organizations. In addition, North Macedonia has taken steps towards harmonization of North Macedonian legislation with the legislation of the EU. Considering this, it is expected that the North Macedonian legislator will take into account the

[6] All the listed Priority Themes are closely described in the Work Program of the Urban Agenda for the EU which is an annex to the Pact of Amsterdam.

requirements set in international documents, acts, and other regulations when drafting and passing a pertaining regulation on a national level. This includes the regulation of urban planning and development, which is why one expects to encounter reflections of international standards and principles in national urban planning and development regulation that direct the process to its higher goals. Having said that, in the text that follows we will analyse the North Macedonian regulation on urban planning and development looking for the reflections of international standards and principles while focusing on its impact on real property rights.

The main regulation on urban planning and development is found in the Law on Urban Planning of 2020[7]. This Law was considered a novelty at the time it was announced, and as a result, it was given a prolonged *vacatio legis* of 120 days. The Law was presented as a new legislative approach to regulating urban planning as a part of the established system of spatial and urban planning. According to its promotors, the Law on Urban Planning of 2020 is offering contemporary regulation aimed to facilitate the process of urban planning and development for all concerned parties, mainly by providing comprehensive regulation on the content and functions of urban planning acts, transparent and efficient procedures for drafting and passing zoning plans and other urban planning and development acts, giving opportunity for active participation in the procedure of drafting and passing zoning plans, etc. However, despite the high expectations, a close look into the provision of the Law on Urban Planning does not unveil any innovative legal solutions. Overall, the law re-adopts existing legal solutions and implements minor changes mainly in the procedures for drafting and passing zoning plans and other urban planning and development acts.

Although the Law on Urban Planning of 2020 lacks the expected innovative approach to urban planning, it needs to be noted that this Law does explicitly recognize several goals of urban planning and development that coincide with contemporary approaches to urban planning and development. According to its provisions, urban planning needs to be conducted according to a list of goals such as balanced urban development, rational planning and use of space, creating conditions for humane living and work conditions for citizens, accessibility of urban spaces for persons with disabilities, sustainable spatial development, preserving and enhancing the quality of the environment and nature, climate change management, preservation and protection of immovable cultural heritage and safety from natural and technological accidents and disasters (Art. 9). Considering the listed goals of urban planning, the Law on Urban Planning does make an effort to direct the process of urban planning and development toward providing urban planning solutions that will add to the quality of life in urbanized areas without creating further disruptions in the environment, something that has been pointed out by scholars to be the desired future of sustainable urban development[8]. The Law on Urban Planning

[7] Law on Urban Planning, *Official Gazette of the Republic of North Macedonia*, no. 32/2020.

[8] Heberle, L. C. 2008. Sustainable Urban Development: Local Strategies as Global Solutions. In: Heberle, L. C. & Opp, S. M. (eds.), *Local Sustainable Urban Development in a Globalized World*. Burlington: Ashgate Publishing Company, p. 2. Pinderhughes, R. 2008. Alternative Urban Futures: Designing Urban Infrastructures that Prioritize Human Needs, are Less Damaging to the Natural Resource Base, and Produce Less

also recognizes the importance of the protection of cultural heritage, and by doing so it is in line with the principles of the UN's New Urban Agenda. Agreeing on the importance of the protection and preservation of cultural heritage some scholars note that that is has become an integrated part of the sustainability of urban development.[9] The Law on Urban Planning also aims to provide a safe living environment by promoting urban development designs that will provide safety for citizens from natural and technological accidents and disasters which is also by the principles of the UN's New Urban Agenda. Planning for disaster prevention has become a very important issue especially during and in the aftermath of the COVID-19 pandemic. According to the First Report on Protecting Environments and Health by Building Urban Resilience - Urban Planning, Design and Management Approaches to Building Resilience – an Evidence Review, of the World Health Organization published in 2022[10] inadequately planned urbanization (among other things) has contributed to cities vulnerability to disasters. This report is a product of an ongoing resilience project that aims to support local authorities and legislators in the application of urban planning approaches that provide the emergence of safe, healthy, and sustainable cities. By promoting safety and disaster management as one of the goals of urban planning the Law on Urban Planning keeps up the pace with the contemporary approach to urban planning and development.

The Law on Urban Planning also sets principles for the implementation of the legislative goals of the process of urban planning. Those principles are the following: an integrated approach in urban planning, care and development of regional features, the realization of public interest and protection of private interest, publicity in the process of drafting and passing of plans, inclusive and participative approach in the process of drafting and passing of plans, horizontal and vertical compatibility and coordination in the planning process and recognition of established scientific facts and standards. By implementing principles of urban planning in line with EU legislation and the Urban Agenda for the EU in the Law on Urban Planning the legislator strives to raise the quality of urban planning and development on a national level and also strives to harmonize North Macedonian legislation with the EU legislation on urban matters. Following the set principles, the Law on Urban Planning regulates the cooperation of state and local authorities in the process of urban planning, especially during the drafting, passing, and implementation of zoning plans and other urban planning acts. This cooperation is reflected in the participation of several authorities in the process that entails, and the preparation and approval of a program for urban planning. Moreover, the cooperation is

Waste Local Strategies as Global Solutions. In: Heberle, L. C. & Opp, S. M. (eds.), *Local Sustainable Urban Development in a Globalized World*. Burlington: Ashgate Publishing Company, pp. 11-12. Steinebach G., Ganser R. & Allin S. 2008. Employing Information and Communication Systems in Planning Processes to Increase Efficiency in Sustainable Urban Development. In: Heberle, L. C. & Opp, S. M. (eds.), *Local Sustainable Urban Development in a Globalized World*. Burlington: Ashgate Publishing Company, p. 20.

[9] Perry, B., Ager, L. & Sitas, R. 2020. Cultural heritage entanglements: Festivals as integrative sites for sustainable urban development. *International Journal of Heritage Studies*, 26(6) p. 605. Nocca, F. 2017. The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool, *Sustainability*, 9(10), pp 4-5.

[10] Available at: https://apps.who.int/iris/handle/10665/355761 (29. 9. 2023).

reflected in various activities linked to zoning plan such as the preparation of its working version, the collection of opinions on the working version from the appropriate authorities, and the preparation, revision, and public presentation of a draft of the zoning plan. The aforementioned cooperation also includes, the preparation of a proposal of a zoning plan and its submission for approval before the appropriate authority and as a final step passing the proposed zoning plan (Art. 26-33). The care for regional features is reflected in the preparation of the basic documentation for urban planning containing data about the current state and possibilities for urban development of a certain region (Art. 18). Regarding the principle of balancing public and private interest, the Law on Urban Planning is explicit that the public interest prevails over the private even though the private interest will be duly recognized (Art. 5). Publicity, inclusivity, and participation in the process of urban planning is provided during the public presentation of the draft of a zoning plan and its publication after it is passed by the appropriate authorities. The principle of horizontal and vertical compatibility is observed by prescribing mandatory compatibility between high-level and low-level zoning plans and other urban planning acts (Art. 7). In an effort to recognize established scientific facts and standards and raise the quality of zoning plans, the Law on Urban Planning mandates that the process of passing a zoning plan includes conducting an expert discussion related to the draft of a zoning plan (Art. 49).

From the viewpoint of setting goals and principles and providing regulation under the set goals and principles, the Law on Urban Planning seemingly meets the standards. However, some provisions leave room for discretion that could turn into arbitrary behaviour on the part of public authorities. As a result, these debatable provisions could have a negative impact on the rights of landowners and other real property rights holders which will be elaborated further in the text.

4. THE IMPACT OF URBAN PLANNING ON REAL PROPERTY RIGHTS

Existing urban planning and development regulations unavoidably affect the rights of landowners and other real property rights holders because such regulations limit the free disposition of land use. The imposed limits prioritize the public before the private interest highlighting the social function of the right of ownership and other real property rights. Even the basic Law on Ownership and Other Real Rights[11] states that the right of ownership should be exercised for the benefit of the individual and the benefit of the community (Art. 3). All this amounts to the duty of landowners and other real property rights holders to embrace a socially responsible behaviour regarding the process of urban planning and development that they participate in as potential investors. According to the Law on Construction,[12] landowners, as well as other real property rights holders such as holders of the right of predial servitude for construction and the holders of the right to long-term lease enjoy the status of investor. The status of an investor enables

[11] The Law on Ownership and Other Real Rights, *Official Gazette of the Republic of Macedonia*, no. 18/2001.

[12] The Law on Construction, *Official Gazette of the Republic of Macedonia*, no. 130/2009.

them to participate in land development undertaking construction activities on the land they own or have the mentioned real property rights.

The most direct way that the process of urban planning and development impacts landowners and other real property rights holders is by regulating the manner of land use. Urban planning acts determine how and to what extent certain land parcels can be used for urban development and all concerned parties must abide by those acts. Respecting the inclusion principle, the Law on Urban Planning does allow for all concerned parties, and that includes landowners and other real property rights holders, to actively participate in the drafting and passing of zoning plans. Their participation is limited to the possibility to view and comment on the draft of a zoning plan and to give their written remarks to the authorities conducting the procedure for drafting and passing the zoning plan. The written remarks can be accepted or rejected at the discretion of the authorities and no legal remedy is available for the concerned parties.

Another way that landowners and other real property rights holders can participate in the process of urban planning and development is by giving initiative for passing a new or amending an existing zoning plan (Art. 39, Law on Urban Planning). From a formal viewpoint, this looks very inclusive because all private individuals, public and private legal entities, and government authorities can give the initiative. The appropriate Commission on Urbanism is obligated to evaluate the initiative and to decide whether to accept or reject it within 15 days of receiving it (Art. 39/4, Law on Urban Planning). If the initiative is accepted it will be incorporated in the proper zoning plan. However, the evaluation and acceptance of the initiative are only possible if the person submitting it takes on the obligation to bear all the costs related to the procedure for passing or amending the appropriate zoning plan. What this means is that investors with large resources at their disposal can influence the content of a particular zoning plan, while concerned parties that have no such resources cannot. So, in effect, the possibility of giving initiative for passing or amending zoning plans is a latent instrument for favouring the interests of rich investors. It is not a stretch to conclude that the local authorities could easily resort to using this instrument to alleviate their financial burden when complying with their duty to regularly plan for urban development. The immediate result of this could be the infringement of the rights of marginalized groups. The long-term effect of this could be uneven urban development because the focus would be on the urban development of so-called "attractive areas" where rich investors have interest and preparedness to invest. In conclusion, some landowners and other real property rights holders as investors can benefit from the possibility to initiate the passing or amending of zoning plans, if they have the funds to finance the process, while others can potentially suffer infringement of their rights or have their needs neglected.

The regulation concerning urban projects is another debatable issue that can have mixed effects on landowners and other real property rights holders. In the Law on Urban Planning, urban projects are defined as urban planning acts that are used for further operationalization of the zoning plans (Art. 58). There are several types of urban projects. The first is the urban project for parcelled construction land which is used for detailed urbanization of large construction land parcels. Second, there is the urban

project for public areas used for detailed urbanization of public areas like sidewalks, streets, and other public areas. Third, there is the project for construction land intended for business, industry, energy, or other similar purposes used for detailed planning of the type of structures that can be constructed on the land. Fourth, there is the project for infrastructure used for detailed planning of the placement of infrastructure above and beneath the land. Fifth, there is the urban project for the operationalization of zoning plans for rural areas where there are no defined construction parcels with the plans. Sixth, there is the urban project for strategic structures used for planning the construction of the so-called strategic structures[13].

Three of the urban projects that the Law on Urban Planning recognizes are types of projects intended to facilitate the realization of the public interest in the course of the urban planning and development process (the urban project for public areas, the urban project for infrastructure and the urban project for strategic structures). By using these types of projects government authorities can rapidly take on construction activities that are considered to be in public interest, without going through a lengthy procedure for drafting or amending the existing zoning plan before they can construct the intended structures. From the viewpoint of efficiency and flexibility, the use of urban projects instead of detailing the matter in zoning plans is ideal for the government authorities looking to realize the set public interest. However, from another point of view, the use of urban projects does raise concerns about the speed at which they can be approved without transparency. The public does not get to see and give an opinion on the urban project before it is approved, and once it has been approved it is very difficult to halt its implementation. Considering that these urban projects are intended to be used for planning the construction of massive structures (infrastructure, strategic structures) that will have an enormous impact on the economy, the environment, and the rights of individuals it is important that their planning and construction is handled with care and prudency rather than expedience. The public backlash for non-transparency regarding the construction of Corridor 10 as a strategic structure in the Republic of North Macedonia is a recent example embodying the concerns regarding the use of urban projects as instruments for urban planning and development.

The remaining three urban projects recognized by the Law on Urban Planning are intended to cater to the needs of private investors (the urban project for parcelled construction land, the urban project for construction land intended for business, industry, energy, or other similar purposes, and the urban project for rural areas). The way that these projects cater to the needs of private investors is by enabling them to influence the details of the urban planning of the land parcels that they own or hold some stake over as investors. Using urban projects to detail the urban development of particular land parcels is very favourable for private investors because the process of approval of urban projects is much faster and relatively easier than passing a zoning plan. There is also the fact that the approval of urban projects is not subjected to public scrutiny as the passing

[13] According to the Law on Construction strategic structures are highways, railways, highway pipelines, and other structures of public interest that are constructed as strategic investment projects or as projects of national importance (Art. 2/1).

of the zoning plans is. The lack of transparency can create the opportunity for abuse of rights on the part of private investors and negatively affect the rights and interests of other concerned parties.

The process of urban planning and development can often include the expansion of cities. The by-product of the expansion is the repurposing of agricultural land into construction land. According to the Law on Urban Planning, agricultural land is considered as repursued into construction land at the moment of passing of the zoning plan, unless the plan determines otherwise (Art. 54). Regarding zoning plans for rural areas, the matter is regulated in a slightly different way. In the case of passing zoning plans for rural areas, the nature of the agricultural land can be preserved if the plan has not explicitly determined its repurposing into construction land. The Law on Urban Planning excludes the repurposing of agricultural land with zoning plans for rural areas if that land is an archaeological site or if the placed infrastructure does not interfere with the use of the land for agricultural production and other rural purposes. What is notable is that the Law on Urban Planning places no limitation regarding the quality of the agricultural land that can potentially be repurposed into construction land. The Law on Agricultural Land[14] also lacks provisions limiting the possibility of repurposing high-quality agricultural land into construction land. This means that there are no legal impediments to high-quality agricultural land being repurposed into construction land. Experts in agricultural matters have lobbied against the possibility of repurposing high-quality agricultural land into construction land but with no success. Regarding the impact of the repurposing of agricultural land into construction land for landowners and other real property rights holders, we can note that it could be a good thing or a bad thing depending on the personal interest of the concerned parties. Repurposing agricultural land into construction land raises the market value of the land and opens the possibility for landowners and other real property rights holders to invest in urban development and reap the benefits of it. However, if the owner's business is agricultural production, then the repurposing of agricultural land into construction land may harm his or her business, especially if the repurposing is for the construction of structures of public interest. When public interest is concerned, after the repurposing expropriation will follow, and the landowner will eventually lose ownership over the land. In case expropriation takes place, a just compensation no less than the market value of the expropriated property is guaranteed for the landowner by the Constitution of the Republic of North Macedonia[15] and the Law on Expropriation[16]. In practice though, the landowners usually have to file a claim before the courts against the expropriation authorities to get that guaranteed just compensation.

Implementation of zoning plans where the public interest is concerned is an issue that has been proven to have a negative impact primarily for landowners. The problem boils down to the lack of a fair balance between public and private interests. Even

[14] The Law on Agricultural Land, *Official Gazette of the Republic of Macedonia*, no. 135/2007.

[15] Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia,* no. 52/91.

[16] Law on Expropriation, *Official Gazette of the Republic of Macedonia*, no. 95/2012.

though the Law on Urban Planning prioritizes the public over the private interest in urban planning, it also states that the private interest will be duly observed. In practice, duly observing private interest is a seldom occurrence. Public authorities constantly push for zoning plans to plan for the construction of structures of public interest on privately owned land even though they have no intention or funding to undertake the construction of the planned structures of public interest. This puts private landowners in a precarious position because they have no chance to develop the land that they own for themselves. Landowners are also not entitled to any compensation because no expropriation will take place if the public authorities don't commence the process of implementing the zoning plan by actually constructing the planned structure of public interest on the privately owned land. There have been situations where private landowners have waited more than 15 years, and some are still waiting, for the public authorities to start the construction of planned structures of public interest, unable to make full use of the land they own during all that time.

Uneven urban development is also an issue with a negative impact on landowners and other real property rights holders. Funding for drafting and passing zoning plans is scarce for municipalities, which is why they focus on the urban development of areas that are more attractive to wealthy investors ready to finance big construction projects. This practice leaves other areas lacking basic urban infrastructure, affordable housing, humane living conditions, etc., or in other words, lacking any kind of development opportunities for landowners and other real property rights holders living in those areas.

The analysis of the provisions of the Law on Urban Planning and its impact on the rights of landowners and other real property rights holders has shown that the Law embraces modern principles and standards for urban planning and development, but also contains provisions that may interfere with the set principles and standards by living room for non-transparency and arbitrary behaviour on part of public authorities. According to the Law on Urban Planning, the private interests of landowners and other real property rights holders stand second to the public interest that takes precedence. However, the Law on Urban Planning does give assurances that private interest will be duly recognized within the limits of legal possibilities. In recognition of private interest, the Law on Urban Planning does allow for private individuals and other entities to actively participate in the urban planning and development process during the drafting and passing of zoning plans. The Law on Urban Planning also allows landowners and other real property rights holders to accommodate the urban development to their needs with the use of urban projects. The shortcomings of this regulation are that it leaves a lot of room for discretion on the part of public authorities since there are no clear rules under what conditions and to what extent private interest can be observed. This can lead to both arbitrary behaviour on the part of public authorities and abuse of rights on the part of investors and it will unavoidably affect the rights of other concerned parties. The Law on Urban Planning also fails to convincingly strike a fair balance between public and private interest and as a result, there have been occasions when private landowners had to endure a disproportionally large burden for the sake of public interest. Taking everything into consideration, we can conclude that the Law on Urban Planning, even

though proclaims acceptance of contemporary principles and standards for urban planning and development, its provisions lack substance for supporting the proclamation, and that is an issue that needs to be addressed by the legislator.

5. CONCLUSION

As the paper demonstrates, urban planning and development in the modern world is viewed as a human-oriented process, intended to provide economic, social, ecological, and other benefits for the human population. It is also an all-inclusive process that transcends national borders and requires the collaboration of all concerned parties.

The North Macedonian regulation on urban planning and development, which is primarily in the Law on Urban Planning, is based on contemporary goals such as balanced urban development, rational planning and use of space, creating conditions for humane living and work conditions for citizens, accessibility of urban spaces for persons with disability, sustainable spatial development, preserving and enhancing the quality of the environment and nature, climate change management, preservation and protection of immovable cultural heritage and safety from natural and technological accidents and disasters. The listed goals serve to direct the process of urban planning and development toward providing urban planning solutions that will add to the quality of life in urbanized areas without creating further disruptions in the environment.

The Law on Urban Planning embraces modern principles and standards for urban planning and development such as an integrated approach in urban planning, care and development of regional features, the realization of public interest and protection of private interest, publicity in the process of drafting and passing of plans, inclusive and participative approach in the process of drafting and passing of plans, horizontal and vertical compatibility and coordination in the planning process and recognition of established scientific facts and standards. The set principles and standards correspond with the contemporary approach to urban planning and development, but the Law on Urban Planning lacks provisions that will substantiate the set standards and principles.

Regarding the impact of urban planning on landowners and other real property rights holders, it is noted that the regulation recognizes the need for private interest to be observed while prioritizing public interest in urban planning. The Law on Urban Planning allows landowners and other real property rights holders to actively participate in the process of urban planning and development and provides them with instruments to adjust the process of urban planning to their private needs. The regulation is far from perfect because it brings both positive and negative effects for all concerned parties. The negative effects amount to the lack of fair balance between public and private interest, opportunities for non-transparent and arbitrary behaviour on the part of public authorities, opportunities for abuse of rights on the part of landowners and other property rights holders as investors, as well as suppression of the rights and interest of marginalized groups.

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LEGAL REGULATION OF CULTURAL HERITAGE: HUNGARY – SERBIA – SLOVENIA

The paper analyses some major questions of the protection of cultural heritage from a comparative law perspective, drawing parallels between the relevant Hungarian (Act LXIV of 2001 on the Protection of Cultural Heritage, Act CXXV of 2017 on Sanctions for Administrative Violations, and Government Decree No. 191/2001 (18. X) on Heritage Protection Penalties), Serbian (Act on Cultural Heritage of 2021, and Act on Cultural Assets) and Slovenian (Act on the Protection of Cultural Heritage of 2008) regulatory backgrounds. The main points of the analysis include, for example: basic terminology, key institutions in charge of tasks relating to the protection of cultural heritage, main responsibilities of ministers concerned in cultural heritage conservation, requirements relating to experts and the training of concerned parties, provisions on removing cultural assets to a foreign country, registers and sanctions (system of penalties). The paper aims to highlight the main similarities and differences between the Hungarian, Serbian and Slovenian regulatory backgrounds on cultural heritage.

Keywords: cultural heritage, legal regulation, Hungary, Serbia, Slovenia.

1. MAJOR INTERNATIONAL ANTECEDENTS

The origins of monument protection in Europe go back 2000 years in time (Goóg, 2016, p. 89). Structured and institutional monument protection is rooted in the Greek and Roman traditions of European antiquity. Although the devoted guarding, protection, and conservation of the shrines of Greek temples built for the Gods and of buildings erected by Roman emperors cannot be unequivocally regarded as conscious monument protection activity, nevertheless, it proves the fact that this was the first era that had seen the conservation of past relics and the recognition of their importance. However, unfortunately, the Middle Ages that followed were not characterized by heritage protection activity. Therefore, the evolution of conscious monument protection in Europe can

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only be dated from the 18th century. As one of the European cradles of consistent heritage and monument protection one may regard France since it was in that country that endeavours to save cultural assets came into focus in the aftermath of the destruction brought about by the French Revolution of 1789. In the 1790s a forerunner of cultural heritage and heritage protection was the French Édouard Pommier, who also created the term „*patrimoine national*" (national heritage). The said expression had originally referred to assets of historical importance seized from the clergy. With a view to ensuring effective monument and heritage protection, the *Musée des Monuments Français* was set up in 1791 upon the initiative of French archaeologist and artist Alexandre Lenoir. All this contributed to setting other European countries on the path of monument protection (Goóg, 2016, pp. 76-79).

At the beginning of the 20th century, more precisely, in 1905, art historian Georg Gottfried Dehio, who belonged to the Vienna School and was of German origin, defined the basic principles relating to monuments and made a distinction between the terms „*Kunst und Altertum*" (artistic and historic monument) and „*Denkmal*" (monument) (Goóg, 2016, pp. 79-80).

At its 13th session in 1964, the UNESCO General Conference adopted a resolution to prevent the illicit import, export and transfer of cultural property, which may be considered a landmark resolution as, for the first time, it provided an internationally uniform definition for the notion of cultural heritage, and it also prescribed measures to be taken by the member countries to ensure effective protection of cultural property (Ney, 1980, p. 11).

UNESCO adopted the World Heritage Convention in 1972 with the aim of protecting the cultural and natural heritage of mankind having outstanding value. The States Parties undertake the obligation to protect and conserve world heritage sites situated in their territory. Pursuant to the underlying basic idea of the said Convention, deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world, therefore, (cultural, natural or mixed) heritage sites of outstanding interest need to be preserved as part of the world heritage of mankind as a whole and passed on to future generations. This requires comprehensive international cooperation, an essential element of which is constituted by the World Heritage List (set up in 1978) (Hungarian National Commission for UNESCO).

The topic of the 20th UNESCO session of 30 November 1978 was, repeatedly, the enhanced protection of cultural property, since there had been a substantial increase in acts of vandalism, theft and illicit traffic involving cultural property in some countries. In its Recommendation, the session formulated such measures that could provide protection against criminals, and the high significance of the Recommendation is also manifested in creating a possibility for the systematic inventorying and cataloguing of cultural property. Pursuant to the document, movable cultural property means all movable objects that are the products of human creation and are of archaeological, historical, artistic, scientific or technical value and interest. Therefore, cultural property includes: archaeological finds (obtained either by way of excavations conducted on land or under water); antique

tools, coins, gems, seals, weapons, inscriptions, mummies, tombs etc.; objects of outstanding historical interest; material of anthropological and ethnological interest; items relating to history (relics of technology, science, social or military history, and legacies of national leaders, artists or scientists); items of artistic interest (such as paintings and drawings, excluding industrial designs and manufactured articles decorated by hand); original photographs, prints and posters; original artistic assemblages and montages (regardless of material); artistic sculpture; practical works of applied art made of such materials as ceramics, wood, glass or metal; publications of special interest, manuscripts, incunabula, documents, codices or books; items of numismatic interest (coins or medals) and specialty stamps of philatelic value; archival material (written records, cartographic materials, photographs, cinematographic films, sound recordings or reports); old dresses, carpets, items of furniture or musical instruments; as well as geological, botanical and zoological specimens. The above division of movable cultural property is only of authoritative (and not binding) character; therefore, it was based on the fact that the Member States have elaborated their own national regulations (Ney, 1980, pp. 11-12).

2. PROTECTION OF CULTURAL HERITAGE FROM A COMPARATIVE LEGAL APPROACH: HUNGARY – SERBIA – SLOVENIA

In the following part, the paper provides a comparative legal analysis of specific major issues relating to the protection of cultural heritage by drawing parallels between the relevant regulatory frameworks in Hungary (Act LXIV of 2001 on the Protection of Cultural Heritage – hereinafter: the Hungarian Act; Act CXXV of 2017 on the Sanctions for Administrative Violations; and Government Decree No. 191/2001 (18. X.) on Heritage Protection Penalties), Serbia (Act on Cultural Heritage of 2021 – hereinafter: the Serbian Act; and Act on Cultural Assets) and Slovenia (2008 Act on the Protection of Cultural Heritage – hereinafter: the Slovenian Act, following the (Latin) alphabetical order of the (English) names of the mentioned countries.

While specific rules referencing "UNESCO" and world heritage is made in the relevant Hungarian, and Serbian legislation, the same is not the case with the Slovenian Act.

The Hungarian Act does not contain the expression "UNESCO", but lays down (in Section 71 (1) e)) that the competent authority shall keep an authentic register of world heritage sites and tentative world heritage sites and areas. In 2011 the Hungarian National Assembly adopted a separate act governing world heritage (Act LXXVII of 2011 on World Heritage), which contains provisions on such matters as a world heritage management plan (Sections 8-9), a world heritage management body (Section 10) and related financing (Section 12).

The Serbian Act lays down, among others, that all cultural heritage sites on the UNESCO World Heritage List require special protection and care (Article 40) and that the central institutions for protection are in charge – among others – of setting up a list of cultural property nominated to be included in the UNESCO List (Article 91). It also establishes the National Committee on Tangible Cultural Heritage and the National

Committee on Intangible Cultural Heritage, which perform responsibilities relating among others to UNESCO and cultural property featuring on and nominated to be added to the UNESCO List (Articles 94-96). In addition, some of the articles of the Serbian Act which will become applicable once the Republic of Serbia joins the European Union deal with tasks that may be associated with the UNESCO List (Articles 94-96).

On the other hand, the Slovenian Act mentions neither the word "UNESCO", nor the expression "world heritage".

Points of analysis to be covered further on in this part comprise: basic terminology, main institutions in charge of tasks relating to the protection of cultural heritage, ministers concerned with cultural heritage and their main responsibilities, requirements relating to experts and the training of concerned parties, provisions on removing cultural assets to a foreign country, registers and sanctions (the system of fines).

2.1. Basic terminology

The Hungarian Act consists of 100 articles which are divided into four parts and it has two Annexes. The first annex is referred to as "Non-protected cultural goods subject to an export licence", while the second annex contains two separate parts: "names and delimitation of National Memorial Sites of Outstanding Importance (The Building of Parliament and its surroundings)" and "National Memorial Sites" which covers20 sites. The Serbian Act consists of fifteen parts comprising 138 articles. The Slovenian Act consists of fourteen parts containing 148 articles. It is revealed on the comparison that the Hungarian Act contains the fewest sections numerically (but incorporates two annexes), while the Serbian Act and Slovenian Act are composed of nearly the same number of sections (and both contain no annexes).

Table 1: Major correspondences between basic terms presented in the given pieces of legislation (based on relevant provisions of the abovementioned acts, as edited by the author)

Hungarian Act	Serbian Act	Slovenian Act
Cultural goods		
Public collection		
	Immovable cultural heritage	Immovable heritage
	Movable cultural heritage	Movable heritage
	- Register of Cultural Goods, - Central Register, - National Register of Intangible Cultural Heritage	Heritage register (register)
Archaeological find		Archaeological find
Archaeological site		Archaeological site
Monument		Monument (cultural monument)
Collection		Collection

All three pieces of legislation provide definitions of basic terms. More concretely, Article 7 of the Hungarian Act, Article 3 of the Serbian Act and Article 3 of the Slovenian Act are relevant in that regard. When it comes to major differences and correspondences

which may be found in the terms listed in the above provisions, it is noteworthy that only the Hungarian Act contains definitions of 'military heritage' or 'national memorial site'. On the other hand, the Serbian Act is particular as only it provides a definition of 'cultural heritage in danger' or 'preliminary protection'. In a similar vein, the Slovenian Act is distinctive as it contains a definition of 'museum' and 'living masterpiece'. The most significant correspondences are presented in Table 1.

2.2. Main institutions in charge of tasks relating to the protection of cultural heritage

The Hungarian Act specifies those entitled to carry out archaeological excavation, namely: the Hungarian National Museum, the Budapest History Museum, city museums with county authority, regional museums with archaeological collections, higher education institutions entitled to organize master's programmes in archaeology, the Research Centre for the Humanities, the body responsible for cultural heritage protection set up by law and the Hungarian Research Institute (Section 20 (4)). The institutions performing the excavation are obliged to arrange for the security of the elements of archaeological heritage during the excavation, as well as for their protection, stabilization and further preservation after the completion of the excavation (Section 27 (1)). Furthermore, they are obliged to carry out the documentation of the excavation and the primary processing of the archaeological finds (Section 27/A (1)), and also to provide for the temporary storage of the finds exposed (Section 27/B (1). The Hungarian Act mentions the National Heritage Institute (NHI), which carries out administrative, supervisory, management and operating tasks relating to memorial sites (Section 60/D), as well as documents archives, video and audio archives (Section 46).

Under Article 82 of the Serbian Act, the institutions responsible for protection are: the Institute for the Protection of Cultural Monuments of Serbia, the Museum and Gallery, the Archives, the Audio-Visual Archives, and the Library for the Protection of Old and Rare Library Materials. The Serbian Act on Cultural Assets in Article 70 also classifies institutions for protection. Most of them overlap with the institutions specified by the Serbian Act. Namely, the Act on Cultural Assets among the institutions for protection includes the Institute for the Protection of Cultural Monuments (which, pursuant to Article 74 of the Act on Cultural Assets, is responsible for the protection of cultural monuments, spatial cultural and historical units, archaeological excavation sites and landmarks), the Museum (whose task under Article 83 of the Serbian Act – together with the Gallery – is to protect and conserve museum materials and intangible cultural heritage), the Archives (the task of which pursuant to Article 83 of the Serbian Act is to protect and conserve archival materials) and the Cinematheque (which is tasked under Article 74 of the Act on Cultural Assets with the protection of film materials). In addition, the Serbian Act on Cultural Assets gives the library for the protection of old and rare books the status of an institution of protection. Under Article 74 of the Act on Cultural Assets, its task is to protect old and rare books. Pursuant to the Serbian Act, the network of institutions of protection in the Republic of Serbia consists of three levels (Article 89), the highest level of which is constituted by the following central institutions of protection: the Institute for the Protection of

Cultural Monuments of the Republic, the National Museum of Serbia, the State Archives of Serbia, the National Library of Serbia, and the Yugoslavian Cinematheque. In addition, a significant role is played by the Centre for Intangible Cultural Heritage of the Ethnographic Museum of Belgrade which performs the tasks of the central institution of protection as an entrusted work (Article 90).

The Slovenian Act in its Article 3 determines the following competent organizations: the Institute for the Protection of Cultural Heritage of Slovenia (for the protection of immovable heritage), the national or authorized museum and the National and University Library (for the protection of movable heritage), and the Coordinator for the Protection of Intangible Heritage (for the protection of intangible heritage). The Institute for the Protection of Cultural Heritage (Article 83 paragraph 2) comprises: the Service for the Protection of Cultural Heritage which, pursuant to Article 84, performs tasks such as: cooperating in the preparation of the heritage protection strategy, preparing proposals for proclamations of immovable monuments and providing professional supervision and the Institute for Nature Conservation which, pursuant to Article 85, performs tasks in the field of the conservation and restoration of monuments.

2.3. Ministers concerned with cultural heritage and their main responsibilities

Under the Hungarian Act, six national ministers have a role in this area. These are the minister responsible for the protection of cultural heritage, the minister responsible for nature conservation, the minister for culture, the minister of tourism, the minister responsible for taxation policy and the minister of national defence.

Most tasks are assigned to the minister responsible for the protection of cultural heritage. For instance, Article 6 of the Hungarian Act envisages that in the context of the protection of cultural heritage, the minister provides for the coordination and professional direction of protection activities, exercises supervision over and controls the authorities acting in the relevant field. In addition, the Hungarian Act also envisages that the approval of the minister responsible for nature conservation is required, under Section 15, for granting protected status to archaeological sites registered as situated in natural or protected natural areas. The minister for culture also plays a relevant role since, under Section 55 (3) c), the said minister may refuse approval of the temporary export of specific objects on loan. Moreover, the minister of tourism, cooperates with NHI in implementing sustainable use and in presenting memorial sites in accordance with Section 61/D (3) c). Finally, approvals of the minister responsible for taxation policy and the minister of national defence are also required under the Hungarian Law. More specifically, the approval of the minister responsible for taxation policy is required under Section 93 (3) concerning administrative service fees applicable to official registration for heritage protection purposes, while the approval of the minister of national defence is required under Section 93 (7) in order to declare the protection of military heritage sites and termination of such protection.

The Serbian Act mentions only the minister responsible for culture, whose tasks *inter alia* include to make a proposal to the Government for the adoption of the programme

for the protection and conservation of the cultural heritage of the Republic of Serbia in conformity with the culture development strategy (Article 10) and to lay down certain rules relating to registers (Article 63). In addition, under the Serbian Act, the minister responsible for culture is in charge of adopting a decision proclaiming cultural heritage in danger (Article 71 (3)). Finally, the said minister is also responsible pursuant to Article 85 of the Act on Cultural Assets for defining the competence of the individual institutions for protection.

The Slovenian Act specifies the following three Slovenian ministers with a role in this field: the minister with responsibility for heritage, the minister for nature conservation, and the minister for culture. The minister with responsibility for heritage is in charge of most of the tasks, such as deciding in the case of doubt as to whether a certain item of movable heritage constitutes a national treasure (Article 10); adopting a decree on the temporary proclamation of the monument, if required (Article 21); and determining the heritage protection areas (Article 25 (9). On the other hand, the minister for nature conservation is authorized to give under Article 16 needed for a proclamation of a monument of national or local significance in an area protected under laws of nature conservation, while the minister for culture, *inter alia*, determines the amount of funds to be granted in specified cases for the restoration of cultural heritage pursuant to Article 40.

In order to provide a better overview, a table comparing the ministers mentioned in the given pieces of legislation is developed (Table 2).

Table 2: The ministers specified in the given pieces of legislation (drafted by the author based on the relevant provisions of the three legal acts)

Hungarian Act	Serbian Act	Slovenian Act
	Minister responsible for culture	
Minister responsible for cultural heritage protection		Minister responsible for cultural heritage
Minister responsible for the protection of nature		Minister responsible for nature conservation
Minister responsible for tourism		
Minister responsible for tax policy		
Minister responsible for national defence		

2.4. Requirements relating to experts and the training of concerned parties

The Hungarian Act contains no express provisions relating to the training of the working staff concerned. However, it does state that the body responsible for cultural heritage protection shall provide expert services in order to safeguard the respective scientific research process and ensure the evaluation of the protected elements of cultural heritage (Section 6 (4)). In addition, if the use of experts is needed in a matter related to heritage protection and required expertise, only such expert may be used who, among others, is professionally qualified in conformity with the applicable legal regulations (Section 75/A (2)).

The Serbian Act stipulates that the specified qualifications and the successfully completed qualifying professional examination constitute requirements for obtaining a job connected with the protection and conservation of cultural heritage. Also, Article 86 of the Serbian Act envisages that the professional suitability of a candidate must be assessed through various professional examination programmes. The Serbian Act on Cultural Assets lays down that the professional examination programmes and the method of exam-taking are to be prescribed by the minister for culture (Article 67). It further stipulates that the trainees are to choose and take a qualifying professional examination depending on their job. For instance, they may take such exams in the Institute for Cultural Monument Protection of the Republic, or in the National Library of Serbia. The Serbian Act envisages for the first time that the costs of the professional examination are to be borne by the institution for protection where the candidate is being employed (Article 68). Pursuant to the Serbian Act, the central institutions for protection must ensure, among others, continuous training (Article 91, point 7)).

The Slovenian Act lays down that individuals carrying out professional work in museums and in the field of conservation and restoration must have, as a minimum, the required secondary qualifications, or depending on their job title, they may be required to have higher education qualifications or to undergo further training courses or pass a qualifying professional examination for obtaining their professional title (Article 103 (1)). The Slovenian Act further emphasizes that individuals who work in the field of cultural heritage protection have both the right and obligation to in-service training for professional development (Article 104). For example, the Cultural Heritage Protection Service provides for the training of staff in the field of immovable heritage protection, while the Cultural Heritage Protection Institute lays down the requirements with regard to the technical competence of the performers of specialised works.

Based on the foregoing, in summary, it may be established that the Hungarian Act does not undertake to spell out the details of training. On the other hand, both the Serbian and Slovenian legal acts do so *inter alia* by placing emphasis on the qualifying professional examination.

2.5. Provisions relating to the removal of cultural property to a foreign country

With regard to the export of cultural goods, the Hungarian Act states that the detailed rules of the relevant procedure shall be established in separate legal act (Section 54 (2)). The Hungarian Act provides in general that the cultural goods enjoying protected status by virtue of the said Act may be exported subject to a temporary (fixed-term) export licence issued by the competent authority, under obligation to return (Section 55). Unprotected cultural goods are classified into 15 categories under Annex 1 to the Hungarian Act. They may be exported subject to the licence of the competent authority with a certificate to accompany the artefact, both of which are issued for a maximum of ten years (Section 56). On the other hand, cultural goods not falling within the scope of Sections 55 or 56 may be exported without the licence of the competent authority (Section 57).

Part XI of the Serbian Act deals, among others, with the rules applicable to export and lays down that cultural goods and archaeological objects cannot be permanently exported from the territory of the Republic of Serbia (with the proviso that in the case of some cultural goods exchange is possible) (Article 108); Cultural goods may be exported temporarily for a definite period for purposes defined by Article 109 of the Serbian Act, while movable property under preliminary protection may be exported subject to a licence under its Article 110.

The Slovenian Act lays down that the permanent export of national heritage is prohibited, with the exception of certain specified cases of exchange. Under the Slovenian Act, the temporary export is permitted subject to an authorization issued by the Minister for a defined period (Article 46).

In a nutshell, it is conspicuous that all three acts prohibit final permanent export in specific cases, but as an exception, the Serbian Act and the Slovenian Act stress the possibility of exchange.

2.6. Registers

In the Hungarian Act, Sections 71-74/C are focused on registers. The Hungarian Act lays down, for example, that the competent authority shall keep on record in a central, authentic register of archaeological sites, archaeological excavation licences and documentations, archaeological sites which granted protected status, historic monuments, areas of historic significance, historic environments and historic landscapes, as well as of world heritage sites and tentative world heritage sites and areas (Section 71 (1)).

Article 3 of The Serbian Act provides definitions of the following terms: 'register of cultural goods', 'central register' and 'National Register of Intangible Cultural Heritage', while Part V of the same statute contains various rules which are applicable to registers. The latter specifies data which should be recorded in the registers (Articles 56 and 58), determines that registers of cultural goods are generally kept by the institutions of protection (Article 59), states that the central register is kept by the central institutions of protection (Article 60), and regulates the individual electronic information systems of cultural heritage (Articles 67-68).

The definition of the term 'heritage register' is already included in Article 3 of the Slovenian Act. Part VII of the same act deals with the register in detail by specifying, among others, that the register consists of three interconnected parts (immovable, movable and intangible heritage), describing the data to be recorded in the register (Article 66) and by stipulating that the register is to be kept by the Ministry (Article 67 (1)).

Contrary to the Hungarian Act, it is conspicuous that the Serbian Act and Slovenian Act mention the term of the registers already among the basic terms and also devote a separate part to its detailed regulation. It may be concluded that in all the three countries, the registers are kept by different agencies (the authority/ the institutions responsible for protection/ the ministry).

2.7. Sanctions

Pursuant to the Hungarian Act, fines that may be issued include town and country planning fines, the maximum amount of which is HUF 10,000,000 (Section 61/K (7)); administrative fines, the amount of which - under Section 61/L - is from HUF 2,500 – to HUF 50,000, in the form of on-the-spot fine from HUF 2,500 to HUF 25,000 (consequently, the maximum limit of the administrative fine is more favourable in this case, since pursuant to Section 10 (2) of Act CXXV of 2017 on the Sanctions for Administrative Violations, in the absence of a provision of the Act to the contrary, even as high an amount as HUF 1,000,000 may be imposed); and the heritage protection fines (Sections 82-85), the amount of which is laid down by Government Decree 191/2001 (18. X.) on Heritage Protection Fines, pursuant to which the amount of fine applicable to archaeological sites and cultural goods is from HUF 10,000 to HUF 250,000,000 in the case of categories I and IV, from HUF 10,000 to HUF 125,000,000 in the case of category II, from HUF 10,000 to HUF 25,000,000 in the case of category III, and the amount of fine applicable to objects of historical monument protection is from HUF 300,000 to HUF 250,000,000 in the case of category I and from HUF 175,000 to HUF 125,000,000 in the case of category II (Section 4).

Part XIII of the Serbian Act discusses "Penalty Provisions" and lays down the five cases where a natural person, a legal person or the responsible person for the institution of protection may be punished with a fine from RSD 50,000.00 to RSD 150,000.00 (Article 130).

Part XIII of the Slovenian Act discusses "Penalty Provisions" and lays down, among others, the amounts of the imposable fines, which may vary wildly depending on the perpetrator and the activity or omission, but altogether within the bracket of EUR 100 to EUR 40,000 (Articles 125-129).

Applying the exchange rates of 1 EUR = 372 HUF (currency exchange rate applied by the National Bank of Hungary on 26 May 2023) and 1 EUR = 117.2781 RSD (currency exchange rate applied by National Bank of Serbia on 30 May 2023) it may be concluded that, overall fines may be imposed within the bracket of EUR 6.72 – EUR 672,043 under the Hungarian regulation, within the bracket of EUR 426 – EUR 1,279 under the Serbian Act and within the bracket of EUR 100 - EUR 40,000 under the Slovenian Act.

3. CONCLUDING REMARKS

Given the limited space available, the paper could not have undertaken to provide a comprehensive comparison covering all details of the Hungarian, Serbian and Slovenian regulatory frameworks relating to cultural heritage.

Therefore, the purpose of its writing was to raise several promising points of comparison and to call attention to some thought-provoking differences and similarities with regard to those issues.

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