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"THE DYNAMICS OF MODERN LEGAL ORDER"

University of Priština
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Faculty of Law

Institute of Criminological and Sociological Research
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THE DYNAMICS OF MODERN LEGAL ORDER

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TABLE OF CONTENTS:

EDITOR'S NOTE

Dear readers,

This year marks the 63rd anniversary of the Faculty of Law at the University of Priština. The organization of the jubilee celebration and the faculty day, now a tradition, includes the hosting of an International Scientific Conference. The fourteenth conference, entitled "The Dynamics of Modern Legal Order," was organized in collaboration with the Institute of Comparative Law and the Institute of Criminological and Sociological Research from Belgrade.

The conference theme proved to be particularly inspiring for authors both from within the country and abroad. Through subtle analysis, the authors presented their thoughts to the readers on the gap that inevitably exists between the dynamics of social relations and normative policy, the reasons for its emergence, and ways to overcome it. We sincerely believe that in the conditions of accelerated globalization, digitalization, the questionable impact of artificial intelligence, especially in post-COVID society, the published texts hold particular, not only scientific but also social significance.

To our particular satisfaction, some authors have chosen to submit their papers in English. The compilation before us contains twelve such papers with very diverse but carefully selected topics.

We express our gratitude to the co-organizers of the conference, the authors who generously shared their ideas, as well as the reviewers whose careful readings contributed that the individual papers, and the compilation as a whole, gain additional quality.

Professor Srđan Radulović, Ph.D.

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THE LEGAL NATURE OF THE REAL BURDEN IN CONTEMPORARY LEGAL SYSTEMS

Summary

The real burden is regulated by the contemporary legal systems as a right that enables its holder to demand the fulfilment of certain obligations from the owner of a particular real estate encumbered with the real burden. As a result of this particular content of the real burden, scholars have adopted different opinions on the matter concerning the legal nature of real burdens. Some scholars hold the opinion that the legal nature of the real burdens is unclear and borders between an obligation and a *right in rem*. Others consider the real burdens as a *right in rem* since it exists as an encumbrance on real estate. There are also scholars who consider real burdens to be obligations between two parties that affect the value of a certain real estate.

This paper aims to examine the legal nature of real burdens from a legislative standpoint by examining the manner of regulation and characteristics of real burdens in contemporary legal systems in Europe.

Key words: property law, real burdens, rights in rem, obligations.

1. EMERGENCE OF REAL BURDENS

Historical sources show that real burdens as rights on real estate have emerged in the period of feudalism. Real burdens were not recognized in the period of Roman law. The concept of property adopted by Roman law could not embrace the idea that owners of real estate could be obliged to perform positive obligations at the expense of the value of their

real estate (N. Gavella, et. al.,2007(II), 48; И. Бабић, 2012, 307). Therefore, in the period of Roman law, there were no rights of that nature. In the feudal period, however, the socio-economic relations that were established created the perfect climate for the creation of rights such as the real burden. In the feudal period the individualistic concept of ownership as the exclusive right of individuals was completely abandoned and replaced with the concept of divided right of ownership. Ownership, particularly ownership of land, was divided between the feudal overlord who had *dominium directum* over the entire land, and his subjects who had *dominium utile* over the land that they were bound to. As a result of the division of the right of ownership the subjects who had *dominium utile* were obligated to work the land for their benefit, but also for the benefit of their feudal overlord. As a result, real burdens as encumbrances have emerged (Z. P. Rašovlć, 2005, 356; R. Kovačević Kuštrimović, 2003, 63-64). These real burdens consisted of positive obligations for the subjects in favor of the feudal overlord, such as payment of rents, giving tributes, working for the feudal overlord, etc. Since the obligations (burdens) were performed on the land that the subject was bound by them were considered real burdens. Since the real burden existed as an encumbrance on the land, the duty to perform the obligation deriving from the real burden passed from one generation of subjects onto another (N. Gavella, et. al., 2007 (II), 48). As scholars note, real burdens initially existed as encumbrances on land in rural areas. In later times, when the cities started to become trade centers that drove economic development, different types of real burdens started to emerge that were not necessarily linked to a particular land. The new types of real burdens resulted from obligations between citizens such as sales contracts, leases and other obligations (N. Gavella, et. al., 2007 (II), 49).

2. REAL BURDENS IN THE CONTEMPORARY LEGAL SYSTEM IN EUROPE

Real burdens, as rights emerging from the period of feudalism, were not embraced by all contemporary legal systems in Europe. According to scholars, the reason why some countries in Europe have rejected the introduction of real burdens in their legal systems was the fear of potentially reviving feudal relations in contemporary European law. According to scholars, such fears were completely unfounded (N. Gavella et. al., 2007 (II), 49).

As comparative analysis shows, the real burdens are regulated in the legal systems of several European countries such as Germany, Switzerland, Croatia and Slovenia. The Macedonian Law on Ownership and Other Real Rights also recognizes real burdens as a type of *right in rem.*

The German Civil Code (art. 1105, p. 1) defines real burdens as encumbrances that consist of periodical obligations that the owner of the encumbered land is obligated to perform in favor of a particular person. Even though real burdens are generally defined as encumbrances on land in favor of a particular person, the German Civil Code (art. 1105, p. 2), also allows for real burdens to be established in favor of a particular piece of land. When the real burden is established in favor of a piece of land every person that becomes the

owner of the privileged land can benefit from the real burden. Co-owned share of the land can also be encumbered by real burden according to the German Civil Code (art. 1106).

In the Swiss Civil Code (art. 782) real burdens are defined as a right that obliges the owner of a particular real estate to perform obligations in favor of the holder of the right of real burden. Much like the German Civil Code, the Swiss Civil Code (art. 782, p. 1) initially defines the real burden as a right in favor of a certain person but also includes the possibility for the real burden to be established as a right in favor of a particular real estate. Unlike the German Civil Code, the Swiss Civil Code (art. 782, p. 2) specifies that the real burden can only consist of one obligation for the owner of the encumbered real estate. An exception is made in the case of so-called *public real burdens*, which are types of real burdens that benefit the public interest (Swiss Civil Code, art. 782, p. 3). The public real burdens can consist of several obligations for owners of the encumbered real estates.

The Croatian Law on Ownership and Other Real Rights (1996, art. 246) regulates the real burden as a *right in rem* on real estate that encumbers the real estate creating an obligation for the owner of the real estate to successively perform obligations deriving from the right of real burden. According to the Croatian Law on Ownership and Other Real Rights (1996, art. 248) the right of real burden can be established for the benefit of each owner of a particular real estate, in favor of the holder of the right to build[1] or in favor of a particular person. The Croatian Law on Ownership and Other Real Rights also specifies that only real estate that is eligible to be pledged can be encumbered by real burdens. When a particular real estate is encumbered with the right of real burden, then all accessories to that real estate are encumbered as well. Co-owned shares of real estate can also be encumbered with real burden according to the Croatian Law on Ownership and Other Real Rights (1996, art. 247, p. 3). The Law on Ownership and Other Real Rights (1996, art. 247, p. 1,2) also states that several real estates can be encumbered with a single right of real burden.

The Slovenian Property Code (2002, art. 249) regulates real burden as a right based on which the owner of the encumbered real estate is obliged to perform future positive obligations (*dare*, *facere*). As the Property Code (2002, art. 350) states, the right of real burden can be established in favor of a particular person or in favor of every owner of a particular privileged real estate.

In the legal system of the Republic of North Macedonia, the right of real burden is regulated by the Law on Ownership and Other Real Rights (2001, art. 236-239). According to the provision of the Law on Ownership and Other Real Rights (2001, art. 236), the real burden consists of positive obligations in favor of a person or a real estate that are due to be performed by the owner of the encumbered real estate. As it can be concluded from the provision, the right of real burden in the Macedonian Law on Ownership and Other Real Rights, same as in the other analyzed property laws and civil codes, is a right that can be

[1] In the Croatian legal system, the right to build is a *right in rem* that enables its holder to own a building built on someone else's land (Law on Ownership and Other Real Rights, 1996, art. 280).

established either in favor of a person or in favor of a real estate (privileged real estate). Subject to encumbrances with real burdens is only real estate. The entire real estate can be encumbered with a real burden or a particular co-owned share of it (Law on Ownership and Other Real Rights, 2001, art. 236, 237). Because the real burdens in the Macedonian law consist of positive obligations, the Law on Ownership and Other Real Rights (art. 238) directs towards the application of the provisions of the Law on Obligations (2001) regulating positive obligations. The Macedonian Law on Ownership and Other Real Rights contains only a few provisions about the right of real burden, which means that the Law isn't very precise in regulating this right. It is stated in the Law on Ownership and Other Real Rights (2001, art. 239) that real burdens are registered in the real estate cadaster, however, there are no provisions on how this right can be acquired. There are also no provisions regarding the protection and the termination of the right of real burden. According to the Macedonian Law on Ownership and Other Real Rights, the regulation of the right of real burden is not exclusively in the domain of the basic law, and it can be subject to regulation by special laws as well. In case a real burden is regulated by a special law, the provisions of the Macedonian Law of Ownership and Other Real Rights (2001) will apply only by exception, when no adequate provision is found in the special law regulating a particular type of real burden.

What can be concluded from the comparative analysis of the regulation of real burdens in the contemporary legal systems in Europe is that in all of them, the real burden is considered a type of *right in rem*. The content of the right of real burden in all the regulations consists of positive obligations for the owner of the encumbered real estate. Usually, real burdens are defined as rights established in favor of a certain person, but there is also the possibility for the real burden to be established in favor of a certain real estate (privileged real estate). The Croatian Law on Ownership and Other Real Rights explicitly states that the right of real burden can also be established in favor of the holder of the right to build. Some European countries such as France, Spain and Italy do not introduce the right of real burden as a *right in rem* in their legal systems.

3. TYPES OF REAL BURDENS

Real Burdens can be classified into several types depending on their characteristics and manner of regulation.

Depending on whether the real burden is established in favor of a certain person or in favor of a particular real estate (privileged real estate) real burdens are classified as personal real burdens and predial real burdens (N. Gavella et. al, 2007 (II), 50; И. Бабић, 2012, 309). Personal real burdens can be established in favor of natural persons, but not in favor of legal persons. A beneficiary of a personal real burden can be an individual, individual and his or her heirs or the members of a particular family (N. Gavella et. al., 2007

(II), 52; Kovačević Kuštrimović, M. Lazić, 2004, 262). Predial real burdens are a type of real burdens established in favor of a particular real estate.

Based on their duration, real burdens can be established as permanent or temporary (N. Gavella et. al., 2007 (II), 50). Permanent real burdens are a type of real burdens that are not limited by time or fulfilment of conditions. Temporary real burdens are those whose duration is limited by the fulfilment of certain conditions or expiration of a certain period.

Considering the content of the obligations deriving from the real burden scholars differentiate real burdens as natural or monetary (N. Gavella et. al., 2007 (II), 50). Natural real burdens are considered to be the type of real burdens where the obligation consists of handing over certain goods or performance of work, while monetary real burdens consist of payment of a sum of money. Regarding the classification of real burdens based on their content, it would be more appropriate for them to be classified as real burdens consisting of performances, and real burdens consisting of handovers, whereas the handovers could be natural or monetary.

Depending on the reason for establishing real burdens, they are classified as private or public (N. Gavella et. al., 2007 (II), 50). Private real burdens are established for the benefit of private individuals, while public real burdens are established for the benefit of the public interest. It needs to be noted that, in some legal systems, such as the legal system of North Macedonia, public real burdens are not recognized. The reason why the Macedonian legal system does not recognize establishing public real burdens is that such real burdens will be contrary to the constitutional provisions that prohibit the limitation of the right of ownership in the public interest without just compensation (Constitution of the Republic of North Macedonia, art. 30).

Based on how real burdens are established, they can be categorized as voluntary and compulsory. Voluntary real burdens are those that are established with the consent of the owner of the encumbered real estate, while compulsory real burdens are those that are established by law or by a constitutive court decision. The Macedonian legal system allows only voluntary real burdens to be established.

4. CHARACTERISTICS OF THE RIGHT OF REAL BURDEN

Since the right of real burden is regulated as a *right in rem*, it possesses the characteristics of other *rights in rem* such as directness, absolute effect, legal determination, specificity, duration, publicity and priority. However, due to the particular nature of the right of real burden, these characteristics manifest differently in real burdens, than in *other rights in rem*.

- The directness as a characteristic of *rights in rem* does not manifest in the right of real burden as a direct authority over the object of the right (the encumbered real estate). The holder of the right of real burden has no direct authority over the encumbered real estate. Instead, he or she has the right to demand fulfilment of the obligations that comprise

the right of the real burden from the owner of the encumbered real estate. However, it needs to be noted that in case of default in the fulfilment of the obligations by the owner of the encumbered real estate, the holder of the right of real burden has the direct authority to demand that the obligations are fulfilled from the value of the encumbered real estate.

- The absolute effect of the right of real burden is reflected in the negative duty of all third parties to refrain from actions that might infringe on the right of real burden. This means that all third parties (not just the owner of the encumbered real estate) are prohibited from taking any actions that might compromise the exercise of the right of real burden on the part of its holder. As a result of the absolute effect of the right of real burden, this right is not subject to prescription. However, that does not apply to the successive positive obligations that need to be performed by the owner of the encumbered real estate regularly. These obligations are subject to prescription. According to the Macedonian Law on Obligations (2001, art. 361), individual claims deriving from a particular right are subject to a prescription period of three years.

- The scope of legal determination of the right of real burden extends only to its explicit determination as a type of real right (*numerus clausus*). However, unlike other *rights in rem*, the content of the right of real burden is only generally determined as consisting of successive positive obligations. The exact content of the real burden is determined at the moment that this right is established. Then the parties explicitly determine the content of the obligations that the owner of the encumbered real estate will be obligated to perform in favor of the beneficiary.

- Specificity as a characteristic of *rights in rem* means that these rights can be established on a particular thing as its object. If the object of the right is not precisely identified, then the *right in rem* is not considered to be established. This refers to the right of real burden as well. When establishing a real burden, the parties must precisely identify which real estate will be encumbered with the right of real burden, meaning that an undetermined part of someone’s property cannot be an object of such encumbrance. If the real burden is established in favor of a certain real estate, then the privileged real estate must be precisely identified as well.

- Regarding the duration of the right of real burden, it needs to be noted that this right can be established as a temporary right or as a permanent right. However, the right of real burden cannot last beyond the existence of encumbered real estate. This means that even if the right of real burden is established as a permanent right if the encumbered real estate is destroyed, the right of real burden will be terminated. If the right of real burden is established in favor of a particular real estate, this right is also terminated if the privileged real estate gets destroyed.

- The publicity of the right of real burden is achieved by its registration in the real estate cadaster, which is a public record containing data about real estate and the rights of real estate (Law on Real Estate Cadaster, 2013, art. 2, p. 1)

- As a *right in rem*, the real burden has priority over other rights that are directed toward the value of the encumbered real estate. This means that the holder of the right of real burden has priority in demanding payment of his or her claims from the value of the encumbered real estate before all other creditors of the owner of the real estate.

Regarding the priority of the right of real burden vis-à-vis other *rights in rem*, it needs to be noted that this priority is determined by the moment when the real burden is established on a particular real estate. If a particular real estate is encumbered by several real burdens, then priority is given to the real burden that is established earliest. The time priority also applies when the real estate is encumbered with competitive *rights in rem* such as the right of real burden and the right of pledge. These two rights compete with each other because both rights are directed towards the value of the encumbered real estate. Suppose the right of real burden is established before the right of pledge on the same real estate. In that case, the holder of the right of a real burden will have priority before the holder of the right of pledge to demand payment of his or her claims from the value of the encumbered real estate.

The time priority of the right of real burden affects other *rights in rem* even though they are not in direct competition with the right of real burden. For example, predial servitudes can be established on the real estate already encumbered by real burden only if they don't interfere with the obligations of the owner of the real estate deriving from the established right of real burden. The same applies to personal servitudes and the right of a long-term lease.

Since the owner of the encumbered real estate is obligated to endure the right of real burden and to perform the obligations deriving from that right it can be said that the right of real burden is given a limited priority before the right of ownership on the encumbered real estate. However, in some legal systems, it is permitted for the owner of the encumbered real estate to demand the termination of the right of a real burden if there is no reasonable purpose for it to exist[2]. In such cases, it can be concluded that the legislator gives priority to the right of ownership.

The right of real burden also possesses some specific characteristics resulting from its particular legal nature. Those characteristics are indivisibility, non-detachability and non-transferability.

- The indivisibility of the right of real burden means that this right cannot be affected by the changes in the state of the real estate that encumbers. As a result of the indivisibility of the real burden in case of division of the encumbered real estate, all its newly formed parts become encumbered with the right of real burden, and all the owners of the newly formed parts are obligated to perform the duties deriving from the real burden. It is important to note that the division of the encumbered real estate into several independent

[2] The termination of the right of real burden due to lack of reasonable purpose is explicitly regulated by the Croatian Law on Ownership and Other Real Rights (1996, art. 276).

parts does not increase the obligations from the real burden. All of the owners of the newly formed parts of real estate are obligated to perform a share of the obligation from the real burden, proportionally to the size of the newly formed part of the real estate that they received in the division.

When the right of real burden is established in favor of a certain real estate (privileged real estate), all of the owners of the privileged real estate are entitled to the right of real burden. In case of division of the privileged real estate, the owners of the newly formed parts become co-holders of the right of real burden, and each of them is entitled to receive a share of the claim deriving from the real burden, proportionally to the size of the part of the privileged real estate that they received in the division. When the claim deriving from the encumbered real estate is by nature indivisible, then the division of the privileged real estate will call for changes in the content of the right of a real burden so that the indivisible obligations can be replaced with divisible ones. It must be underlined that the changes in the content of the right of real burden must not increase the obligations from the real burden for the owner (or owners) of the encumbered real estate, or make its performance more difficult.

- The non-detachability of the right of real burden also refers to the encumbered real estate. According to this principle, the right of real burden cannot be separated from the encumbered real estate, regardless of the transfer of ownership over the real estate. As a result, each new owner of the encumbered real estate will be obligated to perform the obligations deriving from the content of the real burden. However, it needs to be clarified that the new owner of the encumbered real estate is only responsible for the performance of the obligations that come due during the time he or she holds ownership over the encumbered real estate. The obligations that were due to be performed before the change in ownership were the responsibility of the previous owner. If such obligations are not performed by the previous owner, the holder of the right of real burden can file a claim against the estate of the previous owner, since he or she is not entitled to demand payment of those claims from the value of the encumbered real estate.

- The right of real burden is non-transferable. This right is established in favor of a particular person (personal real burden) or in favor of a particular real estate (predial real burden, however, the beneficiary of the real burden is not entitled to transfer his or her right of real burden onto another person. The non-transferability of the real burden is absolute for personal real burdens. As for the predial real burdens, their non-transferability is relative. The right of a predial real burden is transferred by law onto the new owner (or owners) when a change of ownership over the privileged real estate occurs. The non-transferability of the right of real burden does not affect the obligations deriving from the content of the real burden. According to some scholars, individual claims that come due during the duration of the right of real burden can be transferred (N. Gavella et. al., 2007 (II), 69). These individual claims can be transferred by the beneficiary (the holder of the right of real

burden) onto third parties, but under the condition that the nature of the claim allows for such transfer.

5. THE LEGAL NATURE OF REAL BURDENS

The analysis of the regulation about the right of real burden, and the characteristics of this right demonstrate that the real burden is generally treated as a *right in rem* over real estate that entitles its holder to ask performance of certain successive obligations by the owner of the encumbered real estate.

Determining the right of real burden as successive obligations that the owner of the encumbered real estate must perform for the benefit of the holder of the right of real burden (the beneficiary) raises dilemmas among scholars regarding the true legal nature of the real burden. Focusing solely on the content of the right of real burden, some scholars conclude that this right consists of positive and successive obligations between two parties (N. Gavella et. al., 2007 (II), 47). The *inter parities* relation between the owner of the encumbered property and the beneficiary (the holder of the right of real burden) leads them to the conclusion that the real burden is by nature a specific type of obligation, and not a *right in rem* (real right). For other scholars, the right of real burden is not an obligation that has an *inter partes* effect, but a *right in rem* that has *erga omnes* effect. Their conclusion is based on the fact that the right of real burden creates a negative obligation for all third parties to refrain from actions that impede the holder of the right of real burden to freely exercise his or her right which is typical for all *rights in rem* (Р. Живковска, 2005, 128). There are also scholars who consider the right of real burden to be a right with a dual nature. They conclude that the dual nature of the right of real burden creates two parallel legal relations between the parties. One legal relation is the obligation between the owner of the encumbered real estate and the beneficiary (the holder of the right of real burden) that obliges the owner of the encumbered real estate to perform positive obligations (*dare, facere*) in favor of the beneficiary. The other legal relation is a property law relation that regulates the right of real burden as an encumbrance on real estate and to that effect a *right in rem* (N. Gavella et. al., 2007 (II), 47). In Common Law legal systems, the real burden is defined as a legal instrument that enables the person transferring his or her right of ownership of the real estate to create positive duties for his or her ownership successors (R. J. Smith, 2011, 52). However, the legal instrument that is the real burden is not considered as an obligation between two parties that limit the exercise of the acquired right of ownership, but rather as an imposed duty that affects all future owners of the real estate. Unlike contractual limitations of the exercise of the right of ownership, the real burden in Common Law legal systems is a legal instrument that is subject to publicity (it is registered in public records). The registration of the real burden in public records guarantees that all future owners of the encumbered real estate will abide by the duty imposed with the real burden (R. J. Smith, 2011, 52). Aiming to differentiate real burdens from other mere

obligations in Common law legal systems, some scholars define real burdens as a separate type of positive servitudes, meaning servitudes that create positive duties for the owner of the encumbered land (S.F. French, 2000, 225).

Even though there are some specifics to the right of real burden that cause this right to resemble an obligation, the legal treatment of the real burden as a *right in rem* cannot be disputed.

As was shown in the comparative analysis, the right of real burden is regulated by civil codes in the scope of property law (German Civil Code, Swiss Civil Code), and in basic laws regulating property (Law on Ownership and Other Real Rights of Croatia, Property Code of Slovenia, Law on Ownership and Other Real Rights of North Macedonia). From a legislative viewpoint, there is no doubt that the place of the right of a real burden is among the *rights in rem* and it is explicitly determined as such (*numerus clausus* principle).

The right of real burden not only is determined as a *right in rem*, as we have shown, but it also possesses the characteristics typical for *rights in rem*. Due to its nature as a *right in rem*, the right of real burden has an absolute effect against all third parties and creates an *erga omnes* legal relations in which all third parties are obligated to respect the right of real burden, and consequently to refrain from any action that may violate that right. The *erga omnes* legal relation is reinforced by the publicity of the right of real burden, which is achieved by registration of the right in the real estate cadaster as a public record for rights on real estate.

The object of the right of real burden is an immovable thing – real estate. Having a specific thing (movable or immovable) as an object is also typical for the *rights in rem*.

Taking all things into consideration we must conclude that the right of real burden is by legal nature a *right in rem*, and its specific characteristics do not compromise that nature. Similarly to servitudes and the right of pledge, the right of real burden creates two legal relations that exist simultaneously - external and internal. The external relation is the *erga omnes* relation that takes effect between the holder of the right of real burden and all third parties. This relation is the primary relation considering the nature of the right or real burden. The internal relation is the relation between the holder of the right of real burden (the beneficiary) and the owner of the encumbered real estate. Although this internal relation includes the duty of the owner of the encumbered real estate to fulfil the positive obligations that derive from the right of real burden, it cannot be said that this is a typical *inter partes* relation. The obligation in the internal relation is not linked to a particular person as a debtor, but rather to the encumbered real estate, and by extension it is a duty that falls on any and every person who comes to own the encumbered real estate. Furthermore, unlike the debtors in typical *inter partes* obligations who are liable for the fulfilment of their obligations with their entire estate, the owner of the real estate encumbered with the right of real burden is responsible for the fulfilment of the obligation deriving from the real burden only with the value of the encumbered real estate.

It needs to be noted that the obligation from the right of real burden in exceptional cases can become a typical *inter partes* obligation. This is the case when the owner of the encumbered real estate has failed to fulfil the obligations he or she was due to fulfil during the time he or she owned the encumbered real estate. Since the person who defaulted to fulfil the obligations has lost ownership over the encumbered real estate, the unfulfilled obligations cannot be discharged from the value of the encumbered real estate. Instead, the previous owner of the encumbered real estate becomes liable with his or her entire estate for the performance of the obligations he or she was due to fulfil while he or she owned the encumbered real estate.

6. CONCLUSION

Real burdens as rights on real estate emerged in the period of feudalism in socio-economic relations based on the concept of the divided right of ownership between the feudal overlord who had *dominium directum* and his subjects who had *dominium utile.* As a result of the division of the right of ownership the subjects who had *dominium utile* were obligated to work the land, pay rents, give tributes and perform other work for the benefit of the feudal overlord. These obligations were considered real burdens.

Real burdens, as rights emerging from the period of feudalism, are not embraced by all contemporary legal systems in Europe. The legal systems that recognize real burdens consider them as a type of *right in rem.*

The content of the right of real burden consists of positive obligations for the owner of the encumbered real estate. Usually, real burdens are defined as rights established in favor of a certain person, but there is also the possibility for the real burden to be established in favor of a certain real estate (privileged real estate).

Real Burdens are classified into several types depending on their characteristics and manner of regulation. Depending on whether the real burden is established in favor of a certain person or in favor of a particular real estate (privileged real estate) real burdens are classified as personal real burdens and predial real burdens. Based on their duration, real burdens can be established as permanent or temporary. Considering the content of the obligations deriving from the real burden scholars differentiate real burdens as natural or monetary. Depending on the reason for establishing real burdens, they are classified as private or public. Based on how real burdens are established, they are categorized as voluntary and compulsory.

The right of real burden as a *right in rem* possesses the characteristics of other *rights in rem* such as directness, absolute effect, legal determination, specificity, duration, publicity and priority. The right of real burden also possesses some specific characteristics resulting from its particular legal nature. Those characteristics are indivisibility, non-detachability and non-transferability.

Even though there are different opinions among scholars regarding the legal nature of the right of real burden, considering the characteristics of this right and its regulation it can be concluded that this right is generally treated as a *right in rem* over real estate that entitles its holder to ask performance of certain successive obligations from the owner of the encumbered real estate.

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ПРАВНА ПРИРОДА РЕАЛНОГ ТЕРЕТА У САВРЕМЕНИМ ПРАВНИМ СИСТЕМИМА

Апстракт

Реални терет је у савременим правним системима уређен као право које омогућава његовом носиоцу да од власника одређене непокретности оптерећене реалним теретом захтева испуњење одређених обавеза. Као резултат овог спацифичног садржаја реалног терета, у теорији постоје различита мишљења о питању правне природе реалних терета. Неки научници сматрају да је правна природа реалног терета нејасна и да се граничи између облигационог и стварног права. Други сматрају реални терет стварним правом јер представља оптерећење непокретности. Постоје и научници који реалне терете посматрају као обавезе две стране које утичу на вредност одређене непокретности.

Овај рад има за циљ да са законодавног становишта испита правну природу реалних терета кроз испитивање начина регулисања и карактеристика реалних терета у савременим правним системима у Европи.

Кључне речи: имовинско право, реални терети, стварна права, облигације.

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THE ROLE OF DIGITAL TOOLS IN EXERCISING THE RIGHT TO ANNUAL LEAVE IN THE EMPLOYMENT RELATIONSHIP

Summary

In modern times, employers use technology as a means to shape the intra-organizational processes that regulate the working relationship between the employer and the employee. The above is visibly manifested through the use of digital tools in the context of exercising the right to use annual leave by the employee. This paper investigates the role of digital tools used by employers and employees as a means of initiating, regulating and tracking the right to exercise and use annual leave within the framework of the employment relationship, as well as the implications that arise for the employment relationship in terms of the said intra-organizational method of utilizing technology and digital tools that are integrated into the organization by the employer.

Key words: employment relationship, annual leave, digital tools, automation, digital transformation.

1. INTRODUCTION

The digital tools used in the workplace for managing annual leave have changed the way employees take annual leave. The technological advancement and digital transformation of the employers' organizations are changing the dynamics of how workers are able to exercise their lawfully prescribed rights within the framework of the employment relationship.

To begin with, it is worthy to mention that the European Social Partners (2020) signed the Autonomous Framework Agreement on Digitalization initiative, which outlines that one component of the visualized digitalization partnership process that connects the digital technology with the work organization that addresses key issues: digital skills and securing employment, modalities of connecting and disconnecting, AI and guaranteeing the human in control principle, respect of human dignity and surveillance. The following Agreement projects and covers the work organization with the working conditions in covering the working environment of using leave systems in the employment context. This is visibly stating that the awareness of the role of implementing and using digital systems in the employment context, including for the purposes of managing the annual leave process between the employee and the employer is not a brand-new topic on the European soil.

Certain authors (Syrek et al., 2018) note that the quality and well-being of the annual leave days is also linked to factors arising during and after the period of vacation, which in fact are influencing the speed of fade-out effects that the employees experience. Other authors (Kühnel & Sonnentag, 2011) note that leisure time relaxation experiences after vacation delayed the fade-out of beneficial effects, meaning reducing job demands and ensuring leisure time relaxation can prolong relief from vacation. In the given context, ensuring a smooth work unload of working obligations before going on vacation, and ensuring a smooth usage of an annual leave that smoothly and easily help the employees to request, track, use, and monitor the annual leave request, which will not additionally burden them before requesting the annual leave, and monitoring the annual leave status and available remaining days for using annual leave.

Nowadays, the annual leave management systems are being used both to the standard and remote work setting by the employees (Vault, 2023).

2. THE NORMATIVE CONTEXT OF EXERCISING THE RIGHT TO ANNUAL LEAVE

Annual leave allows workers to take time off from work for rest, relaxation, and personal activities, which helps prevent burnout and promotes work-life balance. The employees are entitled, in most employment-related cases, to spent their days off work on private matters in doing as they please, to the extent that they please, without the need to please any demanding work-related activity prescribed by the employer. This means, in theory, a form of a freedom in the sense of not being obligated to act or undertake a potential activity or action, in a manner that it has been accepted and agreed upon by the employee by signing the employment contract or relevant annexes to it with the employer. In other words, exercising the right to annual leave ensures that the employees are entitled to a specified amount of paid leave by the employer in a defined period of days during the span of one calendar year.

2.1. International Labor Organization Convention C132 on Holidays with Pay (1970)

The ILO Convention C132 on Holidays with Pay Convention (Revised) establishes the principle that all workers should be entitled to paid leave and establishes minimum standards for annual leave entitlement. The Convention stipulates that every person to whom this Convention applies is entitled to an annual paid holiday of a specified minimum length, whereby the holiday shall in no case be less than three working weeks for one year of service, and the remuneration will be received in respect of the full period of those holiday days at least in the normal or average amount. (ILO C132 Holidays with Pay Convention Revised, 1970, article 3 paragraph 1 and 3, and article 7 paragraph 1).

2.2. European Union Directive concerning certain aspects of the organization of working time

It is noteworthy that the first version of the Charter of Fundamental Rights of the European Union (2000) has addressed the subject of fair and just working conditions by noting that every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (EU Charter of Fundamental Right, 2000, article 31 paragraph 2).

The EU Working Time Directive 2003/88/EC sets out minimum requirements for annual leave entitlement for workers in EU member states. It mandates a minimum of 4 weeks of paid annual leave for all workers. (EU Directive 2003/88/EC, article 7 paragraph 1).

2.3. National laws

The role of the national legislation is most important for regulating annual leave because the local laws are closely and specifically establishing the minimum requirements and entitlements for the employees in regard to taking time away from work.

Macernyte and Mačiulaitis (2020, 94) argue that in the national context, such as in the case study they conducted in Lithuania, the right to annual paid leave could be better ensured if the legislation would provide for a particular deadline for submitting and rejecting requests for annual leave.

The Macedonian Law on Labor Relations, however, is regulating the core aspects that are covered within the framework of the employment relationship, including the right to exercising the annual leave by the employees.

The law stipulates several options of exercising the right to annual leave, depending on the context and the form of the employment relationship.

In the case of an existence of a part-time employment contract, the law underlines that The employee has the right to an annual leave with a minimum duration of ten working days (Law on Labor Relations, 2005, article 48, paragraph 4).

In the case of an existence of a managerial contract, i.e. an employment contract with managers, the law regulates that the parties can arrange the rights, obligations and responsibilities differently, including for the provisions and purposes relating to the annual leave (Law on Labor Relations, 2005, article 54).

In the case of concluding a standard employment contract, the law covers more aspects regarding the right to annual leave, beginning with defining the context of the right of the annual leave (Law on Labor Relations, 2005, article 137), by addressing that:

- The employee shall have the right to annual leave for the duration of at least 20 workdays.
- The annual leave may be prolonged to 26 work days with a collective agreement or an employment agreement.
- An older employee, which is referred under Article 179 of the Law on Labor Relations, a disabled employee, an employee with at least 60% of physical impairment, and employee who takes care of a physically or mentally handicapped child, shall have the right to additional three workdays of annual leave.
- The employer is obliged to hand down the employee a Decision on the right to (exercise the) annual leave

In terms of acquiring the right to annual leave, the law regulates that in cases when an employee establishes an employment relationship for the first time, it acquires the right to an entire annual vacation, when the person has worked continuously for at least six months with the same employer, regardless of whether the employee works full-time or less than full-time (Law on Labor Relations, 2005, article 139).

Regarding the use of annual leave, the law states the following (Law on Labor Relations, 2005, article 141):

- As a rule, the annual leave shall be used in the course of the calendar year;
- The annual leave may also be used in several parts in agreement with the employee under the condition that one part of the annual leave must last for at least two continuous work weeks;
- The employer shall be obliged to assure that the employee uses two subsequent work weeks of their annual leave until the end of the current calendar year, whereas the remaining part until the 30th of June the following year
- The employee shall have the right to use the annual leave which has not been used in the current calendar year as a result of absence due to disease or injury, maternity leave or childcare leave, by the 30th of June of the following calendar year.
- The employee working abroad may use his full annual leave until the end of the following calendar year if it is defined by the employer’s collective agreement.

Last but not least, Ostoj (2019, 69) analyzed the varying paid annual leave length across the Globe and her findings are stating that not all Countries globally are aligned with the relevant standards set out by the International Labor Organization, regarding the paid annual leave length, by concluding that in some legislations the paid annual leave period is short and not corresponsive to with the tenure period of the employee, while in other legislations the annual leave period is growing with tenure.

3. DIGITAL TOOLS AND THEIR IMPACT ON THE WORKPLACE

As we can see from the most basic buy essential normative framework that touches upon the regulation and the exercising of the annual leave in the context of employment, there are many variations in place which can develop various scenarios of how to "unlock" the right to annual leave by the employee (meaning, when can you use days-off), how the right to annual leave is addressed and defined, how can you exercise the tight to annual leave from the employee's perspective, how can you manage, approve and issue decisions for using the Out-of-Office (OOO) days for annual leave from the employer's perspective, and how to most transparently showcase, track and record the requests for annual leave and the approved annual leave period, both from the perspective of the employee and the employer.

Having the above-mentioned in mind, in the current era of technological development, many employers acting as companies in the private sector, decide to adopt and implement digital tools that help manage, organize and track the annual leave periods for the employees by using digital tools in pursuing this path.

Ikuomola (2017, 81) underlines that having e-leave management system ensures the administration of standard leave policies, centralization of the collection and maintenance of leave records, and automation as much of the leave processes as possible.

Adamu (2020, 86) discusses an Employee Management System that has been developed as a web-based application that can be easily accessed by staff members which made it easy for the employee to request and track their own leave, while on the employer side it helps to allocate, grant and manage leave requests from the employees.

Furthermore, the Trade Union Congress (2020, 20) which is an organization made up of 48 member unions in the United Kingdom, that bring together more than 5.5 million people, has observed that the role in AI and digital tools is also integrated into the line-management role in the context of the employment, whereby, many workers have stated that they experienced that AI-powered technologies and platforms are making holiday allocation decisions on behalf of the management of the employer.

Having the following into consideration, Karan Kalra (2023) briefly but precisely summarizes the evolution of the phases of leave policies:

- Early 20th Century: No standardized leave policies; paid leaves were rare or non-existent globally;
- Mid-20th Century: Introduction of basic leave entitlements, largely influenced by labor movements and emerging labor laws;
- Late 20th Century: Expansion of leave types (maternity, paternity, sick leave) reflecting changing societal values and workforce demographics;
- Early 21st Century: Legal mandates in most countries for minimum leave entitlements; focus on work-life balance and mental health;
- The 2010s:
    - Introduction and adoption of digital tools for leave management, initially through basic digital records and spreadsheets;
    - Emergence of workflow automation in leave management, integrating digital platforms for streamlining leave processes that help in ensuring compliance, efficiency, and transparency.

4. TYPES OF ANNUAL LEAVE MANAGEMENT PLATFORMS

Annual leave management platforms are used as a digital tool by the employers to track and monitor the annual leave of employees. Noteworthy information is that most of the annual leave management platforms are in fact multi-purpose employee management platforms that have embedded and integrated tools within the platforms that address separately the subject of annual leave management. This means that, a particular HR-oriented platform that is used in dealing and addressing employment rights and obligations, is providing options to address various leave management options, as prescribed by law in given Country, out of which the annual leave requests management is one of the few options covered under the leave management space.

Based on the mode of accessing point for a particular annual leave management platform, the following systems can be used and operationalized through intranet, extranet and internet connectivity. There are several differences of any of these access points for the employees and the employers, depending on the digital infrastructure that the employer can build within the organization from its' own workforce that is specialized to create them, or by using external and already created web-based products that offer a platform for digitally managing the annual leave process.

Some of these currently popular platforms that are offering digital annual leave management solutions for the employers are:

- LeaveBoard
- Breathe HR
- Vacation Tracker
- actiPLANS
- Calamari

- AbsenseSoft
- BambooHR
- Deputy
- Factorial HR
- Leave Dates
- LeaveBoard
- TimeTac
- Sparrow
- Stiira
- DaysPlan
- Cocoon
- XperienceHR
- Excel Employee Leave Tracker
- Rippling
- Nanonets

4.1. Intranet annual leave management platform

The intranet annual leave management platforms are mainly a local network platform that can be pre-built as digital tools with limited access only available to one particular employer. The employer's organization of work through a particular annual leave management software can be accessed only by the employees of that particular employer. This function gives better and stricter security of the information, meaning the platform provides a centralized pathway for the employees to communicate with the employer's management and helps manage annual leave requests. These platforms can either be created from the employee or they can be purchased from a third party and get them installed or integrated within the organization.

4.2. Extranet annual leave management platforms

The extranet annual leave management platforms in fact differs from the intranet ones in several components. These extranet software solutions apart from the employees, can also be accessed by an authorized third party by the employer, such as vendors. Mainly, the extranet is not as stricter for accessing it, and it can be accessed from members of the organization and from external users as well. The extranet platforms are in-between platforms between the intranet and the internet, meaning that the platform can also be bridged and integrated with other platforms that the employer uses, while considering the need to ensure the personal data of the employees and restrict access to uninvited users.

4.3. Internet annual leave management platforms

The internet annual leave management platforms are the ones that are widely available, and most debatable from a data protection standpoint because they require a vendor risk assessment process, since the service providers of these platforms are storing the data either on their own services, or in a cloud space. From the perspective of the employer, these platforms most of the time are set up as subscription-based platforms, meaning that the employer needs to subscribe to the platform, to pay for access, and to use the annual leave management platforms. Noteworthy information is that these platforms are not solely covering annual leave management processes, but rather than that, they are covering an array of employee management processes that are prescribed by law under the all-in-one software solution approach. This characterizes the employee management process by streaming it to be conducted digitally instead on a standard paper format.

Conflux, which is one of the human resource management systems that is used by employers for managing the human capital, in this case the employees, is noting that (2023) the digital tools for employment leave management can be grouped as:

- Leave management software that acts as a digital platform for managing leave requests and balances between the employees and the employers
- Self-service portals that stream the employees to independently submit leave requests, to check the status of the requests and track the approval status
- Leave tracking apps that are mobile apps who enable the employee real-time access to a particular platform for request annual leave
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5. PRACTICAL IMPLICATIONS OF USING ANNUAL LEAVE MANAGEMENT PLATFORMS IN THE WORKPLACE

When it comes to the importance of the practical implications that these digital tools are offering on the employer’s organizations, it should be noted that these implications are applicable both for the side of the employee and the employer.

From the perspective of the employee, the most important implication that arises is the actual opportunity to digitally exercise the right of using annual leave. This means that the employees that work in digitally-oriented organizations are entitled to enhanced methods of using and exercising particular employment rights, as they are prescribed by law, or even in some scenarios surpassing the minimum requirements that should be followed and abided by the employers. which are set by the applicable labor legislations. Some of the useful additions that can be considered as enhanced features of exercising the annual leave include, but are not limited to:

- Streamlined and preconfigured annual leave requesting process
- Improved productivity
- Improved efficiency

- Enhanced employee satisfaction
- Increased transparency of exercising employment rights, such as the right to annual leave
- Better planning and optimization of the work-life balance of the employee

From the perspective of the employers, the usability of the digital tools that help manage the annual leave is helping in several areas at the same time. This relates to:

- Tracking the past and ongoing annual leave period
- Managing the annual leave period for the whole workforce, which can vary depending of the structure of the company that acts as an employer
- Communicating the annual leave requests with the employee
- Communicating the annual leave approvals with the employee
- Keeping and storing the annual leave records in a digital format
- Using semi-automated functions for exercising the right to annual leave to the employee, such as the case of pre-emptively notifying the employee from the particular annual leave system regarding the available days of annual leave and the lawfully defined period of using annual leave days
- Notifying the employer periodically of any ongoing and pending annual leave requests by the employee
- Helping employees be more productive by having an ease-up process for requesting days off work
- Enabling real-time overview of the annual leave statuses
- Keeping digital evidence
- Improving compliance by ensuring that all the employees are using their entitled right to annual leave

Last but not least, the usage of annual leave management platforms in the context of the employment relationship, is having a mutually useful implication that affects the employee and the employer, which helps in having a synchronized evidence and overview of annual leave days between the employee and the employer. The most common types of mutually-important digital evidence and records regarding the right to exercising the annual leave are covering:

- The records on used days for annual leave
- The records of the number of requests and approvals for using annual leave
- The records of overviewing the annual leave period of other colleagues
- The records of the remaining days for using annual leave

6. CONCLUSION

The usage of digital tools to manage the annual leave process nowadays is getting more and more integrated in the employers' organizations, which directly affect the employment relations ship, mainly in rearranging and enabling a digital stream of initiating,

tracking and overviewing the annual leave status regarding the right to exercise annual leave by the employee in the employment relationship.

This in fact, enables a multiplatform synchronization of annual leave, which additionally boosts up transparency and efficiency for both the employees and the employers. It is most common practice that employers are integrating the annual leave platform with other digital platforms that the employer uses, and by doing so, nowadays if the employee updates its' Out-of-Office status, that status can automatically be updated into the other digital tools that are used by the employee, meaning automated update of the email correspondence of the employee by replying automated reply notices from the employee that it is currently Out-of-Office, and also if the employee is using a digital calendar to plan and schedule work-related tasks and activities, to mark and block the digital calendar of any incoming work-related issues in those particular days when the employee is exercising the right to annual leave.

Of course, depending on the level of the digital integration and cross-platform synchronization that the employer is performing, which affects the employee working in the given organization, the multiplatform synchronization is even more rooted and automated, which in fact required a separate analysis.

To conclude with, it is needed to be noted that the employers that undertake basic or more advanced digital transformation of their organization, are nowadays subject to using more and more digital platforms, some of them are built internally, some of them are built by other vendors and are made available to the employer, either by subscription or by offering a ready-to-go annual leave software solution, depending on the issue of the ownership of the intellectual property right of the product. From the perspective pf the employment relationship, it is important to mention that the annual leave process, unlike in the past period, can now be invoke, initiated and managed not only by paper form, but in a digital format. Depending on the digital literacy of the employees and the level of digital transformation of the employers, the role of digital tools towards exercising the right to annual leave in the employment relationship nowadays is something very common, and if it is integrated in the workplace, it should be used to ease up and unburden the annual leave management process between the employee and the employer.

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УЛОГА ДИГИТАЛНИХ АЛАТА ПРЕМА ОСТВАРИВАЊУ ПРАВА НА ГОДИШЊИ ОДМОР У РАДНОМ ОДНОСУ

Апстракт

У савремено доба, послодавци користе технологију као средство за обликовање унутрашњих организационих процеса који регулишу радни однос између послодавца и запосленог. Наведено се видљиво манифестује кроз коришћење дигиталних алата у контексту остваривања права на коришћење годишњег одмора.. У овом раду истражује се улога дигиталних алата које користе послодавци и радници као средство за иницирање, регулисање и евидентирање права на коришћење годишњег одмора у оквиру радног односа, као и импликације које произилазе на радни однос у смислу поменути интра-организациони метод коришћења технологије и дигиталних алата које је послодавац интегрисао у организацију

Кључне речи: радни однос, годишњи одмор, дигитални алати, аутоматизација, дигитална трансформација.

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CRIMINAL LAW PROTECTION OF PRIVATE SECURITY OFFICERS IN SERBIA

Summary

Criminal law protects men and basic social values without specifying what those values are. The development of society, market economy, and science development leads to the development of security, which in its modern form also includes private security as a segment. The basic unit of private security is a person, that is, a private security officer who, due to his vulnerability, must also have criminal protection. In the paper, the authors, using normative methods, examine what are the bases and what are the limits of that protection, how certain provisions of the criminal legislation of Serbia are applied in practice, primarily by the judicial authorities. Private security officers are protected more through the qualified forms of crimes of Aggravated Murder and Serious Bodily Injury, which means that their life and bodily integrity are protected. However, the Serbian legislator does not "strengthen" protect the private security officer from insult, but only through the basic form of this crime, like other citizens. In particular, attention is drawn to the entirety of the legal system of Serbia, where when applying criminal law, attention must also be paid to the legal regulation of private security.

Key words: private security guard, steward, private detective, criminal law, protection.

1. INTRODUCTION

Private security officers in Serbia *de facto* have existed since long time[1], but *de jure* only since 2013 with the adoption of the Private Security Law (2013; hereinafter ZPO) and

[1] Further readings in Lestanin & Nikac, 2022, 177-185.

the on Private Detective Activities Law (2013; hereinafter: ZDD). The full implementation of these two system regulations began only after about 6 years from their adoption. Their adoption created a legal framework for building a private security system as part of overall security in Serbia. This has created a profession that, on the one hand, brings an increased level of security, and on the other hand, can be increasingly threatened due to its exposure to security risks (crime, terrorism and other harmful events).

The state, as a social entity, has a monopoly over coercive measures, the direct implementation of which is entrusted to state bodies with the limitation of respect for human and minority rights and civil liberties guaranteed by the constitution and international legal acts, the principle of legality, proportionality, restraint, and subsidiarity. The possibility of using means of coercion is one of the most important elements that distinguish the police from other authorities, according to which it has a great responsibility in the enforcement of laws and powers (Nikač & Leštanin, 2017, 191). The democratization of society, the crime rate increasing, modern technologies and other favorable conditions led to the fact that the state shared the monopoly over coercion with private actors so that today we have private security guards, stewards, private detectives and even private prisons with the right to apply coercion (Leštanin & Nikač, 2024).

In Serbian criminal law, for a long time, there has been a noticeable tendency towards increased criminal law protection of the lives of certain categories of persons. It manifests itself through the introduction of new crimes or new forms of existing crimes in which human life and bodily integrity appear as a protective object (or one of the protective objects) and through the frequent serving of punishments issued for already foreseen crimes, including the introduction sentences of life imprisonment as the most severe criminal sanctions in Serbian criminal legislation. Without going into the discussion about the justification and expediency of some new solutions, one cannot dispute the effort of the legislator to ensure enhanced criminal law protection of life as the greatest human value (Đorđević & Đorđević, 2021, 85). Such a solution can be disputed from the aspect of international law because it does not recognize any difference in the protection of human life and bodily integrity.[2]

2. SPECIAL CRIMINAL LAW PROTECTION OF CERTAIN PROFESSIONS

Increased vulnerability leads to increased protection, which is followed by Serbian criminal legislation. Some professions are more vulnerable to safety than others. Thus, first of all, the official relationship of a certain person is strengthened. In addition, the Criminal Code, 2005 (hereinafter: CC) singles out military personnel, whose life and bodily integrity are protected more closely, while at the same time protecting the unhindered performance of

[2] See Art. 3 of Universal Declaration of Human Rights, Art. 2 of European Convention for the Protection of Human Rights and Art. 6 of International Covenant on Civil and Political Rights

official (military) duty. These persons, in addition to increased protection, also have increased responsibility because the legislator in a special part of the CC issued that an official and military person can appear as a perpetrator of a crime in a basic or qualified form. There are crimes against the freedoms and rights of man and citizen, against people's health, against the security of computer data, against legal traffic, against official duty and against the Serbian Armed Forces. For these crimes, the legislator issued serious punishments.

Executives of judicial functions (judges and public prosecutors) and police officers also enjoy enhanced criminal law protection. This applies not only to their life and physical integrity, but also to the exercise of judicial function and policing. Finally, the amendments to the criminal legislation from 2009 introduced enhanced protection of persons performing work of public importance, because in the previous period there were murders of journalists that remained unsolved, as well as attacks on them during the execution of a journalist's work. However, CC does not protect all works of public importance, but only those in the field of public information, people's health, education, public transport, legal and professional assistance before courts and other state bodies. In addition, in order for a person from this category to be protected more, there must also be an 'increased risk' for the safety of the person performing it. In addition to journalists, medical staff (doctors and medical technicians), teaching staff in schools and universities, controllers in public transport, lawyers, private security officers and others can be classified in this category of persons.

Regarding the broadly defined circle of persons who perform work of public importance, which in addition to particularly vulnerable persons (journalists, lawyers, medical personnel, private security officers, etc.) also includes other persons who are not particularly exposed to the possibility of an attack on their lives and physical integrity in the performance of duty, the solution accepted in the CC is fully justified. In this way, the state gives greater authority and emphasizes the importance of the works they perform, and the persons who perform those works have a stronger sense of security when performing those works, regardless of which works of public importance are involved. However, the very application of such a widely set norm can lead to misinterpretations and an unnecessary and unjustified expansion of criminal protection.

If we analyze the criminal protection of private security officers in the performance of their duties, we notice that the criminal legislation is not uniform. As the main reason for this situation, it is considered that every private security system works in a real social environment, which therefore determines that system as part of the overall security system. In this sense, the level of social development, the degree of rule of law and respect for human rights, history, tradition and culture, etc., influence the crimes that protect the life and physical integrity of private security officers in certain countries. That is why it is simply impossible to mechanically transfer the criminal law protection of private security officers from one state to another.

Considering the regulations in the field of private security, the jobs of private security guards, stewards and private detectives can be considered as works of public importance in the field of legal and professional assistance before courts and other state authorities (Leštanin & Nikač, 2023, 147). However, the 'increased risk' does not exist for all private security officers, but only for physical security guards, stewards and private detectives.

3. DEFINITION OF PRIVATE SECURITY OFFICER

A private security officer is a person who has a license from the Ministry of the Interior (hereinafter: MoI) for the performance of private security services (Art. 3, Par. 1, Item 16 of the ZPO).[3] In other words, a private security officer is a licensed person who, for private needs, performs security duties issued by law. ZPO entitles private security officers to exercise certain powers that are similar in nature to those exercised by police officers (Art. 46-57 ZPO). Some of the powers imply the restriction of certain human rights and freedoms (right to life, right to physical and mental integrity, right to property, freedom of movement, etc.). In order for a person to be a private security officer, in addition to having a license, that person must be employed or engaged outside of an employment relationship with a business entity that has a license to perform security services. During the service, the private security officer is obliged to wear a uniform and display the ID card in a visible place. According to the provision of Article 60 par. 2 ZPO uniform can be worn only during the service. It must also be emphasized that personal security jobs can also be carried out in civil suits, but only on the basis of a written order from the employer.

A private detective is a person who is employed by a business entity for private detective activity and who has a license to perform private detective service, under the conditions of the ZDD. Investigative services can be provided by a private detective only on the basis of a written contract concluded with the user of the services (Art. 12, par. 1). The private detective has the authority to collect and process data (Art. 10 and 11 ZDD) and use of force – coercive means (Art. 16 ZDD). A private detective may use physical force, gas spray and firearms exclusively for the purpose of protecting his/her own life and bodily integrity, only if he/she cannot otherwise repel a simultaneous direct illegal attack (Art. 16 ZDD). A private detective keeps and carries personal weapons, which can be got under the Weapons and Ammunition Law, and there is no possibility to keep and carry official weapons (Art. 15 ZDD). A private detective, when performing work, is obliged to carry ID card and authorization for the performance of contracted services given by the service user.

A steward is a person who has been trained to perform the tasks of the steward service, who has a license from the MoI to perform these tasks and to whom the provisions of ZPO relating to private security officers apply accordingly, unless otherwise issued by

[3] Further readings in Nikač & Leštanin, 2023, 22-24.

law (Art. 3. Par. 1, item 15 of the ZPO). In other words, a steward is a person licensed to maintain order at public gatherings who possesses the powers issued by law. Steward can apply all the powers issued by the ZPO (Art. 46-57) except for certain means of coercion (gas spray, handcuffs, specially trained dogs and firearms), while they can use physical force (Art. 46, par. 7 ZPO).[4] Stewards do not have to wear a uniform during their duties, but they are required to wear vests with reflective strips and the inscription ‘Steward' on Serbian and additionally in English. It must be emphasized here that a steward can also be employed as a private security guard, in which case they must be in uniform and equipped with uniform jackets or vests with reflective strips and the inscription 'Security' on Serbian and additionally in English. Wardens do not have identification cards and therefore are not required to carry them (Art. 42, par. 1 and 2 of the ZPO). Stewards are hired either by an employer who has a license to perform private physical security service or by the organizers of school events and certain sports events of minor importance, as well as at other public gatherings when it is possible to ensure the maintenance of a peaceful gathering in this way. For example, schools, sports clubs and other event organizers can hire licensed stewards in accordance with the labor regulations (indefinite or fixed time work, temporary and casual work, contract of act or supplementary work).

4. MURDER OF PRIVATE SECURITY OFFICER

The specificity of this felony is the feature of the passive subject (victim), which must be included in the intention of the perpetrator of the felony. This means that the perpetrator must be aware of the fact that the victim is a private security officer and that he/she is depriving him/her of life precisely because of this characteristic of victim. According to the position of case law and certain criminal law scholars, private security officers during the performance of their service can be considered as officials in the sense of criminal legislation (Stojanović, 2020, 450; Delić, 2023, 46; Verdict No Kzz 210/2022). Therefore, criminal law protection goes in the direction of protection as well as all other officials during the performance of their duties. If such a position were to be adopted, it would mean that private security officers, in addition to increased protection, also bear increased criminal liability, if they appear as perpetrators of certain crimes. This would create additional confusion because certain unlawful acts would simultaneously constitute a felony and a misdemeanor, which is inadmissible. The authors believe that private security officers should be viewed as persons performing work of public importance who are provided with special criminal law protection of life in connection with the tasks they perform. It is precisely the words 'in connection with' that should be viewed broadly, where

[4] When maintaining order at sports events, stewards have special and additional powers and duties. Further readings Leštanin, 2021, 174-177.

it would also include criminal protection during the performance of private security service (Leštanin & Nikač, 2023, 148).

We may come to a situation where certain forms of aggravated murder overlap. This is the case if a private security officer is killed in the performance of official duty and in connection with the performance of official duty, in which case there will be a felony of murder of a private security officer (apparent ideal concurrence based on specialty). However, it is also possible that a private security officer was killed while performing private security service (at the time he/she was performing those service and at the place where those service were performed), but that the motive for the murder was not related to the performance of private security service (private revenge, jealousy, self-interest, profit etc.), when there could be a qualified form of murder. It is also possible (which was also the motive for the introduction of this form of aggravated murder) that the murder of a private security officer occurred outside the time and place of performing private security service (in a store, on vacation, etc.), but in connection with the performance of such service, for example, as revenge for the intervention during the security service of the facility.

5. SERIOUS BODY INJURY TOWARD PRIVATE SECURITY OFFICER

A private security officer must be protected from violence. Violence as a criminal law concept and as an act of execution in felony where it is included in the legal description should be defined as follows. It is the use of physical force that constitutes an attack on one's bodily integrity. So, it must be an (active) action, not an omission. Then, committing violence implies the use of force (and not threats), which must be directed at the body of a person, with the fact that it must be a more sensitive, rough application of physical force. The concept of violence does not include the goal to be achieved with it. Violence as an act of execution is the application of only that physical force that attacks bodily integrity (Stojanović, 2014, 4).

As with murder, the specificity of this form of serious bodily injury is the feature of the passive subject (victim), which must be covered by the intent of the perpetrator of the crime. This means that the perpetrator must be aware of the fact that the victim is a private security officer and that he/she is causing the injury precisely because of that status. In the case of this qualified form of felony, the legislator defined the passive subject with the wording ‘a person who performs work of public importance’, without specifying which specific persons are involved. This means that the definition from Art. 112 CC is applicable. However, what is characteristic of this felony is that, for its existence, the legislator does not require that a serious bodily injury has been inflicted on a person who performs work of public importance in connection with the work performed by that person. The question is justified; does this mean that every serious bodily injury inflicted on a person who performs work of public importance in the field of providing legal and professional assistance (private security officers) will represent a more severe form of this felony? We add to that the

question whether in that case the motives and incentives from which the felony was committed are considered? The authors believe that the legislator did not have this intention and that this is an obvious mistake that should be removed during the next amendments to the CC.[5]

6. OTHER FELONIES

The legislator in Serbia tried in Art. 112 CC to define most terms used in the text of the Code. However, certain doubts arise in their application. This is also the case with the concept of an official, where in one case the Supreme Court of Cassation considered a private (physical) security guard as an official and as a victim of a felony of an Attack on an Official in Performance of Duty from Art. 323 par 1 CC (Verdict No Kzz 210/2022). This position of the court can be subject to criticism because the court did not take into account certain provisions of the ZPO and other laws and therefore the legal system of the Republic of Serbia. It will be most easily explained on the example of the difference between police officers and private security officers. Unlike the powers of police officers, which can be exercised in unlimited time and space, private security officers can only exercise powers during the service and within the protected facility and/or area. Also, police officers exercise power in the general interest and the interest of all citizens, while private security officers exercise power in order to protect the safety of the specific employer (private interest). In addition, the contract as a declaration of will of two business (legal) subjects must provide additional support so that the powers of the private security officer can be applied. It is indisputable that private security officers perform official duties and act on behalf of the 'service', but these official duties are not in the field of public or national security, but private security and in the service of private interests (Leštanin & Nikač, 2024).

Art. 112 par. 1 item 7 of the CC issues that if an official is identified as the perpetrator of certain crime, it can be the perpetrator of those crimes if it does not follow from the characteristics of a particular crime or from a specific regulation that the perpetrator can only be an official. In a special part of the CC, in about forty crimes, an official appears as the perpetrator of a crime in the basic or qualified form, for which serious penalties are issued. At the same time, the ZPO and the ZDD criminalized certain actions as misdemeanors, which could be brought under a special part of criminal legislation. This state creates additional confusion in the application of law, and especially in respecting the principle of *ne bis in idem* or 'not twice in the same matter'. This kind of expansion of the 'criminal zone' has no criminal-policy basis, and it could also be said that it is against Art. 3 of the CC, which determines that the basis and scope for defining crimes, imposing criminal sanctions and their enforcement, and to the extent necessary for the suppression of those crimes, is the protection of a human being and other fundamental social values.

[5] Similar in Đorđević, 2019, 52.

However, on the other hand, the legislator decided to reduce the ‘criminal zone’, that is, the protection of private security officers when it comes to endangering their safety by threatening to attack the life or body of a private security officer or a person close to it. The legislator enhanced protection for the felony of Endangerment of Safety from Art. 138 par. 3 CC provides only to persons who perform work of public importance in the field of information related to the tasks they perform. The authors believe that such a solution has no criminal-policy justification and that with future amendments, private security officers should also have enhanced protection against threats related to the duties they perform.

7. CONCLUSION

Respecting the principle of legality, the Serbian legislator set the basis and scope of criminal protection and responsibility in the criminal legislation (Art. 3 of the CC). Thus, everything that can be brought under basic social values through the development of society is protected by criminal legislation. This also allows the increased threat of certain values to receive increased protection. That is why, in the criminal legislation of Serbia, certain categories of persons have received enhanced criminal protection, but also enhanced criminal liability.

Effective private security largely depends on legal protection and security of its officers as holders of certain coercive powers. Consequently, within the overall legal protection of private security officers, their criminal protection is of crucial importance. In most modern countries, it is achieved by issuing felonies and misdemeanors, by imposing and enforcing criminal and misdemeanor sanctions on persons who, in various ways, endanger the life and physical integrity of private security officers or oppose them in the performance of private security duties. In any case, in the Serbian criminal legislation, the most significant crimes for which specific criminal protection is provided to private security officers are: Aggravated Murder from Art. 114 par. 1 item 8 of CC and Serious Bodily Injury from Art. 121 par. 6 CC.

In order to implement effective criminal protection of private security officers, the police, prosecutor's office and courts must also pay attention to other laws and regulations governing the field of private security. From the analyzed verdict, we could notice that the expansion of the ‘criminal zone’ may occur if all the provisions of the regulations, that is, the entire legal system, are not considered. Feature of a passive subject (victim) is the most important element for the existence of qualified forms of crimes that protect the life and physical integrity of private security officers.

Starting from the fact that the problem of the criminal protection of private security officers is not only in the regulations, but also in the persecution policy carried out by the judicial authorities, perhaps in the future reform of our criminal legislation, certain provisions should be specified in order to avoid misinterpretation and incorrect application.

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КРИВИЧНОПРАВНА ЗАШТИТА СЛУЖБЕНИКА ПРИВАТНЕ БЕЗБЕДНОСТИ У СРБИЈИ

Апстракт

Кривично право штити човека и основне друштвене вредности не улазећи појединачно које су то вредности. Развојем друштва, тржишне економије, науке доводи до развоја безбедности која у својој савременој форми познаје и приватну безбедност као сегмент. Основна јединица приватне безбедности је човек, односно службеник приватне безбедности кои због своје угрожености мора имати и кривичноправну заштиту. Аутори у раду, нормативним методама, истражују који су основи и које су границе те заштите, како се поједине одредбе кривичног законодавства Србије примењују у пракси превасходно од стране правосудних органа. Службеници приватне безбедности штите се појачано кроз квалификоване облике кривичних дела Тешког убиства и Тешеке телесне повреде што значи да се штити њихов живот и телесни интегиртет. Међутим српски законодавац „појачано“ не штити службеника приватног обезбеђења од увреде већ само кроз основни облик овог кривичног дела као и остале грађане. Нарочито се скреће пажња на свеукупност правног система Србије где приликом примене кривичног права истовремено се мора обратити пажња и на правно уређивање приватне безбедности.

Кључне речи: службеник обезбеђења, редар, приватни детектив, кривично право, заштита.

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STRATEGIC APPROACH TO THE JUDICIAL REFORM IN MONTENEGRO: THE CURRENT STATE OF PLAY AND A WAY FORWARD[1]

Summary

More than two decades have passed since Montenegro introduced the strategic approach to judicial reform. The quality of policy documents, but also the intensity of reform processes varied over the time, being intensified mostly when the strong political support to Montenegro EU accession processes existed. Considering the importance of the present reform momentum, as for the future of Montenegro judiciary as for its EU accession processes, in this paper, the authors address the main findings on the current state of play judicial reform in Montenegro. The paper also provides the recommendations on the necessary steps to be taken in order to foster those processes towards a full fulfilment of the Interim Benchmarks (IBMs) in Chapter 23 and receiving the Interim Benchmark Assessment Report (IBAR), since this is the precondition to obtain the closing benchmarks and to enter the final stage of negotiations in Chapter 23.

Key words: judicial reform, judiciary, justice reform, Chapter 23, EU integrations.

1. INTRODUCTION

Aimed at ensuring reform continuity based on long-term public policy planning that begun through the Judicial System Reform Project from 2000, continued through the

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Judicial Reform Strategy 2007-2012 and following the expiration of the Judicial Reform Strategy 2014-2018 (JRS 2014-2018), the Government of Montenegro adopted the Judicial Reform Strategy 2019-2022 (hereinafter referred to as the Strategy, JRS 2019-2022) at the session held on 12 September 2019. Reform activities in this four-year term have been focused on achieving five strategic objectives as follows:

- Strengthening the independence, impartiality and accountability of the judiciary
- Strengthening the efficiency of the judiciary
- Montenegrin judiciary as part of the European judiciary
- Strengthening the accessibility, transparency and public trust in the judiciary
- Development of the Ministry of Justice, Judicial Training Centre, professions of lawyers, notaries, bailiffs and court expert witnesses.

Priorities defined as such are an illustration of the need to ensure the implementation of the most significant reform priorities determined in the negotiating process for Chapter 23 (hereinafter referred to as: CH 23).

In order to define, in more detail, the manner and dynamics of implementation (activities, result and performance indicators, deadlines, competent authorities and funds planned for the implementation of operational goals defined in the Strategy), along with the adoption of the Strategy, the Action Plan for the Implementation of the Judicial Reform Strategy 2019-2020 has been adopted (hereinafter referred to as: AP 2019-2020), after the expiration of which the Government adopted a new Action Plan for the Implementation of the Judicial Reform Strategy 2021-2022 on 9 December 2021 (hereinafter referred to as: AP 2021-2022).

JRS 2019-2022 also envisaged the establishment of the monitoring mechanism, and the monitoring of the Strategy implementation has been entrusted to the Council for Monitoring the Implementation of JRS 2019-2022, formed by the Government of Montenegro (hereinafter referred to as: JRS Council 2019-2022) has, so far, prepared three annual reports on the implementation of the Strategy and AP 2019, 2020 and 2021, adopted by the Government of Montenegro.

Simultaneously, progress in area of judicial reform has been monitored through mechanisms established in the context of Montenegro's negotiations with the European Union (hereinafter referred to as: EU) which involves reporting within the monitoring of the Stabilization and Association Agreement implementation (hereinafter referred to as: SAA) as well the implementation of Action Plan for Chapter 23. Indirectly, certain aspects of judicial reform have been monitored by universal and regional treaty bodies and the special procedures of the United Nations (hereinafter referred to as: the UN) and the Council of Europe (hereinafter referred to as: CoE), and all the reports created within these mechanisms in the period of JRS 2019-2022 implementation can be considered a relevant information source, along with the findings of civil society organizations and academic community.

Since the period of the JRS implementation has been marked by a turbulent situation on Montenegro political scene, and blockade of work of the most important judicial institutions, the Ministry of Justice decided in 2023 to make an important step forward by conducting a comprehensive evaluation of the reform progress made through the JRS implementation, but also to develop a new package of policy documents (the Strategy, the Action Plan and the Monitoring and Evaluation Methodology) to frame the reform processes in 2024-2027 period.[2]

2. NO REFORM PLANNING WITHOUT OBJECTIVE EVALUATION

There is not any doubt that ex-post analyses aimed at assessing the impact of implementation of policy documents, as well as ex-ante analyses as tool to comprehensively scan the current state of play before designing future reform steps play a paramount role in the reform success.

In Montenegro, conducting such analysis is not just a matter of a good will or methodological approach, but also a standard part of the procedure of developing and monitoring policy documents. Decree on methodology and process of drafting, aligning and monitoring of implementation of strategic documents as well as Methodology for policy development, drafting and monitoring of strategic planning documents (GSG: 2018) established a legal basis for the evaluation of strategies and programs in the Montenegrin planning system.

Accordingly, purpose of the JRS 2019-2022 evaluation conducted in 2023 to precede developing the Judicial Reform Strategy 2024-2027 (JRS 2024-2027) is twofold:

- On one hand, to assess the results and impact of the Strategy implementation objectively and systematically at the end of the period this public policy document refers to (*ex post* analysis), whereby the relevance and meeting of objectives, as well as the efficiency of development, effectiveness, impact and sustainability of the strategic document are determined.
- Simultaneously, there is a requirement to ensure quality inputs in the process of developing new strategic documents (strategy and its action plan) which would be used to plan directly and in detail the reform processes in judiciary following the year 2023, whereby the results of this evaluation will become an important part of the ex-ante analysis necessary for the development of the new strategy.

Evaluation was carried out during May and June 2023, through the combination of quantitative and qualitative methods, including the documentation analysis and in-depth

[2] The authors of this paper have been actively engaged in this process in the capacities of the Working Group President (M. Jauković) and the international expert in charge of conducting External Evaluation and supporting the Working group in developing JRS 2024-2025 and accompanied Action Plan (M. Kolaković-Bojović).

interviews, aimed at assessing relevance, coherence, effectiveness, effectiveness, impact and sustainability.

3. THE MOST IMPORTANT FINDINGS AND CONCLUSIONS OF THE EVALUATION

3.1. JRC 2019-2022 relevance, coherence and effectiveness

Started from the above-mentioned importance of ex-post and ex-ante analyses, in the course of the JRS 2014-2018 impact assessment that became an integral part of the Strategy, the Evaluation showed that an opportunity was missed to analyze, in essence, the results of its implementation and therefore, clearly connect the existing state and the challenges at the time with the objectives, measures and activities contained in the JRS 2019-2022 and its action plans.

The Evaluation also showed that the objectives and activities from this strategic document are still **relevant**, not only because only three and a half years passed from the adoption of the JRC 2019-2022 until the Evaluation, but also due to limited Strategy implementation effects where many reform activities have remained unimplemented.

In terms of **coherence**, it is important to note that the adoption of the JRC 2019-2022, as well as the assessment of its implementation results are envisaged in key public policy documents of the Government i.e. in the Government Work Program and the Program of Accession of Montenegro to the EU. The foundations of the Strategy include in principle the key international standards concerning the organization and functioning of the judiciary. JRS 2019-2022 addresses the need for further improvement of criminal legislation. The fact that the Secretariat-General of the Government was not directly included in the development of the Strategy affected the above-mentioned.

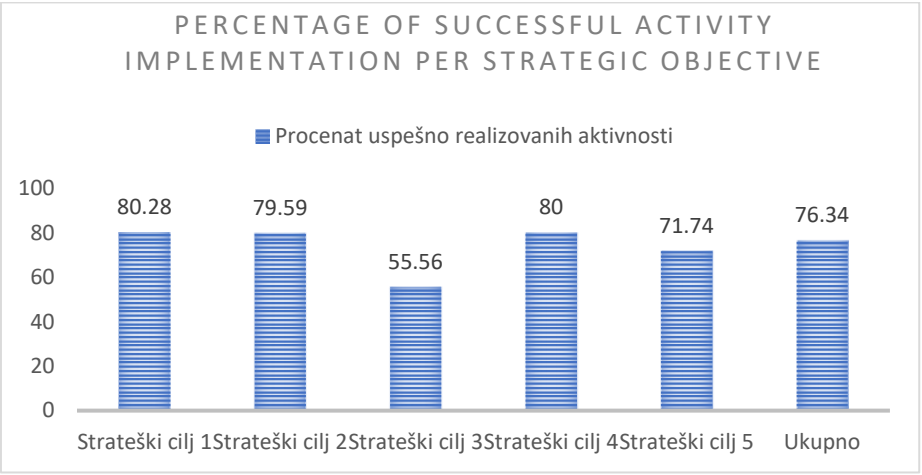
JRS 2019-2022 was not aligned with relevant international gender equality standards. Namely, as stated above, the Strategy and its action plans did not recognize nor address the lack of existing normative and institutional framework in Montenegro which currently does not ensure gender equality of judges and state prosecutors. (Janashia & Elezović: 2022)

In terms of **effectiveness**, following the summary of statistical parameters on Strategy implementation, it can be concluded that, except for 2019 bringing the first implementation year, the implementation percentage in the period 2020-2022 is unsatisfactory.

In terms of the degree of activity implementation per strategic objectives, the difference in terms of achieved results is noticeable, considering that the degree of full activity implementation ranges from minimum 55,56% in case of Strategic Objective 4 up

to approximately 80% which is the implementation percentage of strategic objectives 1, 2 and 4.

Chart 1: Degree of activity implementation per strategic objective



The main reasons of insufficient degree of Strategy implementation can be found in methodological shortcomings in defining operational goals, activities and deadlines for their implementation, as well as low indicator quality which prevent effective reform implementation monitoring. In addition, the lack of monitoring mechanism efficiency had a significant impact, focused on the lack of appropriate organizational structure and lack of early warning mechanisms. Long-term blockade of the work of the Judicial Council and Prosecutorial Council, lack of human resources and necessary expertise in institutions, pandemic caused by COVID 19, strike of lawyers as well as the general political instability in the country, significantly slowed down the implementation of the Strategy.

3.2. Independence, impartiality and accountability of the judiciary

In terms of strengthening judicial independence and impartiality, the main obstacle in achieving better results and more effectiveness of reforms were caused by the delay in amending the judicial and organizational legislation[3] to align them with the Venice

[3] For more information on the relevant international standards on judicial independence and their transposition in the national legislation, see: Jauković, M. (2020) *Pravo na nezavisan i nepristrasan sud: međunarodno-pravni standardi i njihova uključenost u crnogorsko zakonodavstvo*: master rad, Podgorica; Kolaković-Bojović, M. and Turanjanin, V. (2017) *Autonomy of Public Prosecution Service - The Impact of the "Checks and Balances" Principle and International Standards.* Journal of Eastern-European Criminal Law (2). pp. 26-41; Kolaković-Bojović, M. (2016) *Constitutional Provisions on Judicial Independence and EU Standards.* Annals of the Faculty of Law in Belgrade: Journal of Legal and Social Sciences, LXIV (3). pp. 192-204; Kolaković-Bojović, M. (2017) *Stavovi Venecijanske komisije kao okvir ustavnih promena u oblasti pravosuđa.* Zbornik Instituta za

Commission opinions.[4] The process of developing the draft amendments have started during the JRS 2019-2022 implementation period and the work process itself on developing the draft was deemed transparent and inclusive, in principle (HRA, 2022) it hasn't been finished even in early 2024.

Following the suspension during the blockade of the work of both councils, sufficient dynamics of evaluation of judges and public prosecutors was achieved in the final year of Strategy implementation.

Budget of courts and prosecution offices has been increased but it is still below the values targeted by the Strategy (1% of the Annual State Budget). Courts and prosecution offices were awarded the status of autonomous budget users, but the establishment of an effective budget control system and introduction of necessary software solutions are delayed.

Infrastructure capacities of both councils are still inadequate and, apart from analyses and plans, further steps towards relocating the judicial authorities to a new building have not been taken, while in terms of administrative capacities, the largest problems are still strategic and project planning, monitoring, evaluation and reporting. (Tmušić, Abadić, Bogosavljević: 2019)

Random case allocation system is still not functioning in misdemeanor courts, but the delegation of cases has been practiced to a lesser extent.

Commission for determining ethical and disciplinary accountability of judges and public prosecutors has not resolved all the initiated proceedings but only 50%, while the inspection supervision mechanism of the Ministry of Justice is still facing two issues: lack of extraordinary inspection supervisions and lack of human resources. Situation in terms of accountability of judicial professionals is unbalanced and there is a need to significantly improve the work of disciplinary authorities.

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kriminološka i sociološka istraživanja, 36 (3). pp. 21-37; Kolaković-Bojović, M. (2018) *Nezavisnost pravosuđa i efikasnost sudske zaštite kao međunarodni pravni standard i uslov članstva u EU.* In: Organizacija pravosuđa i efikasnost sudske zaštite (Evropski standardi i stanje u Srbiji): krivičnopravni aspekti; LVIII savetovanje Srpskog udruženja za krivičnopravnu teoriju i praksu. Srpsko udruženje za krivičnopravnu teoriju i praksu; Intermex, Beograd, pp. 95-116; Kolaković-Bojović, M. (2018) *The Rule of Law Principle: the EU Concept vs. National Legal Identity*. In: Naučni skup sa međunarodnim učešćem Univerzalno i osobeno u pravu. Univerzitet u Kosovskoj Mitrovici, Pravni fakultet, Kosovska Mitrovica, pp. 137-159. ISBN 978-86-6083-053-3; Kolaković-Bojović, M. (2018) *The Rule of Law and Constitutional Changes in Serbia*. In: Međunarodna naučno-stručna konferencija "Krivično zakonodavstvo i funkcionisanje pravne države" 20-21. april 2018, Trebinje. Srpsko udruženje za krivičnopravnu teoriju i praksu; Grad Trebinje; Ministarstvo pravde Republike Srpske, Trebinje, pp. 277-292.

[4] For better understanding of the legislative reform background, consult the following: CDL-AD(2023)011, CDL-REF(2023)016, CDL-AD(2022)050, CDL-AD(2021)030, CDL-PI(2021)008, CDL-REF(2021)040, CDL-AD(2021)012, CDL(2021)016, CDL-REF(2021)028, CDL-REF(2018)047, CDL-AD(2018)015.

3.3. Efficiency of judiciary

The overall efficiency of Montenegro judiciary at the end of JRS 2019-2022 was accessed as limited, considering a worrying situation in various aspects of efficiency.

This starts with the disproportional values describing efficiency of the court network assessed by CEPEJ (CEPEJ: 2022), but also considering that the judicial network rationalization process is still in an analytical stage (Stawa, G: 2022).

In parallel at the time of conducting evaluation, the reform of criminal and civil legislation was significantly delayed, and drafts have still not been submitted for adoption. Desired results in terms of reducing the number of unresolved number of cases have not been achieved but progress can be noted in terms of efficiency of enforcing court decisions (87,10% of enforced court decisions out of the total number of enforceable cases in 2022).

Serious problem is still the state of the judicial infrastructure and safety of judges and public prosecutors and citizens that have business before the courts and state prosecution offices. Apart from analyses carried out and partially implemented planning process, there was no significant progress in terms of judicial infrastructure improvement. (Tmušić, Abadić, Bogosavljević: 2019)

The lack of progress in terms of ICT system improvement is still a large problem. The existing JIS, apart from not being used by the misdemeanor courts, is outdated and does not support the needs for effective case management and increasingly complex and detailed reporting. Working group tasked with the development of the new ICT system, following the recent termination of contract with the company that should have implemented the system, decided to continue the work on the improvement of JIS as a transitional solution until a new system is developed.

Considering the significance of efficient collecting and processing of statistical data for improving the efficiency of judiciary, it is important to note that this process still presents a large challenge for Montenegrin judiciary.

3.4. Accessibility, transparency and public trust in the judiciary

Limited progress has been also made in terms of Montenegrin courts making references to the ECHR case law. Systematization and availability of ECHR case law has been partially limited due to staffing changes in the Supreme Court Division for Case Law, but this is a temporary obstacle.

The system of free legal aid is functioning without major difficulties but its further improvement through amendments to the Law on Free Legal Aid and increase of the circle of users is delayed due to the delayed response of the European Commission to provide an opinion on the draft Law. Even though there are numerous activities toward the transparency of the judiciary, overall research that would result in objective quantifiable parameters of the real state of play in this area is lacking.

3.5. Strengthening capacities of the Ministry of Justice, Judicial Training Centre, professions of lawyers, notaries, bailiffs, and court expert witnesses

There is no any doubt that the reform progress is highly dependent from strengthening institutional and administrative capacities of the main stakeholders in charge of reform implementation. However, the goals in this area defined in JRS 2019-2022 has been just partially met. Serious shortcomings have been noted in terms of the need to ensure appropriate capacities of the Ministry of Justice which, despite numerous trainings, have been significantly weakened due to a high employee turnover. The situation is slightly better in terms of the improvement of work of the Judicial Training Centre, the budget of which has been perceived as satisfactory and working conditions (although the premises are rented) as very good, including the required IT equipment. E-learning platform has been established and the development of courses in upcoming.

In terms of the further improvement of the work of notaries and bailiffs, the continuation of interconnecting their information system with other institutions and organizations remains a priority which further improves legal security and work efficiency. Proactive relation of chambers in terms of supervision over the work of bailiffs and notaries is lacking for the purpose of strengthening the accountability mechanisms.

Delays in adopting the Code of Ethics for lawyers and the lack of efficiency of work of disciplinary bodies of the Chamber of Lawyers are still concerning.

Organization and work of court expert witnesses require additional legislator's attention, which would impact the quality and impartiality of court expert witnesses as well establishing sustainable training mechanisms, ethics and integrity.

3.6. Monitoring, evaluation and financial resources for the reform implementation

The weaknesses of the JRS 2019-2022 identified in this regard explain a great portion of the implementation/results weaknesses. Namely, the funds planned for the implementation of the Strategy and action plans have generally been sufficient and financing planned activities has been significantly supported by donors.

However, the monitoring mechanism didn’t provide for the possibility of an overview of the efficiency of planned and spent funds concerning the results achieved. The problem of lacking human resources in certain institutions, significantly strengthening by employee turnover during the implementation of the Strategy affected the lack of implementation of certain activities and alternative solutions have not been envisaged. The lack of initial basis has been recognized as one of the limiting factors that affected the aimed goals, planning of the scope of activities, implementation dynamics and assessment of required funds.

The existing monitoring mechanism has only partially achieved its purpose aimed at ensuring the efficient implementation of the Strategy. This was caused by the lack of the

early warning mechanism, low (annual) reporting frequency and multiplication of monitoring mechanisms in the area of reform of judiciary and overload of administrative capacities by reporting activities.

In addition to the above-mentioned reasons indicating the necessary continuous strategic planning in the area of reform of judiciary, the suspicion that cancelling this practice would negatively impact sustainability of already implemented reforms is justified.

Implementation of the Strategy provided a limited impact on judges and state prosecutors and the judicial system in its entirety, as well as citizens, NGOs, the economy and the EU integration process.

In terms of the impact on judges and public prosecutors, although the Strategy provided for the strengthening of their professional capacities through numerous training programs and international cooperation, the long-term blockade of both councils, delays in legislative reform in almost all areas, the lack of capital investments in judicial infrastructure and ICT system, pandemic caused by COVID 19, the strike of lawyers and general political instability in the country have significantly decreased the potential impact of the implementation of the Strategy and even caused stagnation and regressive processes in certain areas.

When it comes to the impact on citizens and the economy, it can be noted that the impact of the Strategy is very limited, whereas the effects are most visible in the part relating to the judicial professions, primarily notaries and bailiffs, the work of which has significantly contributed to a facilitated access to justice and the increase of legal security through more efficient enforcement of court decisions and unburdening of the courts. The low level of citizens' trust in judiciary, including lawyers as well, explained by a lack of integrity due to political influence and corruption additionally speaks to the limited effects of the implementation of the Strategy, particularly in terms of establishing effective accountability mechanisms.

In addition to the general assessment that the inclusion and transparency practices of creating and implementing public policies gave been improved in recent years, representatives of NGOs still have remarks in terms of the scope and quality of their inclusion into these processes.

Although it is one of the fundamental reform pillars within Chapters 23 and 24 i.e. the entire Cluster 1 (*Fundamentals*), due to the limited impact achieved in the implementation period, Strategy has not significantly contributed to Montenegro's accession process to the EU. On the contrary, its non-efficient implementation negatively impacted this process.

In terms of the sustainability of the Strategy implementation results, the lack of effective budget and HR management as well as the lack of HR, particularly the capacities in the field of analytics, strategic and project planning is of special concern in this context. All of the above, along with a high level of financial, expert and logistic dependence of a

large reform segment on project support, challenges the sustainability of already achieved and expected benefits of implemented reforms.

4. A NEW JUDICIAL REFORM STRATEGY 2024-2027

As previously said, such a limited progress achieved through the JRS 2019-2022 implementation, as well as a strong political commitment to Montenegro EU path resulted in the ten-months long journey (June 2023- March 2024) of, in parallel, developing a new JRS 2024-2027 and accompanying Action Plan for 2024-2025 period and intensive implementation of reform activities (mostly legislative reform).

Overall Objective of the Strategy is further strengthening of the Rule of Law by strengthening independence, accountability, professionalism, and efficiency of judiciary as well as the improved access to justice and legal security in the process of exercising the protection of rights and freedoms of citizens and increasing trust in the judicial system.

Furthermore, the Strategy is based on three specific strategic objectives that rely on the vision and the overall objective of the Strategy and are clearly related to the JRS 2019-2022 strategic objectives.

These strategic objectives will be implemented through 22 operational goals, considering progress achieved in the implementation period of the previous strategic document, as well as current challenges.

1. Strengthening independence, impartiality and accountability of the judiciary
2. Improving professionalism and efficiency of judiciary
3. Improving access to justice, transparency and trust in the judiciary

For each of the hierarchical degree of objectives, appropriate successful indicators have been defined with initial and target values at the half of the Strategy implementation period, as well as in the final year. Specifically, impact indicators are defined for strategic objectives and outcome indicators for operational goals. Additionally, for specific Strategy implementation activities, result indicators have been defined within the Action Plan.

Each strategic objective relates to the list of IBMs that are relevant for that objective and should be fulfilled by achieving the objective. At the same time this means establishing the direct connection between the indicators defined for each strategic objective and the IBMs that shell ensure a more accurate monitoring of the IBM fulfilment using the indicators defined in the JRS 2024-2027. This also contributes better organization of reporting, monitoring and evaluation processes.[5]

[5] For more information on the relationship between effective monitoring and evaluation of national policy documents and those developed in the context of EU accession processes, see: Kolaković-Bojović, M. (2018) *Organizacija pravosuđa u Republici Srbiji- reformski okvir i EU standardi*, Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, M. and Petković, B. (2020) *Položaj pravosuđa u Srbiji - između vladavine prava i samovlašća.* Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, Milica and Simonovski, Ivica (2023) *The*

The Action Plan covers 2024-2025 period and mostly focuses on finishing legislative reform and overall system stabilization after the crisis experience in the previous period, as well as on the policy and infrastructure planning while it is expected that the next Action Plan for 2026-2027 period will be focused on achieving track record. Furthermore, the second AP will correspond in time with fulfilling closing benchmarks in Chapter 23.

5. NEXT STEP OR HOW TO ENSURE REFORM CONTINUITY AND STABILITY?

Since the JRS 2024-2026 adoption is expected at the moment of developing this paper, it is also the right moment to respond this “simple” question: What can make implementation of this new Strategy more efficient and more effective comparing with the previous one?

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СТРАТЕШКИ ПРИСТУП РЕФОРМИ ПРАВОСУЂА У ЦРНОЈ ГОРИ: ТРЕНУТНО СТАЊЕ И БУДУЋИ ПРАВЦИ

Апстракт

Прошло је више од две деценије од када је Црна Гора увела стратешки приступ реформи правосуђа. Квалитет докумената јавних, али и интензитет реформских процеса варирао је током времена, интензивирајући се углавном када је постојала снажна политичка подршка процесима придруживања Црне Горе ЕУ. С обзиром на значај тренутног реформског замаха, како за будућност црногорског правосуђа, тако и за процесе приступања ЕУ, аутори се у овом раду осврћу на главне налазе о тренутном стању реформе правосуђа у Црној Гори. Рад такође даје препоруке о неопходним корацима које треба предузети како би се ти процеси подстакли ка пуном испуњавању привремених мерила у Поглављу 23 и добијању Извештаја о процени испуњености привремених мерила (IBAR), будући да ово представља предуслов за добијање мерила за затварање, чиме се улази у завршну фазу преговора у Поглављу 23

Кључне речи: реформа правосуђа, правосуђе, Поглавље 23, ЕУ интеграције.

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BITCOIN – ALTERNATIVE WAYS TO LESSEN THE VOLATILITY[1]

Summary

Bitcoin reorganized the global financial environment, and gave it a new quality. Consequently, entirely new cluster of legal problems was created. Although very heterogeneous, these problems have the same source: extreme volatility of cryptocurrency market and apparent lack of experience of the participants.

It seems that cryptocurrencies are immune to the general regulation, and in the absence of adequate regulation model, "private law" interventions seem suitable to prevent negative effects of volatility or at least to minimize the possibility of the associated risks actually materializing.

In this article we present and analyze three, as we see it, most prominent models that contractual parties can use for that purposes. This article is product of ongoing multiphase theoretical and empirical research based primarily, but not limited to them, on different techniques of analytical and comparative normative method. This article is sequel on previous, and introduction to following article on these topics.

Key words: Cryptocurrencies, Bitcoin, Cryptocurrency clauses, Smart contracts, Volatility.

1. INTRODUCTION

Gradual evolution of the system of exchange of goods (Calcaterra, Kaal & Rao, 2020, 202; Petrović & Damjanović, 2023, 282-284; Ström, 2020, 188), therefore of medium of exchange, is inextricably tied to the technological progress (Petrović & Damjanović, 2023, 282-284), although the first, because of legal or cultural constrains, evolved

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significantly slower (Calcaterra *et al*., 2020, 202-203)[2]. Nowadays, with the efforts of computer, economic and legal experts to create the instruments which enable payment without any physical means of exchange[3], money evolved into sophisticated and abstract financial instrument (Ström, 2020, 188).

The transformation of the economy from one that was based on labor-intensive investments to an economy based on knowledge and innovation created a more concrete society (Petrović & Damjanović, 2023a, 129). So, because contemporary society, among other things, strives for decentralized solutions for human interactions (Calcaterra *et al*., 2020, 193), new technologies[4] brought dramatically different financial setting, both in terms of volume and dynamic of change (Vasić, 2019, 7)[5]. And probably most important change is related to the breaking of the traditional link between the production of money and the state (Petrović & Damjanović, 2023, 282).

Limitations of early centralized digital currencies were circumvented by the use of cryptographic techniques (Cavalhiero & Cavalhiero, 2022, 209). Blockchain based technological infrastructure translated Hayek's ideas of "money issued by private entities and competitive currency market" from utopistic to realistic (Syropyatov, 2021, 324). And cryptocurrencies, these sets of governing rules (Raskin, 2015, 971)[6] without referee (Abramowicz, 2015, 3) are the part of a long-term proliferation cycle with enormous capacity to further expand opportunities that were presented in the early years of Internet (Calcaterra *et al*, 2020, 204).

Bitcoin as most prominent crypto-project meets its own challenges and limitations. Technological imperfections on the side, bitcoin is known for extreme volatility which is, although the list of causes is well described (Mirjanich, 2014, 223; Syropyatov, 2021; 320/322), and even though volatility does not always mean deviation for the worst

[2] It can also be said that technology is progressing exponentially, and that knowledge of technology (or understanding of it) progresses linearly (Cvetković, 2022, 448).

[3] Ideas conceived in early 1980s on replacing traditional forms of money with digital ones (Cavalhiero & Cavalhiero, 2022, 209), nowadays can be summarized in one phrase: FinTech. Neologism which originates from the words "financial" and "technology" (Jović & Nikolić, 2022, 47) is an umbrella term that refers to any (successful) attempt to use technology to provide financial instruments and services that are entirely or primarily digital and more convenient than those traditional financial institutions offer (Bakić, 2022, 128-129).
As we see it also includes two more categories: RegTech and SupTech (Jović & Nikolić, 2022, 46-47, 53-55).

[4] List of techno-economic, therefore social achievements (Vasić, 2019, 8-9) is long and goes from simple "Homelink" internet based informational webister (Bakić, 2022, 119-120) to so called robo-advisors that provide portfolio management services.

[5] Partially applied digitalization limited only to financial products and services proved to be insufficient (Vasić, 2019, 7). It influences all areas of human existence (Cvetković, 2020, 84), but the implemetation of blockchain technology became most relevant in different areas (Cvetković, 2020, 84).

[6] Argument can be made that they allow automatic enforcement of property rights (Abramowicz, 2015, 3).

(Dehouche, 2021, 3), the single biggest unresolved economic and legal problem that has to be addressed.

The value of bitcoin is not just volatile, but highly, if not completely unpredictable (Garrat & Wallace, 2018, 1896; Syropyatov, 2021, 320), meaning that bitcoin meets both forms of deviation from consistency (Dehouche, 2021, 2). Bitcoin possess hedging capabilities and is used as "safe heaven" asset in a long run (Dehouche, 2021, 2, 16). Paradoxically in a short term (Dehouche, 2021, 16) there is significant time cost of its usage (Garrat & Wallace, 2018, 1889). Being so, parties are unsurprisingly hesitant to exchange goods or services for bitcoin.

The idea behind LegalTech phenomenon is to use technology, primarily digital, to automatize legal system (Cvetković, 2022, 448) and avoid construction of even more complex legal environment (Cvetković, 2022, 448). Still, cryptocurrency market yearns for regulation, and it is somewhere expected from legal experts to be the first to intervene and bring order into the newly created environment[7]. But, even with all the efforts to regulate blockchain related processes, standardize terminology and indicate a method for resolving disputes (Cvetković, 2020, 84), it seems that there is no sign of an adequate, firm, innovation friendly and effective legal model. So, until such a model is first discovered by jurisprudence (Raskin, 2015, 972) and then confirmed in safer environment such as "Sandbox" or "Innovation Hubs" (Jović & Nikolić, 2022, 48-51), alternative methods must be explored and adapted for specific cases.

2. (CRYPTO)CURRENCY CLAUSES

The general tendency of money abstraction favored the nominalist over the valorist monetary conception. It appears that monetary nominalism, compared to monetary valorism, increases the level of legal certainty in monetary obligations (Radulović, 2021, 37). In most strict theoretical sense, it does, but only if monetary standard has not been changed or there is no monetary imbalance of any kind (Begović & Ilić, 2017, 29-31). Then, objectively, since numeral denomination is not necessarily an expression of the value of monetary units, especially in long term obligations, there is a risk that purchasing power of the money changes (Begović & Ilić, 2017, 29). Question is to which party will this risk be transferred to (Radulović, 2021, 37) and is the legal principle of equality of mutual consideration compromised (Radulović, 2021, 37).

Contractual partners are interested in the actual value of money, not its sum. Therefore, they practice party autonomy and freedom of choice by adapting content of contract hence their relations to their preference (Belović, 2014, 42), in this case through so called legal exceptions to nominalist principle (Begović & Ilić, 2017, 30). Contractual

[7] Stable coins, conceptually speaking, can underscore what technology-driven optimization of policy making is actually possible in complex monetary systems (Calcaterra *et al*., 2020, 194).

parties are prone to use specific type of price adjustment clauses – currency clauses (Radulović, 2021, 38). Through this legal institute they peg amount of debt to the exchange rate of other, presumably more stable currency, and create contractual formula for structuring the risk of unexpected substantial currency depreciation in optimal way for both parties.

Except for the financial institutions operating under the Central Bank[8], in the Republic of Serbia contractual parties can use bitcoin, or any other cryptocurrency for that matter, under the set of rather liberal rules (Radulović, 2021, 38). It is possible to use them as substitute in what is traditionally considered to be monetary obligations (Radulović, 2021, 39). Regardless of whether parties think of cryptocurrencies as hedging instrument, special clauses in contract where price is nominated in cryptocurrency are named as "cryptocurrency clauses" (Radulović, 2021, 38).

Arguments can be made that bitcoin can be used as hedging instrument despite its extreme volatility (Dehouche, 2021, 3, 16; Radulović, 2021, 38-41). We agree that this claim is highly questionable. But, most experts would agree that the opposite is not just possible, but most certainly recommended. In other words, parties can opt to nominate price in bitcoin, but to prevent negative effects of bitcoin volatility they can adjust the actual value of payments made in bitcoin with respect to alterations in the exchange rate to suitable fiduciary currency. By doing so, they can enjoy all the advantages of bitcoin (speed of transaction, temporal and territorial unlimitedness and low fees) and at the same time lessen negative effects of its instability.

3. INSURANCE MODELS

Increasing reliance on blockchain technology creates new challenges (Mijatović, 2022, 100), but also new opportunities. Namely, there is inevitable tension between the innovators and law (Zuckerman, 2021, 78). Initially legislative processes are slow and generally inefficient. Jurisprudence is more efficient, but in the beginning not consistent. Usually, it is insurance that is primary method of societal governance with capacity to influence industries and markets on systemic level (Zuckerman, 2021, 114). Nowadays users are more educated about crypto ecosystem, so the stigmas surrounding illicit uses of cryptocurrencies and susceptibility to hacking began to fade (Zuckerman, 2021, 108). Plus, digital asset storage providers dramatically improved security of private keys, but no solution can be absolutely safe (Zuckerman 2020, 8). Put differently, although there is no regulation model that defines role of insurance companies in crypto ecosystem (Zuckerman, 2021, 103-105), there is massive demand for new insurance products and services to mitigate risks related to use of this incredible piece of technology.

[8] Zakon o digitalnoj imovini, 2020, čl 13.

With necessary technical help of companies that wish to buy insurance (Zuckerman, 2021, 105), insurers offered coverage in case of theft, fraud and malicious hacking, initially for companies that offer commercial digital asset storage (Zuckerman, 2021, 86-87). Digital asset insurance provides three benefits to policy holders: risk transfer, risk mitigation, and marketing (Zuckerman, 2021, 86). Naturally, the demand for so-called digital asset insurance products and services (Zuckerman, 2020, 10) began to grow because it became clear that insurance, even in a form of "self-insurance" (Zuckerman 2021, 97, 109) is actually crucial, not only for asset protection, but also to sprung wider adoption of crypto-assets (Zuckerman 2020, 10).

Members of "Allianz" group experimented with different insurance programs related to blockchain since year of 2015 (Mijatović, 2022, 100). Yet, to our knowledge, the first company to offer insurance coverage for cryptocurrency exchanges and custodians is "Elliptic". Following this example, "Marsh", "AON", " XL Group" (Zuckerman 2021, 95), but also "Lloyd's of London" which is best suited for emerging digital asset insurance products (Zuckerman 2021, 95), occupied part of newly created market with unique policies that cover losses related mostly to theft, loss, cyber-attack, and errors in cryptocurrency transactions. Also, "Blockchain Insurance Industry Initiative" was established. This cooperation, with joint members from Asia, Europe and America, became worldwide initiative (Püttgen & Kaulartz, 2017, 253) with the main goal to develop standards and procedures for industry-wide use of blockchain (Püttgen & Kaulartz, 2017, 253). There are even projects in DeFi space that offer digital alternatives to insurance of digital assets (Zuckerman 2021, 94).

List of insurance services and products does not end here (Zuckerman 2020, 11). Level of sophistication and amount of customization that is necessary makes digital asset insurance viable primarily at commercial scale (Zuckerman 2020, 11). Still, the list was extended in recent years, especially under the pressure of Sars-COV-2 pandemic. For example, "AXA" allowed paying for all their services and products in bitcoin; "Dynamic" uses smart contracts nominated in Ethereum to cover the risk of flight delay (Püttgen & Kaulartz, 2017, 254); there are even companies that offer reinsurance protocols to create extra layer of protection (Mijatović, 2022, 100-104).

It is well known fact that cryptocurrencies, even those with superior technical and economic features such as bitcoin, are known for their high volatility. This is true despite the fact that the initial issuer and inventor solved two major problems – additional issuing and counterfeiting (Garrat & Wallace, 2018, 1887). Volatility is a leading cause of significant losses and the main reason for mistrust even among DeFi enthusiasts. So-called cryptocurrency price protection policies can help to mitigate risks of significant price movements.

Generally, cyber insurance does not include indemnification for the value of the assets (Zuckerman 2020, 11; Zuckerman 2021:91). This is especially true when it comes to the value of bitcoin. By nature, main goal of insurance contract, which is (partially) aleatory

by default, is to cover the risk of unexpected event happening (Kabašić, 2022, 213), and when it comes to the bitcoin there is no risk in classical sense – it is almost certain in short term that its value will drop at some point, and there is nothing unexpected there, on the contrary. However, at this moment there is a relatively small number of corporations experimenting with “insurance” products that are designed to protect investors, at least to some degree, from financial losses that are the result of price fluctuations in the cryptocurrency market. To name a few, “Lloyd’s” in conjunction with “Coincover”, “Binance”, and “FdcTech” through the platform “Condor FX Pro”, they all created policies which provide coverage for users if the real market value of their crypto-asset decreases. Also, “Choise.com”, the first-ever MetaFi ecosystem, has launched price insurance product for customers that are purchasing digital assets.

It should be emphasized that these policies may come with significant expenses. First, they come with high premiums (Zuckerman, 2020, 12). Insurance company needs to consider the likelihood of risk realization when setting the premium. So, payments that the policyholder makes in exchange for insurance coverage are high by nature due to the extreme risk exposure (Zuckerman, 2020, 12). For example, among countless other factors, insurers must consider that the relevant technologies for digital assets is new and not fully tested, transactions on blockchains are usually pseudonymous and completely irreversible, the regulatory landscape is uncertain (Zuckerman, 2020, 12). So, not just premiums, but also deductibles, fixed or percent-based, are required and expectedly high. Also, standard technique of accessing the risk depends on the way the assets are stored (Zuckerman 2020, 11), so price of insurance may vary significantly.

4. SOME SMART CONTRACT OPTIONS

With Bitcoin being the first and the most intriguing novelty, although older as an idea[9], smart contracts are next most promising concept. Smart contract pushed the idea of possible application of blockchain further (Garcia Bringas, Pastor-López & Psaila, 2019, 315). They are the proof that cryptocurrencies cannot live without blockchain, and that possibilities of blockchain go way beyond currency creation (Garcia Bringas *et al*., 2019, 315).

Smart contracts are self-executing, usually blockchain based programs, which automatically complete obligation if predetermined conditions are met (Cvetković, 2020,

[9] They were presented as concept by Nick Szabo (1997), but the advent of Blockchain has made it actually applicable (Arcari, 2019, 364-365; Cvetković, 2020, 89; Garcia Bringas *et al*., 2019, 317). Smart contracts are a sequel of the EDI concept (Electronic Data Interchange) created in 1969. It is a standardized language to describe and categorize contracts electronically used by programmers to enable computers to interact with and manipulate contracts (Sklaroff, 2017, 287-288). Surprising fact is that “no litigation concerning EDI-formed contracts occurred” in the technology’s forty-year history (Sklaroff, 2017, 289).

89) according to the binary „if this - then that“ and „all or nothing“ scheme (Arcari, 2019, 365, 371-372; Püttgen & Kaulartz, 2017, 254; Sklaroff, 2017, 291). They record exchange of consideration between parties (Arcari, 2019, 370-371) without interference from any third party (Püttgen & Kaulartz, 2017, 253)[10]. What is new is that there is no need to initiate change verification – it happens automatically if conditions are met. Of course, to make this automatic verification possible once the conditions were met, and that is usually the case, certain amount of coins, at least equal to the amount of specific obligation, is “deposited” into computer code. In traditional sense, this means that the owner of the coins performs possessional rights without the factual authority on digital currency (Čelić, 2023, 111-115).

From legal standpoint they are a milestone of LegalTech 2.0 (Cvetković, 2022, 448). Although arguments can be made that these are not contract in most strict sense (Püttgen & Kaulartz, 2017, 254), smart contract are computer codes of contractual significance[11]. Based on the satisfaction of required conditions set forth in the contract (Arcari, 2019, 370), smart contracts revive principle *pacta sunt servanda* (Cvetković, 2020, 89, 92) in a most strict sense for those who prefer to eliminate ambiguity of natural language (Cvetković, 2020, 90)[12], so the legal certainty is increased if not guaranteed (Cvetković, 2020, 92).

Because of their automated enforcing mechanisms, if they were carefully designed and programed, smart contracts can provide more predictable outcomes. Even though it is complex technical and legal challenge, they can be used to lessen negative effects of bitcoin volatility and to adjust the amount of debt in accordance with principle of equal mutual consideration.

Simple solution is to create smart contract and link it to “price Oracle” – tertiary computer program that operates separately from the smart contract’s code and delivers information from outside the blockchain (Arcari, 2019, 373). These programs provide external data on the current value of an asset so the smart contract can retrieve real-time price data. Based on this information, coded hedging mechanisms allow smart contract to monitor exchange rate of bitcoin and fiat currency[13], and automatically adjust the amount of debt in bitcoin to mirror the price predetermined in fiat currency. Debtor can also provide

[10] It should be noted that, at this moment, smart contracting is more expensive than traditional semantic contracts in environments when there is *ex post* uncertainty (Sklaroff, 2017, 291).

[11] Smart contracts can be compared to an offer and the acceptance (Püttgen & Kaulartz, 2017, 254). Yet, it is advisable to only use smart contracts where they show strengths, namely when fulfilling the contract (Püttgen & Kaulartz, 2017, 255)

[12] According to Jared Arcari (2019, 393), in future legal texts, smart contracts ”…should be defined as “electronic code that, upon the occurrence of (a) specified condition(s), is capable of running automatically according to pre-specified functions to execute a transaction between parties, stored and processed on a Blockchain or other distributed network and authenticated by a Digital Signature.”

[13] Parties are not limited to one currency only. They can create “basket” of currencies with different scales of stability, so the value of the payment can be determined based on the calculated average of these currencies.

collaterals which smart contract can automatically liquidate by selling them if the bitcoin price falls below predetermined point. Yet, we believe that there is even more interesting, certainly more advanced option.

Although they haven't really solved number of essential problems (Syropyatov, 2021, 328), "Stablecoins" are interesting novelty in cryptocurrency market (Syropyatov, 2021, 322). Their emergence is an initial indicator for the possible co-evolution of decentralized technology and money (Calcaterra *et al*., 2020, 205). In essence these are the form of cryptocurrencies designed with the primary goal to lessen the negative effects of "classic" cryptocurrencies biggest flaw – their volatility (Syropyatov, 2021, 323)[14], but in such a way that allows avoidance of otherwise necessary conversion of crypto to fiat currency (Calcaterra *et al*., 2020, 194) for parties who want to avoid putting trust in unfettered discretion of governing bodies and their arbitrary decisions (Calcaterra *et al*., 2020, 196) but who also want to avoid taxes for cashing out crypto assets (Syropyatov, 2021, 325-326).

Generally speaking, stablecoins come either in a centralized or decentralized form. Centralized stablecoins are issued by an organization that directly or indirectly exerts control over the assets that are used to back up the value of stable coins (Tomić & Todorović, 2020, 17, 18). In other words, there is sufficient volume of assets held in a reserve, and stablecoins are issued in identifiable ratio with the backing asset(s). Decentralized stablecoins use algorithmic setup to adapt the number of coins to market fluctuations in order to secure value[15].

Centralized stablecoins are quasi-electronic representation of the asset that is used to back them up and they carry the same, or even greater risk of inflation as their "parent" asset (Syropyatov, 2021, 328). Yet, there are ways to use them or, even better, algorithmic stablecoins as volatility risk management tool.

Stablecoins, obviously, can be used as means of payment. Although this is an option, there are other ways to use stablecoins to lessen the risks of market volatility in such a way that allows parties to enjoy all the benefits of using various "classic" cryptocurrencies.

For example, contractual parties can nominate price in any cryptocurrency they prefer, bitcoin for example. If they feel that they are exposed to the significant risk of a value change, they can use cryptocurrency clauses to link amount of debt to stablecoin of their own choice. Even better, stablecoins can be used in smart contracts. Through self-executing contracts parties can hedge against bitcoin depreciation by pegging amount of

[14] Interestingly enough, solid argument can be made that stable coins are direct cause, or at least one of them, of cryptocurrency market volatility, especially when it comes to bitcoin (Syropyatov, 2021, 326-327).

[15] Since they adopt monetary standard of elastic, fully automatic, non-discretionary supply that is regulated to achieve stabile price in relation to price index, they are usually referred as a "Hayek's money" (Syropyatov, 2021, 322-323).

debt to the exchange rate of stablecoin. One way to do that is by using a smart contract that is programmed to automatically convert bitcoin payments into stablecoins based on a predetermined exchange rate. That is possible if parties linked the code to adequate data sources enabling the code to automatically recognize cryptocurrency market patterns. In other words, payment is made in bitcoin, but the smart contract is automatically executed and adapts the amount of bitcoin to the exchange rate of selected stablecoin.

5. INSTEAD OF CONCLUSION

The functioning of the economy on a global scale results in the creation of a single market, which in terms of technical and technological progress and the development of digital technology represents a single digital market (Petrović & Damjanović, 2023a, 126). In this environment the most prominent innovation comes in the form of Bitcoin. The regulatory landscape surrounding Bitcoin is constantly evolving, but the absence of steady regulations creates uncertainty for industries and individuals. It undermines the general acceptance and integration of Bitcoin into conventional monetary obligations, especially because existing regulation doesn't even try to resolve major problems in the crypto environment.

Volatility is most certainly one of them. In that context, this paper is merely introduction to private law interventions we find suitable to prevent negative effects of bitcoin price instability. This interventions will be individually discussed in detail in following articles.

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БИТКОИН –АЛТЕРНАТИВНИ НАЧИНИ ЗА УМАЊЕЊЕ ВОЛАТИЛНОСТИ

Апстракт

Биткоин, али и касније пројекти, реорганизовали су глобално финансијско окружење. Дали су му нови квалитет. Последично, међутим, отворили су нови кластер правних питања. Ови проблеми врло су хетерогени. Међутим, уз неопходну дозу генерализације, проблеми везани за криптовалутно пословање, непосредно или посредно, имају исти узрок, а то су комбинација изражене волатилности криптовалутног тржишта и још израженијег неискуства учесника на њему.

Делује као да су криптовалуте комплетно су имуне на опште правне норме. Но, у недостатку адекватног регулаторног модела, „приватноправне интервенције“ могу допринети превенцији негативних ефеката волатилности или барем смањења могућности да до реализације повезаних ризика дође.

У овом чланку представљамо и анализирамо три модела који, према нашем мишљењу, имају највећи потенцијал у изнетом смислу. Рад је резултат текућег вишефазног теоријско-емпиријског истраживања заснованог примарно, али не и искључиво, на техникама аналитичког и компаративног нормативног метода. У том контексту, рад је наставак на претходне, а увод у наредне радове који произлазе из овог истраживања.

Кључне речи: Криптовалуте, Биткоин, Криптовалутне клаузуле, Паметни уговори, Волатилност.

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ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS WITHIN AN INTERNATIONAL ORGANIZATION: THE CASE OF THE FEDERAL REPUBLIC OF GERMANY AND OFFICE OF A HIGH REPRESENTATIVE

Summary

How can individuals safeguard their human rights when a violation occurs due to the activities of an international organization (IO)? This question touches upon the most fundamental legal matters such as who is to be held accountable among multiple stakeholders, what is the applicable law, which judicial jurisdiction is competent, which capacities individuals have, whether an IO has *ius standi* under international law, etc. To avoid delving into a broad discussion on the issues posed, our focus will center on a specific scenario involving the Federal Republic of Germany. Specifically, we will explore the country's accountability for human rights violations stemming from the legislative actions of Mr. Hans Christian Friedrich Schmidt, a diplomat acting as a High Representative in Bosnia and Herzegovina since 2021. Hypothetical construction herein is the following: IO's are bound by international law, whereas individuals lack the standing to pursue legal action against them; further, accountability of an IO is not a precondition for accountability of a member state, and individuals are permitted to challenge states accountability. Translated to our research query, individuals whose rights are infringed due to the legislative activities of a High Representative—operating within the Office of a High Representative—have the right to bring forth claims against the Federal Republic of Germany. It is so not solely due to individuals' lack of legal capacity against IO's but also because Mr. Hans Christian Friedrich Schmidt maintains a dual legal connection with the Federal Republic of Germany (through citizenship and diplomatic status), coupled with the country's provision of support for his activities, including a diplomatic passport, armed protection, vehicles, and other resources.

Presumptions of this research are that the Peace Implementation Council (PIC) has the competency to unilaterally appoint a High Representative to Bosnia and Herzegovina. At the same time, it cannot unilaterally transfer powers from the ambit of Chapter VII of the

Charter of the United Nations to a High Representative, and the Office of a High Representative is an IO. It is assumed in this study that the Peace Implementation Council (PIC) can unilaterally appoint a High Representative to Bosnia and Herzegovina, but lacks the authority to independently transfer powers from Chapter VII of the United Nations Charter to a High Representative and that the High Representative's Office is an IO. Inquiry in this work is limited to the accountability of the Federal Republic of Germany without examining which models apply to it.

Keywords: international organization, accountability, member states, OHR.

1. INTRODUCTION

The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement(s) was signed on December 14, 1995, by the leaders of Bosnia and Herzegovina, Croatia, and Serbia, to end the Bosnian War. The Republic of Srpska and the Federation of Bosnia and Herzegovina are parties to the Dayton Peace Agreement and its Annexes. The agreement was witnessed by representatives of the United States, the European Union, Russia, and the Contact Group (France, Germany, and the United Kingdom). The Dayton Agreements stand out for their distinct legal characteristics, setting them apart from typical peace treaties (Gaeta, 1996). These agreements boast several unique legal elements, including a multitude of international assurances designed to ensure their enforcement. These assurances consist of both institutional guarantees, like IFOR and the High Representative, and various safeguards operating on different levels. Moreover, they are defined by specific procedures for ratification and coming into effect. Notably, the Agreement on Initialing, the sole treaty signed at Dayton, took immediate effect, underscoring the exceptional legal process for finalizing and enacting the agreements. Additional distinctive aspects are present, such as the special relationship between Entities, the legal subjectivity of the Republic of Srpska and the Federation of Bosnia and Herzegovina, and constitution-building (Gaeta, 1996), albeit not delved into here. As noted, the Dayton Accord encompasses a series of international agreements delineating the broad features of the peace deals aimed at settling the Bosnian conflict. Of particular importance within the Dayton Accord are its Annexes. Alongside the General Framework Agreement, twelve annexes are included, each constituting a separate international agreement (Gaeta, 147, 1996). These annexes address specific matters like military affairs, human rights, refugee concerns, and the establishment of governance and reconciliation institutions.

A High Representative to Bosnia and Herzegovina was introduced via Annex 10 to the Dayton Peace Agreement titled: ‘Agreement on Civilian Implementation’. This Annex stipulates the mandate and methods of coordination and liaison, privileges and immunities and introduces the office of a High Representative. In most generalized terms the Parties, which include the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia (succeeded by Serbia), the Federation of Bosnia and Herzegovina

(former Muslim—Croat Federation), and the Republika Srpska, have mutually agreed that the civilian aspects of the peace settlement will involve various actions. These actions encompass ongoing humanitarian aid efforts, rebuilding of infrastructure and economy, the establishment of political and constitutional bodies in Bosnia and Herzegovina, promotion of human rights, and the repatriation of displaced persons and refugees. A significant number of international organizations and agencies are expected to provide support in these endeavors. Given the challenges ahead, the Parties have requested the appointment of a High Representative, in accordance with relevant United Nations Security Council resolutions. The High Representative's role is intended and proscribed to facilitate the Parties' initiatives, mobilize, and possibly coordinate the activities of involved organizations and agencies in the civilian aspects of the peace settlement, based on the mandate outlined in a United Nations Security Council (UNSC) resolution. The responsibilities of the High Representative will include monitoring the implementation of the peace settlement, maintaining close communication with the Parties to ensure their full compliance, and fostering cooperation with the organizations and agencies involved.

Accordingly, the role of the UNSC in appointing a High Representative is crucial. Perhaps there has been some procedural fragmentation in this regard, but authority fragmentation or authority transfer has never occurred. Namely, the UNSC Resolution 1031 (Resolution 1031 (1995), UN Doc. S/RES/1031(1995), serves as the legal basis for the PIC's engagement in appointing a High Representative to Bosnia and Herzegovina. Since the adoption of the UNSC's Resolution 1031 two precedential elements persistently coincide in appointing a High Representative: 1) selection by the PIC, and 2) the UNSC's approval. When this path was followed, the European Court of Human Rights (Court) observed that the High Representative was exercising lawfully delegated UNSC Chapter VII powers, so that the impugned action was, in principle, "attributable" to the UN within the meaning of the draft article 3 of the Draft Articles on the Responsibility of International Organizations (Berić and others vs Bosnia and Herzegovina, Application nos. 36357/04, 36360/04, 38346/04..). Consequently, eventual complaints against commissions or omissions of a Haigh Representative would be declared incompatible *ratione personae* by the Court.

The powers of a High Representative were criticized on various grounds. Researchers have identified that the authority vested in the OHR (Banning, 2015) plays a crucial role in shaping a wide array of legislative, judicial, and executive actions. This is due to the widely accepted perception that the High Representative wields quasi-sovereign powers, positioning them at a juncture marked by two conflicting imperatives: promoting democracy through non-democratic methods, and establishing statehood amidst disregard for popular sovereignty norms (Majstorović, 2007). Legislative powers are presumed as obstacles to the accession process of Bosnia and Herzegovina to the European Union. Also, the Venice Commission observed those powers from the human rights perspective. In order to uphold the democratic principle of people's sovereignty, it is essential that laws are enacted by a body chosen through popular vote. According to Article 3 of the (first)

Protocol to the ECHR, the election of the legislative body by the populace is a fundamental right, which loses its essence if laws are established by an alternative entity (Venice Commission Opinion CDL-AD (2005) 004 para 88). However, there was no competent court to address this and similar human rights violations.

The described situation lasted till 2021 when the appointment of Mr. Hans Christian Friedrich Schmidt by the Steering Board of the PIC was rejected by the UNSC (see the Draft Resolution S/2021/667 and UNSC 76th year: 8823rd meeting, Thursday, 22 July 2021). This created an unprecedented situation: Mr. Hans Christian Friedrich Schmidt perhaps became an Officeholder to OHR but not a High Representative in full capacity in terms of the UNSC Chapter VII powers. Despite the lack of the UNSC's approval, Mr. Hans Christian Friedrich Schmidt exercised legislative powers on several occasions. For instance, on April 27, 2023 he amended the Criminal Code of the Republic of Srpska (see Decision on enacting the Law on Amendment to the Criminal Code of Republika Srpska | Office of the High Representative (ohr.int), on July 01st 2023 he amended the Criminal Code of Bosnia and Herzegovina (see Decision enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina | Office of the High Representative (ohr.int)), and recently on March 26th 2024, Mr. Hans Christian Friedrich Schmidt adopted the Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina (see Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina | Office of the High Representative (ohr.int)). There are no convincing reasons we can see to support the position that those activities were governed by the implied powers doctrine (Banning, 2015), given the High Representative's legislative authority is derived from Chapter VII of the United Nations Charter and in its essence it contradicts sovereignty and human rights.

Now, how can citizens of Bosnia and Herzegovina protect their human rights from the ambit of Article 3 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedom (Convention)? To answer this question, we are going to consider OHR's accountability and problems to this approach. In this part of the research, we are going to address the general challenges of IO's accountability as well as the particular situation of the OHR in light of its status within the domestic legal system in Bosnia. Following this part, we are going to examine arguments supporting the claim for the accountability of the Federal Republic of Germany. In this part of the research, we are going to examine if two crucial assessment requirements of accountability coincide: the breach of a material aspect of international law and the jurisdictional link. Within the material aspect, we are going to address the general primary obligations and indicate the specific primary obligations of the Federal Republic of Germany in this particular case. We then moved on to scrutinize the extraterritorial dimension, following which we dissected the three main arguments supporting the assertion of 'attributability' to the Federal Republic of Germany. These arguments encompassed its position under the Dayton Peace Agreement, the disapproval expressed by the UNSC regarding the appointment of Mr. Hans Christian Friedrich Schmidt as a High Representative, and Mr. Hans Christian Friedrich Schmidt's

diplomatic credentials. Finally, we examined judicial jurisdiction starting with the general principle of state immunity in international law, followed by the more specific principle of domestic jurisdiction.

2. WHY NOT CLAIM THE ACCOUNTABILITY OF THE OHR?

An array of possible answers to the question raised exists. Initially, the eligibility of Mr. Hans Christian Friedrich Schmidt for a High Representative role is subject to debate. As we have seen, in contrast to his predecessors, who received endorsement through UNSC resolutions under Chapter VII of the United Nations Charter, his appointment lacks UNSC approval. However, further discussion about this particular aspect would revolve around the issue of *ultra vires*, although this does not serve as a decisive factor for our subject matter. So, for the purpose of further debate, we could conditionally accept that Mr. Hans Christian Friedrich Schmidt is a High Representative to Bosnia and Herzegovina acting in the capacity of the Officeholder at the Office of the High Representative in Bosnia Herzegovina (OHR).

2.1. General challenges concerning IO's accountability

Further, considerations about the eventual accountability of the OHR necessarily delve into status issues. The legal framework surrounding the OHR is intricate, with its positioning in both international and domestic legal systems causing ambiguity over its classification as a distinct international entity (Banning, 27, 2015). The OHR has been described both as an 'instrumentality of foreign States' and as an entity acting in an official capacity (Banning, 26, 2015). Within the Dayton Peace Agreement's Annex 10, which is an international treaty in its nature, certain immunities are granted to the OHR, notably diplomatic immunities under Article III(4). Nonetheless, it is essential to note that diplomatic immunities, catered to diplomats' personal protection in the host country, differ from the immunities of international organizations. While diplomatic immunities focus on individuals, international organization immunities encompass the entity as a whole, offering broader protection against legal actions that could impede its operations. Additionally, diplomatic immunities are traditionally based on the principle of reciprocity, where states mutually agree to grant immunities to each other's diplomats. However, the unique position of the OHR as an international entity may raise questions about the application of reciprocity in its case.

Still, no specific legislation governs international organizations, and interpreting their legal status relies on analogies and shared characteristics. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the Draft Articles on Responsibility of International Organizations

(DARIO)[1] serve as pivotal tools for evaluating organizations such as the OHR. Considering the extensive definition of IO outlined in Article 2[2] of DARIO, it is plausible to regard the OHR as an IO within the scope of this investigation.[3] Regarding its responsibility in this specific instance, we could analyze it from the perspective of challenges typically associated with IOs accountability and also consider the unique factors linked to OHR's internal legal status.

As to the perspective of accountability typically associated with IOs, it is a relatively unintended aspect of their functioning. IO's play a crucial role in addressing global challenges and promoting cooperation among member states (Surdej, A., 2020). They provide a platform for countries to come together and discuss common issues, develop shared goals, and coordinate their efforts (Coicaud, J., 2001). Furthermore, IO's contribute to international socialization and the development of global governance by promoting a sense of international legitimacy. These organizations are essential for tackling global issues such as climate change, poverty alleviation, and human rights protection. So, the question of IO's accountability was viewed as a secondary concern. However, accountability issues faced by the United Nations (UN) and other IOs arose and included serious offenses such as sexual exploitation and abuse, limited accountability mechanisms, lack of remedies, and ambivalence of states (Boon and Mégret, 3, 6, and 7, 2019). Further, IO's like the UN have been criticized for adhering to a narrow definition of accountability. Internal policies and mechanisms often prioritize monitoring and procedures over providing remedies for breaches of international law and human rights. While some accountability mechanisms exist within international organizations, such as the UN Dispute Tribunal, their mandate is primarily oriented towards internal complaints, lacking robust mechanisms for addressing breaches of international law and human rights. Contributing to this situation is the state's attitude toward holding these organizations accountable (Boon and Mégret, 3, 6, and 7, 2019).

Either way, IOs are undeniably bound by the principle of accountability. This principle is rooted in two closely linked foundations: legal and factual (Kreca, 263, 2022). The legal foundation pertains to the legal status held by international organizations. Being recognized as subjects within international law, they bear inherent responsibility when breaching international law, as being responsible for their unlawful commissions or omissions is a key aspect of their standing. The factual foundation focuses on the extensive

[1] Draft Articles on Responsibility of International Organizations https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

[2] Article 2 (a) of the DARIO reads: "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

[3] In Chapter IV, DARIO determine the conditions are under which a State or an international organization can demand accountability as a victimized party. This involves the right to request that the responsible international organization fulfil its international obligations. It should be noted that individuals are not considered eligible to exercise this right.

scope of activities conducted by international organizations across various facets of global affairs, along with the associated risks that these pursuits pose to the interests of states, other international bodies, and individuals (Kreca, 262, 2022).

Challenged by various obstacles, the creation of precise and enforceable legal regulations on the accountability of international organizations poses difficulties. The sheer number of international bodies with different missions and capacities presents a significant hurdle. Another major challenge arises from the fact that international organizations lack legal standing (of *ius standi*) in the International Court of Justice, rendering its precedents on IO's accountability virtually nonexistent. While the International Court of Justice has sporadically touched upon the subject of international organizations' accountability in select decisions, it was in the *obiter dicta* form (Kreca, 264, 2022).

Therefore, the issue of IO's accountability is associated with significant legal obstacles. In de *lege ferenda* sense, to enhance the accountability of international organizations and address the limitations of traditional accountability methods, there is a need to shift towards more holistic, victim-centered, and innovative strategies (Boon and Mégret, 2, 5, and 7, 2019). Emphasizing the significance of adopting a victim-centered approach within international organizations is crucial in providing redress and justice to those affected by their actions, ensuring the protection of their rights. To achieve this, it is essential to explore novel legal frameworks, mechanisms, and strategies that surpass conventional monitoring and procedural tactics. Such efforts should entail a comprehensive view of international organizations' accountability, including external monitoring and internal procedures to address violations of international law and human rights. Establishing external oversight mechanisms for independent scrutiny is particularly vital in bolstering the accountability of international organizations (Boon and Mégret, 2, 2019).

All this leaves individuals vulnerable to human rights violations resulting from the commissions or omissions by an IO or its member State(s). In his article, Gasbarri (Gasbarri, 2024) points out that international law lacks a specific legal category to address violations committed by international organizations. This gap in the legal framework means that there is no distinct set of rules or mechanisms specifically tailored to hold international organizations accountable for their actions. The implications of this lack of a specific legal category for addressing violations by international organizations are significant. It means that victims of harm caused by international organizations must rely on existing legal regimes created for other actors, such as states. Another aggravating circumstance for victims is insufficient case law. Additionally, disputes between individuals and international organizations are usually settled before domestic courts. Domestic judicial decisions are unsuitable to constitute or even impact international law norms due to the lack of consistency and their hierarchical standing (Kreca, 263, 2022). Unlike that, the European Court of Justice's rulings on the matter are not plagued by such shortcomings, but they primarily pertain to communitarian law (Kreca, 265, 2022).

2.2. The OHR within the legal system of Bosnia and Herzegovina

When examining the OHR's position within the legal framework of Bosnia, it is essential to consult the relevant rulings issued by the national Constitutional court. The decision made on November 3, 2000, in U-9/00 serves as a valuable initial reference point. Specifically, the Law on the State Border Service of Bosnia and Herzegovina was decreed by a High Representative on January 13, 2000. This legislation was officially published in the "Official Gazette" on January 26, 2000 (as documented in the "Official Gazette of Bosnia and Herzegovina", issue 2/2000). A group of eleven members from the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina lodged a formal request to the Constitutional Court of Bosnia and Herzegovina for a constitutional examination of the aforementioned State Border Service law. The applicants emphasized that the High Representative lacks the authority to enforce this law if it has not been ratified by the Parliament of Bosnia and Herzegovina, as it is not covered by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina. Furthermore, Chapter XI/b 2 of the Bonn Declaration also does not confer any normative powers in this regard.

The Constitutional Court recognized that the Parliamentary Assembly of Bosnia and Herzegovina concurrently exercises legislative competences with the OHR. It has been observed that this scenario arises from a type of functional duality: where one authority of a legal framework interferes with another legal framework, hence taking on dual roles. This principle also holds for the High Representative: entrusted by the international community with specific authorities, his jurisdiction is of an international nature. In this particular instance, the High Representative - whose authorities are derived from Annex 10 of the General Framework agreements, relevant resolutions of the United Nations Security Council, and Bonn declarations - is not under the oversight of the Constitutional Court. Furthermore, the exercise of his powers impacts the legal system of Bosnia and Herzegovina, substituting the local governing bodies. Consequently, he functioned as the *de facto* government of Bosnia and Herzegovina, and the legislation he enacted held the status of domestic law and should be recognized as such in Bosnia and Herzegovina.

This approach was consistently followed in consequent case law. As to the recent case law referring to the period when Mr. Hans Christian Friedrich Schmidt took over the Office, the situation is following. On October 11, 2022, the Presidency member of Bosnia and Herzegovina submitted a request to the Constitutional Court of Bosnia and Herzegovina for the review of the constitutional compliance of the amendments made to the Federation of Bosnia and Herzegovina's Constitution and Articles 1 to 5 of the Election Law of Bosnia and Herzegovina. These amendments were enacted by the High Representative for Bosnia and Herzegovina through decisions 06/22 and 07/22 dated October 2, 2022, as published in the "Official Gazette of BiH" No. 67/22. The request, labeled as U-27/22, was acknowledged by the Constitutional Court. After thorough assessment, the Constitutional Court determined that the amendments in question did not violate the Constitution.

Furthermore, the court discussed the authority of the High Representative as outlined in Annex 10 of the Dayton Peace Agreement, refraining from making a specific determination regarding Mr. Hans Christian Friedrich Schmidt's status.[4]

3. ACCOUNTABILITY OF THE FEDERAL REPUBLIC OF GERMANY

When discussing the accountability of a member state of an IO, it is crucial to examine whether two crucial assessment requirements coincide. The initial prerequisite involves the breach of a material aspect of international law, which is considered less complex to prove here, followed by a more stringent prerequisite regarding attributability.

3.1. A breach of an international obligation

As to the first requirement, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) in Article 12 defines a breach of an international obligation by a state as follows: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". This definition emphasizes that a breach occurs when a state's actions do not align with the requirements set forth by the international obligation in question. The definition of breach in Article 12 is flexible and can encompass various forms of non-compliance with obligations, whether they demand strict adherence to specific criteria or a minimum standard of behavior. This definition covers acts, omissions, or a combination of both, emphasizing that both types of actions by state entities can lead to breaches of international obligations (Crawford, 2013). Further, the material element of breach involves understanding the autonomy of primary obligations. These obligations can cover a wide range of areas, such as human rights, environmental protection, trade agreements, and diplomatic relations and they define the conduct that states are required to adhere to in their interactions with other states or entities (Crawford, 2013). The autonomous nature of primary obligations means they exist independently of the rules governing state responsibility.

At this point, we can accept that ECHR presents a material element of international law, and as such it is a source of primary obligations on the part of the Federal Republic of Germany. In the material sense, the legislative activities of Mr. Hans Christian Friedrich

[4] Interestingly, in the form of *obiter dictum* the Constitutional Court contextualized legislative activities of a High Representative to Article 2 of Annex 10 which reads 'The High Representative shall: a. Monitor the implementation of the peace settlement; b. Maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects' as well as to Article 5 which reads 'The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.'

Schmidt undoubtedly amount to violations of human rights from the ambit of Article 3 of Protocol 1 to the ECHR to the citizens of Bosnia and Herzegovina. Namely, this particular Article safeguards the right to vote i.e. to freely choose the legislature. It enables citizens to indirectly partake in the adoption of the laws. Otherwise, the right to vote, the electoral process, and, ultimately, the democratic order itself, would be devoid of substance (*Riza and Others v. Bulgaria*, Applications nos. 48555/10 and 48377/10, 2016, § 148). When legislation is adopted by another body citizens' rights from the ambit of Article 3 of Protocol 1 to the Convention are deprived of their content (European Commission for Democracy through Law (Venice Commission Opinion CDL-AD (2005) 004 para 88). If the described activities were pursued directly by the Federal Republic of Germany they would be qualified as a breach of international law (see Shaw, 485-487, 2017).

Perhaps a more detailed explanation is needed on the primary obligations associated with the initial assessment requirement. In this regard, we could wonder what are the specific primary obligations that the Federal Republic of Germany upholds herein? Primary obligations regarding human rights generally pertain to the specific responsibilities that states are bound by international law to uphold and safeguard human rights. These duties include both negative obligations, where states must refrain from violating or interfering with individuals' enjoyment of human rights, and positive obligations, which require states to actively work toward the realization of human rights (Crawford, 2013). Furthermore, there are procedural safeguards that compel states to protect individuals from human rights violations through effective measures like legislation, law enforcement, and accessible judicial remedies that guarantee access to justice, compensation, and prevention of future abuses. Moreover, as an imperative principle, states must ensure that human rights are universally enjoyed without discrimination based on factors such as race, gender, religion, nationality, or other prohibited grounds. It could be considered that general primary obligations pertain to guarantees from the ambit of Article 3 of Protocol 1 to the ECHR making those guarantees the specific primary obligations of the Federal Republic of Germany.

An additional challenge in discussing the specific primary obligations of the Federal Republic of Germany potentially arises from the extraterritorial nature violations. Even so, the Federal Republic of Germany can be held accountable for its commissions or omissions. This form of accountability encompasses the conduct of state agents as well as instances where states fail to meet their international obligations, leading to extraterritorial breaches of human rights standards (Türkelli, 3, 2021). Human rights violations that stem from the actions or inactions of an IO could be also attributable to the Federal Republic of Germany as an extraterritorial state (see Türkelli, 4, 2021).

3.2. Attributability to the Federal Republic of Germany

As to the requirement of attributability, it should be borne in mind that in general terms states may be attributed responsibility for the acts of IOs as members depending on the powers conferred, delegated, or transferred to the IO. Namely, if states confer specific powers to an IO and use the IO as an agent to carry out certain functions, the states retain responsibility for the acts of the IO within the scope of the powers granted to it (Türkelli, 5, 2021). In such cases, states are accountable for the actions of the IO as they have authorized and empowered the organization to act on their behalf. This scenario perfectly describes the current situation with the Federal Republic of Germany and the Office of the High Representative to Bosnia and Herzegovina (OHR). The OHR was introduced via Annex 10 to the Dayton Peace Agreement titled: 'Agreement on Civilian Implementation' to the Dayton Peace Agreement which in its Article 1 reads:

> 37. In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below.

Apparently, State parties are using the OHR as their agent.[5] In the past, State parties used to evade responsibility for human rights abuses during peace implementation due to the presence of a High Representative endorsed by the UNSC. This particular aspect was construed in the international case law as deeming the OHR as a crucial element of the UNSC's efforts to restore and maintain peace as per Chapter VII of the UN Charter Berić and others vs Bosnia and Herzegovina, Application nos. 36357/04, 36360/04, 38346/04..). Consequently, it was impracticable to determine *ratione personae* judicial jurisdiction over the commissions or omissions of the (O)HR. Now, several occurrences coincide here amounting to the arguments for accountability of the Federal Republic of Germany: its status under the Dayton Peace Agreement, the UNSC's disapproval of Mr. Hans Christian Friedrich Schmidt's appointment as a High Representative, and Mr. Hans Christian Friedrich Schmidt's status of its diplomat.

Regarding the status of the Federal Republic of Germany in the Dayton Peace Agreement, it was observed despite not being a party. However, the Federal Republic of Germany is a witness to the Dayton Peace Agreement. While witnesses in peace agreements are typically not bound by the treaty's terms, they may have specific expectations or

[5] Accountability of the Bosnia and Herzegovina is not an issue here because it concurrently exercises legislative competences with the OHR which potentially undermines its responsibility for the OHR's human rights breaches (see Türkelli, 5, 2021).

responsibilities that extend beyond merely symbolic participation (Varga, 2021). In that sense, witnesses may be expected to verify and monitor the implementation of the treaty by the parties involved. For instance, Cuba and Norway, as witnesses in the Colombia peace process, issued joint statements on the implementation of the Final Agreement, demonstrating their ongoing monitoring role (Varga, 224, 2021). Also, witnesses can play a role in ensuring that the agreed-upon terms are being followed providing legal clarifications and facilitating eventual conflict resolutions between the parties, and ensuring the smooth progress of the peace process. In correspondence with the Dayton Accords, the Federal Republic of Yugoslavia (FRY) sent letters to various countries, including the Federal Republic of Germany. Within these letters, FRY, a party to the Dayton Peace Agreement, committed to taking every required action to guarantee that Republika Srpska adheres to the terms outlined in the Annexes while upholding the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina (Varga, 219, 2021). In this way, the Federal Republic of Germany formally gained certain rights concerning the implementation of the Dayton Peace Agreement's Annexes.

Factual engagement of the Federal Republic of Germany in Bosnia and Herzegovina is much alike. The stability of the exchange rate of Bosnian currency (convertible mark) is due to the Deutsche Mark. The local currency in Bosnia was initially pegged to the Deutsche Mark at par, from 2002 it has been pegged to the Euro keeping the same exchange rate as the Deutsche Mark would. Furthermore, the Federal Republic of Germany actively participates in peace-building efforts and contributes to developmental and infrastructural projects in Bosnia and Herzegovina, fostering economic cooperation between the two countries. The latter aspect of cooperation can be significantly influential (Chatterjee, 2020), enabling the Federal Republic of Germany to meet its role. In general, the role of the Federal Republic of Germany becomes deeper and increasingly important. Previously, it was criticized for lack of political attention, limited political activity, and reliance on multilateral approaches to address issues in Bosnia (Thiel, 2013), which is not the case nowadays. Today, the Federal Republic of Germany has its legislative, judicial, and executive governor over Bosnia and Herzegovina as well as two German-national judges out of a total of three foreign judges at the Constitutional Court of Bosnia and Herzegovina.

Regarding the UNSC's disapproval of Mr. Hans Christian Friedrich Schmidt's appointment as a High Representative it should be borne in mind that the appointing process was constitutionalized in 1995 through the UNSC Resolution (Resolution 1031 (1995), UN Doc. S/RES/1031 (1995)). To circumvent debates over the interpretation of formal sources related to this process, we will base our description on the longstanding practice. The appointment of the first High Representative to Bosnia and Herzegovina introduced: 1) consultations with the Government of Bosnia and Herzegovina, 2) the Peace Implementation Council's (PIC) approval, and 3) the UNSC agreement as pivotal three elements of the accepted procedure. The first element was quickly aborted with the appointment of the second High Representative in 1997 but no party protested against it in a

legally relevant manner. Therefore, the abolition of the first element was contested by all parties. The second and third elements were persistently held during the whole period of the Dayton Peace Agreement implementation.

It might be disputed if the practice of appointing a High Representative to Bosnia and Herzegovina was consistently followed in 2006 in the case of Mr. Christian Schwarz-Schilling. Essentially, the appointment of him by the PIC was acknowledged in a letter format by the UNSC, although there is no specific resolution in place. It should be noted that this occurrence does not stray from the standard procedure, as both the UNSC and the PIC actively endorsed his designation. There was no opposition from any party to the Dayton Peace Agreement.

In contrast to the established procedure, the appointment of Mr. Hans Christian Friedrich Schmidt by the Steering Board of the PIC was rejected by the UNSC (see the Draft Resolution S/2021/667 and UNSC 76th year: 8823rd meeting, Thursday, 22 July 2021). It was followed by active protests by the UNSC members (Russian Federation – also a member of the PIC; and the People's Republic of China). For, even if the Steering Board of the PIC might be competent to unilaterally appoint the Officeholder to the OHR, it certainly is not empowered to transfer the UNSC's principal powers to that individual. Without the UNSC's endorsement, *ratione personae* judicial jurisdiction over the commissions of Mr. Hans Christian Friedrich Schmidt is realistic.

As to the diplomatic status of Mr. Hans Christian Friedrich Schmidt, besides conferring personal immunities, it situates him in a subrogated position to the Federal Ministry for Foreign Affairs. This could be a firm basis for recalling the accountability of the Federal Republic of Germany. Namely, in the context of state responsibility, international law defines the concept of direction or control by the state as the state's ability to influence or oversee the actions of private entities to the extent that those actions can be considered as if they were carried out by the state itself (Crawford, 2013a). The notion of 'effective control' is important in this regard and it implies a core relationship of subordination between the state and the private entity, indicating a level of oversight or influence that equates the actions of the private entity with those of the state.

In this regard, Article 8 of the ARSIWA elaborated by the International Law Commission acknowledges the principle that actions performed by private actors can be attributed to a state. It outlines that if a person or a group of individuals carry out actions under the instructions, direction, or control of a state, these actions can be deemed acts of the state according to international law. This concept has been upheld in various instances by international tribunals, which have held states responsible for damages or violations caused by individuals with whom they have a relationship. To prove state liability, it is essential to show a direct order or acknowledged authorization from the state to the private actors, establishing a clear connection between the state and the wrongful behavior (Crawford, 2013). Should this link be established, the state could be held accountable for repercussions like compensations or other forms of remedies for the affected parties.

With respect to human rights violations, Article 1 of the ECHR establishes that states have obligations beyond their borders. This means that each Member State has the duty to ensure that the rights and freedoms outlined in the Convention are upheld for all individuals under their authority, even if they are not within the state's own territory. The Court has defined two primary models for determining extraterritorial obligations: the "spatial model" and the "personal model" (Haeck et al., 2021). The spatial model is relevant when an individual is present in an area controlled by the state, whereas the personal model applies when an individual is acting under state direction or acknowledgment (Haeck et al., 2021). The personal model in this case provides a clear jurisdictional link since it refers to situations where the state's agents operate abroad, such as military or diplomatic missions (Haeck et al., 2021). Therefore, in cases where individuals or their property are affected in a manner that violates their human rights by diplomatic or consular agents abroad, the sending state may bear responsibility under the ECHR. Despite the actions taking place beyond its own borders, the sending state is deemed to possess jurisdiction over the victims involved. The ECHR guarantees protection for individuals against human rights infringements regardless of the location of such violations by holding states accountable for the conduct of their diplomatic or consular representatives overseas (Haeck et al., 3, 2021).

3.3. Judicial Jurisdiction of the Federal Republic of Germany

In order to delve into the issue of German accountability, it is essential to provide a brief overview of how the German court exercises jurisdiction in the current case. Several factors lead to the preference for German court competencies. The first factor stems from the principle of state immunity in international law. State immunity, as supported by the Latin maxim "*par in parem non habet imperium*," highlights that entities of equal standing should not wield authority over each other. This principle underscores the autonomy and sovereignty of states, advocating for equal treatment among nations. State immunity plays a pivotal role in upholding the equality of states by limiting a state's jurisdiction over the actions of other states. By ensuring that no state falls under the jurisdiction of another state's courts without consent, it maintains a level international playing field. State immunity protects the sovereignty of states by shielding them from external interference in their matters through interventions by foreign courts. This safeguard enables states to operate independently without external legal disruptions.

The second factor arises from the principle of domestic jurisdiction. The nature of the sovereignty of states dictates the principle of domestic jurisdiction, stating that while a state holds supreme authority within its own territorial boundaries, it should refrain from interfering in the internal affairs of other nations. Jurisdiction, in a general sense, pertains to a state's power under international law to regulate and influence individuals, property, and situations, embodying the fundamental tenets of state sovereignty, equality among states, and non-intervention in domestic matters (Shaw, 485-487, 2017). It is a pivotal aspect of

state sovereignty, as it represents the exertion of control that can modify, establish, or terminate legal responsibilities. This authority can be exercised through legislative, executive, or judicial means, with a focus here on judicial jurisdiction. Judicial jurisdiction revolves around the competency of a country's courts to preside over cases involving foreign elements. Various grounds exist on which a state's courts can base their claim to exercise such jurisdiction, encompassing criminal considerations such as the territorial and universal principles, and civil aspects ranging from the defendant's mere presence in the country to principles of nationality and domicile (Shaw, 485-487, 2017).

A German court is competent in both aspects of judicial jurisdiction. Namely, according to Section 6 of the German Criminal Code entitled 'Offences committed abroad against internationally protected legal interests,' German criminal law extends to offenses committed overseas, irrespective of the jurisdiction under which they occur. This includes offenses subject to international agreements binding on the Federal Republic of Germany that mandate prosecution, even if they occur outside the country. Bearing in mind the circumstances of the case described in the introduction of this paper, the nationality principle from Section 6 of the German Criminal Code could be relevant. However, the issue of criminal liability becomes more intricate since besides the formal element (proscribed by law), a subjective element (fault) is also necessary. In addition, the primary intention herein is not to address and raise this sort of accountability.

As to civil accountability, it should be borne in mind that Mr. Hans Christian Friedrich Schmidt benefits from diplomatic immunities. While the recognition of his status as a Higher Representative is debatable due to the absence of approval from the UNSC,[6] his position as a German diplomatic official remains valid. The regulations concerning diplomatic immunities and privileges are primarily governed by the Vienna Convention on Diplomatic Relations (VCDR),[7] which establishes the rights and responsibilities of diplomats and the countries hosting them. Within the VCDR framework, diplomats can be held accountable either by the host country's courts or by the sending country's courts. The first scenario requires diplomatic actions of Bosnia and Herzegovina toward the Federal Republic of Germany to waive diplomatic immunity from Mr. Hans Christian Friedrich

[6] If we accept that Mr. Hans Christian Friedrich Schmidt is a High Representative and acts as an organ of IO, this fact in itself it does not preclude accountability of the Federal Republic of Germany. See Article 47 of the Draft articles on the responsibility of international organizations, 2011. Also, Comments of the ILC on Article 3 of the Draft Articles on Responsibility of International Organizations, in section (6) reads ‘The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both’. Available at https://legal.un.org/ilc/reports/2009/english/chp4.pdf

[7] Vienna Convention on Diplomatic Relations https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

Schmidt to subject him to the Bosnian judiciary.[8] The decision to waive diplomatic immunity lies with the Federal Republic of Germany. Therefore, the discretion to take diplomatic measures and the power to waive diplomatic immunity are both held by different public authorities and do not serve as a remedy accessible to the individual who suffers human rights violations.

For this reason, the only plausible option available to individuals to protect their human rights is the second scenario i.e. to bring the case before the courts of the Federal Republic of Germany. The legal system of the Federal Republic of Germany appears suitable to pursue this approach for the following reasons. First, Article 25 of the German Basic Law (Grundgesetz),[9] introduces the primacy of international law and proscribes that the general rules of international law shall be an integral part of federal law. The Federal Republic of Germany embraces a stance of moderate dualism when it comes to international law (Engel, 2023). Following this doctrine, the European Convention on Human Rights (ECHR) was recognized as an international agreement, received parliamentary ratification on 5 December 1952, and came into effect on 3 September 1953 (Engel, 2023). As outlined in Article 59 paragraph 2 of the Basic Law, the ECHR was granted the status of a federal statute in the hierarchical structure of the German legal system. This further results in the German court's obligation to apply the ECHR within the framework of accepted methods of its interpretation (Hoffmeister, 3, 2006). The German Federal Constitutional Court (FCC) has emphasized that the Convention serves as an interpretative tool for German norms of a constitutional nature.

As to decisions of the European Court of Human Rights (ECtHR) the German Federal Constitutional Court (FCC) has ruled that they have domestic effects in Germany. This means that German courts are expected to consider and respect judgments of the ECtHR especially in cases where fundamental rights are at stake, ensuring compliance with the principles and standards set forth in the ECHR (Hoffmeister, 5, 2006). If a German court disregards a relevant finding of the ECtHR, individuals have the right to file a constitutional complaint against the decision of the German court that ignored the ECtHR's judgment. By filing a constitutional complaint based on the alleged violation of the ECHR, individuals can challenge the decision of the German court and seek redress for the failure to consider relevant ECtHR findings. The FCC has the authority to review cases where German courts have disregarded ECtHR judgments and can revoke decisions that do not align with the principles of the ECHR (Hoffmeister, 5, 2006).

[8] The procedure is the same for both civil and criminal accountability.

[9] The German Basic Law (Grundgesetz) https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

4. CONCLUSION

In conclusion, the protection of human rights for citizens of Bosnia and Herzegovina within the scope of Article 3 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms (ECHR) involves navigating complex challenges related to accountability mechanisms and legal frameworks. The Office of the High Representative (OHR) plays a crucial role in this context, but its accountability and effectiveness in safeguarding human rights face significant obstacles, including issues related to the accountability of international organizations (IOs) and the OHR's status within Bosnia's domestic legal system.

Furthermore, the accountability of the Federal Republic of Germany in cases of human rights violations linked to the legislative activities of its representatives within international organizations requires a thorough assessment of two key factors: the breach of a material aspect of international law and the jurisdictional link. Germany's general primary obligations under international law encompass upholding and safeguarding human rights, including both negative and positive obligations, as well as ensuring procedural safeguards to protect individuals from violations.

The extraterritorial dimension adds another layer of complexity to attributing accountability to Germany for human rights violations. Three main arguments support the assertion of attributability to Germany in this context: its position under the Dayton Peace Agreement, the disapproval expressed by the United Nations Security Council regarding the appointment of Mr. Hans Christian Friedrich Schmidt as a High Representative, and Mr. Schmidt's diplomatic credentials, which establish a legal connection between him and Germany.

Finally, considerations of judicial jurisdiction play a crucial role in determining accountability. The general principle of state immunity in international law must be balanced with the specific principle of domestic jurisdiction, which may provide avenues for individuals to seek redress for human rights violations through legal mechanisms and oversight processes.

In essence, the protection of human rights for citizens of Bosnia and Herzegovina within the framework of the ECHR requires a comprehensive approach that addresses accountability challenges, legal complexities, and the roles of international organizations and member states like Germany in upholding human rights standards and ensuring justice for individuals affected by violations.

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Др Драган ДАКИЋ*

ОДГОВОРНОСТ ЗА КРШЕЊЕ ЉУДСКИХ ПРАВА У МЕЂУНАРОНОЈ ОРГАНИЗАЦИЈИ: СЛУЧАЈ ФЕДЕРАЛНЕ РЕПУБЛИКЕ НЕМАЧКЕ И КАНЦЕЛАРИЈЕ ВИСОКОГ ПРЕДСТАВНИКА

Апстракт

Опште истраживачко питање у овом раду се тиче начина на који појединци могу заштитити своја људска права када је њихово кршење проузроковано активностима међународне организације. Јасно је да се овако формулисано питање тиче основних изазова који се отварају када је ријеч о одговороности МО, попут дефинисања конкретног субјекта захтјева, судске надлежности, процесних права појединаца и пасивне легитимације саме МО исл. Управо из тог разлога главно истраживачко питање је формулисано у суженом оквиру и тиче се конкрене одговорности Савезне републике Њемачке за законодавне активности њеног држављанина и дипломате Ханса Кристијана Фридриха Шмита који борави у Босни и Херцеговини од 2021. године као високи представник – орган МО која носи скраћен назив ОХР. Ове активности су посматране кроз призму гаранција из члана 3 протокола 1 уз Европску конвенцију за заштиту људских права и основних слобода које грађанима Босне и Херцеговине гарантују право на избор законодавних тијела а тиме и на легислативну активност искључиво ових тијела.

Хипотетички оквир истраживања је следећи: МО су везане међународним правом али грађани немају страначку способнос у поступку против МО; одговорност МО није предуслов за одговорност државе чланице чије утврђивање могу да траже и грађани. Конкретно, теза је да грађани Босне и Херцеговине у описаном случају имају право тужбе против против Савезне Републике Њемачке без обзира на евентуалну одговорност других субјеката међународног права. Како бисмо тестирали наведену тезу прво су представљени општи изазови који се јављају у циљу утврђивања одговорности МО а затим и изазови који произилазе из статуса ОХР-а у правном систему Босне и Херцеговине.

Након овог дијела рада, испитани су аргументи који подржавају тврдњу о одговорности Савезне Републике Њемачке. Истражено је да ли је дошло до стицаја два кључна елемента одговорноси: кршење материјалног аспекта међународног права и јурисдикционе везе. У оквиру материјалног аспекта дискутовано је о општим примарним обавезама које државе имају и указано је на специфичне примарне обавезе Савезне Републике Немачке у овом конкретном случају. Затим смо прешли на

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испитивање екстериторијалне димензије евентуалних Њемачких обавеза односно одговорности, након чега смо сецирали три главна аргумента који подржавају тврдњу о „приписвости“ посматраних активности Савезној Републици Њемачкој. Ови аргументи обухватају њен правни статус у систему Дејтонских мировних споразума, одбијање Савјета безбједности Уједињених нација да именује господина Ханса Кристијана Фридриха Шмита за високог представника као и његов дипломатски статус. Коначно, испитали смо судску надлежност почевши од општег принципа имунитета државе у међународном праву, а затим од односнијег принципа домаће јурисдикције.

Кључне речи: међународна организација, одговорност, чланство, OHR.

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THE IMPACT OF DIGITALIZATION ON INSURANCE CONTRACT AND INSURED'S RIGHTS[1]

Summary

The author examines the legal implications of using digital technologies in insurance law in the context of protection of insured's right as a weaker contractual party. The central part of the paper is dedicated to the process of personalization, i.e., the possibility of offering insurance cover that fully corresponds to the needs and profile of the insured, based on data obtained by the insurer while using digital technologies. However, since this process contradicts some of the basic principles of insurance industry, the question arises regarding the protection of the insured's rights when the personalization has not been conducted adequately, and thus the premium and cover do not meet the needs of the insured that motivated him to conclude an insurance contract in the first place. Comparative legal analysis shows that this issue is still not regulated, indicating that provisions of consumer protection regulations must be applied. This is also the case with the legislation of the Republic of Serbia, where certain answers can be found in the Consumer Protection Law and in the Law on Contract and Torts.

Key words: insurance, personalization, consumer protection, premium, cover.

1. INTRODUCTION

Fourth Industrial Revolution is slowly turning into the Fifth Industrial Revolution that is characterized by vanishing distinctions between physical, digital and biological (Howells, 2020, 145). Even though the coming period will be focused on concepts such as sustainability, human-centeredness or concern for environment, it will still be accompanied

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by the transformation of the industrial structure through the utilization of Internet of Things, Big Data,[2] AI, which all were the landmarks of the Fourth Industrial Revolution. Innovations around information technology definitely transformed and deeply influenced the further development of society and its social and economic aspects (Baldwin, 2016). The usage of data, data science and analytic tools that enable extracting insights from a great amount of randomly collected data still remains viable field in many commercial sectors due to importance of collected information.

Financial sector is accordingly one of the sectors in which the rapid changes and development are to be noticed on a daily level. Exception in that sense isn`t an insurance industry in which the process of digitalization can largely contribute to different phases: from improving product development and underwriting, to revamping distribution tactics, consumer interactions, and business models. At the same time, digital capabilities make it easier for new entrants, including non-insurers, to acquire segments of the insurer's value chain (Albrecher *et al*., 2019, 354). Given features were the focus of research regarding insurance industry at the beginning of the century. Nowadays focus is more on the new insurance products that are more situation- and demand based, like cyber insurance, on underwriting of automatic algorithmic decision-making process, data protection, elimination of informational asymmetry (Baranauskas, 2021, 70). All these features of the insurance market stem from the fact that a great amount of information is now available everywhere and to everyone.

2. USAGE OF DIGITAL TECHNOLOGIES IN INSURANCE INDUSTRY

Individuals use and rely on technologies immensely while information become easily available, at arm's length due to usage of social media, smart devices, cookies, etc. A great number of devices that we all use on a daily level make records on the users' behavior and transforms them into data (Cohen, 2019, 15-25). Even though it was not necessary to design and process information in this manner, recognition of the value of data determined the online service providers to act in a given way. Manners in which data can be used include, among others, personalization of commercial communication (offers, ads), monitoring the demands for certain products or optimizing certain processes, controlling fraudulent behavior. In a blink of an eye personal profile of each individual and one's behavior can be defined (Mantelero & Vaciago, 2013, 161-169).

When it comes to insurance contracts, the given statement becomes even more obvious because information represents the most valuable resource in terms of an insurance contact. Not having adequate information makes it impossible for the potential customer to evaluate the object of the agreement, as well as its costs and benefits, while the insurer

[2] Big data is also understood as "high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation" (Południak-Gierz, 2018, fn. 3).

potentially faces an adverse selection phenomenon.[3] For that reason, insureds use internet-based technologies to do research on products that suits their needs while comparing the prices offered by several insurers, whilst insurers use technologies to collect as much as possible information on the potential insured in order to define their profile. Value-chain in insurance industry is now largely affected by the process of digitalization that defines a great amount of primary and side activities conducted by insurers. The given feature of the insurance industry is mostly a post-covid product in which the insurers had to rethink and remodel their business practice.[4] Remodeling was focused on offering new products, more personalized and usage-based services. Some of the benefits of using technologies in insurance sector is providing more precise pricing, building accurate risk profiles of the insureds, reducing uninsurance and over-insurance, comparing insurance precise in order to find the most suitable and affordable one, elimination of the information asymmetry that accompanies insurance contracts.

Worldwide we already have examples of this process. In automobile insurance industry,[5] telematics insurance provides services of local determination, road assistance, etc. and collecting the data on the insured which contributes largely to more precise pricing and actuarial accuracy.[6] Analyzing telematics data on cars using algorithms of machine learning, services of insurance companies with AI create personalized risk profiles for drivers (Lupačov & Stanković, 2022, 80). Some insurance companies use the data collected in order to enable drivers to get some discounts if they use safe driving habits. The system of insurance using AI is capable of determining how serious the damage is, assess the costs of repair and analyze the impact of the accident on future premiums for the given driver. Also, majority of insurance companies have implemented a system which enables them to quickly accept automated solutions for taking on complex risks with new clients in life insurance. The system actually learned to digitalize data from scanned medical records, photos, faxes, tables and other sources and that process was almost impossible in the past. After certain period of time, insurers are able to define accurately the profile of the insured which enables

[3] Siegelmann, 2004, 1223-1225.

[4] Raise of the awareness of the necessity of insurance, new risks, distance market are just some of the factors that definitely changed the insurance market.

[5] About 7–10% of AXA Japan customers cause a car accident every year and 1% of it are large-loss accidents with large insurance sums. For that reason, insurer AXA turned to Google TensorFlow to build deep neural networks to analyze large amounts of customer data to predict potential losses, in order to optimize prices for their motor insurance policies. The AXA team has achieved an accuracy rate of 78% in its predictions. This provides AXA with useful applications to achieve higher profits, including creating new insurance services such as real-time pricing at the point of sale. (Kuma & Srivastava & Bisht, 2019, 81).

[6] Health insurance industry is also suitable for the use of such technologies. Information as age, health history, certain habits define the scope of insurance. Usage of those technologies would enable to insureds to provide insurer with information on daily activity or exercising time via telematic channel and then to receive calculated premium using this kind of data.

accuracy in pricing, in a more efficient and prompt way while also offering a possibility to offer more insurance products (Rose, 2013, 1-9).

Despite the fact that nowadays insurers aim at establishing new way of doing business, offering new products while relying on digital service providers (Stoeckli & Dremel & Uebernickel, 2018, 285-307), some of them still face many obstacles while trying to offer and use information gathered though digitalization of insurance contract. When compared to banking sector, it is clear that insurance sector is still trying to keep up the pace with the given trends and despite all the efforts (Baranauskas & Raišienė, 2021, 188). First of all comes the question of how to obtain all the information and keep a record on them. Also, potential insureds are not always willing to share their personal information. They do however have expectations that their insurance product and premium will be personalized in accordance with better risk segmentation (Popović & Anišić & Vranić, 2022, 125). In the case of the insurance market and organizations, recent years have shown a continuous adaptation of technological innovations, as well as a shift in focus to user-driven product customization and personalized service.[7] Insurers also face challenges in maintaining data privacy and availability because they rarely acquire raw telemetry data; they receive them summarized, which further requires that they are processed in a wise way (Albrecher *et al.*, 2019, 352).

The listed challenges accompanying the process of digitalization of an insurance contract are partially the consequence of the fact that insurance companies haven't reached the maturity level required to fully and effectively incorporate new technologies developments into their everyday processes, products or service management systems. Lack of "maturity" also accompanies the behavior of the insureds that still hesitate to conclude their insurance contracts online if they feel need some extra information and advice, which makes simpler insurance products more suitable for online shopping.[8]

Due to given "obstacles" and lack of adequate response from the insurance sector, the reform of legislation still hasn't taken place, even though it is clear that unresolved issues may appear on the side of both contractual parties. The rapid pace of change makes it challenging to understand the full impact of these advances. At the moment most of the legal systems do not even recognize the principles of functioning these new technologies, despite the fact the main task ahead of the legal system is to provide need for protection of

[7] Personalization of consumer interactions, including product offerings, has been a focus of artificial intelligence applications in almost every corporate industry. Historically, insurance companies have excelled at selling insurance but not necessarily at cultivating customer relationships following the original sale. Customers increasingly expect similar experiences from insurers as they do with other product and service providers.

[8] This refers to motor vehicle insurance, property insurance, certain forms of personal liability insurance. In Serbia only policies for travel insurance, car assistance, health insurance and homeowner insurance can be purchased online. For the other products potential customers can only send their inquiries online, but the answer will be given by an insurance agent who underwrites risk in traditional manner and send an offer afterwards. (Popović & Anišić & Vranić, 2022, 127).

public and individual interests. It is clear that certain changes in legal systems will have to be undertaken in order to maintain the given goal.[9]

Until then scholars are obliged to offer solutions for the situations in which insured believes his right from the insurance contract have been endangered. For example, insurer gathers information on a man that is young and healthy, but behaves risky while driving a bicycle because he listens to music while driving, doesn't wear helmet because he wants his hair to look well when he gets to work. He is to be considered highly risky, which will affect the personalized premium price he will have to pay that can further lead to unfair distributive outcome (Pałka & Wiśniewska, 2022, 9). Then there is the question of the treatment of a bicycle driver that gets distracted more easily due to their "personal characteristic of their mind" and not due to some conditions that can control? Will they be obliged to pay higher premium even though they can't affect or change their own behavior? Especially when one considers that the insurance thrives to distribute risks in fair manner. The end result, despite all the possible good effects for the insurance market itself, may be an expensive insurance for come insureds or even denying insurance coverage to some.

3. PERSONALIZATION OF AN INSURANCE CONTRACT

It is evident that digitalization requires cooperation between analogue and digital world and ways of doing business, where the new technologies enhance interaction with customers and all the information[10] is available at great speed. Based on their experiences in other industries where the service providers offer digital experience, customers have grown to expect a similar experience more and more when it comes to the services supplied in insurance industry.[11] In the context of insurance, digitalization is understood as "the use of new technologies to industrialize and automatize processes, to change the communication between customer and insurer, and to generate and evaluate new data." (Eling & Lehmann, 2018, 363). Producing and consuming is and will be mostly taking place in the internet-based cyber-physical space that will require certain changes (Rekettye & Pranjic, 2020, 6). Even though customers are used to personal assistance from different brokers, agents and to direct channel of information, nowadays the information is mostly gathered online where products and prices can be easily compared using aggregator platforms.[12] Also, all processes

[9] The presumption is that certain notions, classifactions will be discussed, while some new models will be developed as a response to social and economic changes.

[10] Some of the information is location, search history, preferences, internet behavior, online shopping, opinions on certain subjects through social media, blogs, etc.

[11] Insurance companies appear to be in a transitional stage in customization and personalization procedures as compared to banking sector. (Baranauskas, 2021, 71)

[12] Lemonade CEO Daniel Schreiber believes that future insurers will not be using brokers since they will be replaced by bots and artificial intelligence will be performing the duties of actuaries (Albrecher *et al*., 2019, 355).

are now aiming at being completely automized (processing contracts, reporting on claims, underwriting, product offering).

Due to great usage of all the devices connected to Internet and information-based systems, insurers get into insight into a personal preferences and characteristics of their potential customers,[13] to form their personal profile, even though the collected information is semi-structured and unstructured (Venkatesh, 2019, 92–97). This enables insurers to analyze the risks and enhance its efforts to predict when and whether the insured case will take place more thoroughly. Extending client data enables insurers to better differentiate customer group, i.e., to form smaller risk pools. Analytics approaches convert big data to understandable results for the insurers, e.g., by explaining how customers make their buying decisions and what are their habits, even in those situations in which traditional methods of analytics fail to offer an explanation (Eckert & Osterrieder, 2020, 109, 342). Gathering a huge amount of personal information on potential and existing insureds also enables insurers to better manage issues like moral hazard and information asymmetry (Powell & Goldman, 2021, 141–160).

Relying on gathered information opens variety of options for both insurer and insured and maybe the most specific use of personal data is the personalized underwriting, risk assessment for an individual. Insurance companies can monetize data by offering personalized products or by offering personalized pricing to potential insureds and products that are eligible to offer protection from specific risks. Since there are so many risks that can’t be predicted and controlled, insurers try to personalize their offer as much as possible by offering extensions of coverage and policy period, by including additional risks, which all influences an insurance premium. Using Big data[14] they get an opportunity to get an insight into customer’s needs and to offer them a customize insurance product. Artificial intelligence enables insurers to gather information from mobile devices and sensors in different facilities and location, which all leads to more precise analysis of each potential customer. Besides from personal general information on a potential customer (his age and health status) new technologies offer possibility to gain information on someone’s specific behavior (a person likes listening to music while biking, is prone to distraction and refuses to wear helmet due to his haircut).[15] All this information may lead to a conclusion that the insured acts in a more dangerous way than an insured acting cautiously, which would make insurer offer the first insured a higher premium. It means that those persons perceived to exhibit larger levels of risk would experience an increase in costs, which, in addition to always being negative for these individuals, could lead to unequal distributive outcomes.

[13] Insurers actually obtain from certain providers (Google, e. g.) since they themselves do not have an access to them. Some of them could be search activity, website behavior, online shopping etc. (Rekettye & Pranjic, 2020, 8).

[14] It is accessed that approximately 2.5M terabytes of data are created on a daily level. (Kuma & Dev Srivastava & Bisht, 2019, 80).

[15] Example taken from Pałka & Wiśniewska, 2022, 8.

The possibilities that internet and the whole process of digitalization offer definitely make insurers find themselves in an even more privileged position, compared to the insured one. Apart from the fact that the insured faces difficulties to compare the prices of the insurance products, since they depend largely on the insured's risk profile, and the product quality dimensions, digital tools available to the insurers make the whole process more complicated for the insured person.

For that reason, it is obvious that the process of digitalization will require certain modifications in the fields of insurance products distribution and customer interactions,[16] even though none of them are still undertaken. At the same time the possibilities of insurer's misrepresentation of his insurance product and insured's misunderstanding of the insurance transaction demands however wider discussion of the rights of the insured as a consumer. There is a possibility that the application of such databases by insurers may undermine ideas of risk sharing in terms of positive distribution and social solidarity and the belief in fairness, main ideas evolving around insurance (Mullins & Holland & Cunneen, 2021, 3).

4. PROTECTION OF INSURED'S RIGHT IN CASE OF MISPERSONALIZATION

Even though personalization starts to be a widespread practice among European insurers, Serbian insurance industry is still underdeveloped in this sense. The reasons for that are a required know-how, workforce and tools to analyze and implement the collected data from telematic devices, internet sources, social networks, internet sources and apps. Apart from that, this process requires a huge investment by the insurers, which explains why only the big companies can perform the process by themselves and on their own, while the others have to rely on the data collected by other companies. In Serbia digitization remains in its infancy with internet use primarily for advertising and information dissemination rather than direct sales, while artificial intelligence and blockchain are yet to make significant inroads in the Serbian insurance market (Popović & Anišić & Vranić, 2022, 124).

This however doesn't mean that the further digitalization and personalization of insurance contract will circumvent Serbian insurance market. When compared to other insurance markets, it is obvious it is just a matter of time. It is therefore necessary to consider how the consequences of the personalization that wasn't carried out in an adequate manner will be treated, especially bearing in mind that relation between the consumer and

[16] It is still questionable at what pace the whole process will take place since a great deal of relevant information is still to be digitalized in order to be relevant. The issues however extend beyond digitizing the data. The majority of practical machine learning applications now rely on supervised learning techniques. Supervised learning uses a training data set to help machines predict or classify fresh data. To create the training set, enrich the input data by categorizing it based on the desired output categories. Insurance, particularly reinsurance, relies heavily on expertise. Claims experience must be assessed in light of changing situations and judicial decisions.

insurer is based on trust, and in this case on trust in technology as well (Południak-Gierz, 2018, 303). The process of personalization and the tools required are not perfect and an inadequate personalization (mispersonalization[17]) is a possible threat.

An example that can be found in the literature is an example of the insured whose personalized car insurance contract is automatically updated due to circumstances in which he is driving (type of the road, speed, etc.) (Południak-Gierz & Tereszkiewicz, 2023, 37). In an ideal world where the tools used for personalization work unblemished, there would always be a perfect ratio of risk and premium paid accordingly. This, however, cannot always be the case, which leads to situation with risks not being covered accordingly or the cover being too broad for the given insured and the actual needs of an insured.

As previously mentioned, Big Data technology enables insurers to generate informed predictions about client behavior based on demand and pricing schemes. The outcome can be different prices to different customers, based on customer's personal characteristics. It is possible that someone gets to pay a more expensive premium because an insurer established through digital tools that this insured uses an iPhone, which further indicates he has a high-paying job. Insurers also have an option to group their potential insureds into groups when website triggers its search results based on potential consumer's characteristics, independent of their risk profile (Rekettye & Pranjic, 2020, 8).

Reasons for offering an incorrect premium or cover may also be incorrect data, error in algorithm, but also an intentional misuse of the personal situation of the insured.[18] It indicates that the incorrect premium or cover may result both from unconscionability and conscionability of the insurer, that will always be a party with an access to all this data, which enables them to control the algorithms used and better understand the legal rights and obligations (Casey & Niblett, 2017, 1401-1447). For that reason, it is obvious why the greater burden will be on the insurers and their distributors that are obliged to advice their clients accordingly. Apart from that, an insurance contract is a consumer contract, the standard of "good faith" is to be applied on the relation between contracting parties, demanding a higher standard of behavior (Eggers & Picken & Foss, 2018, 1-13). Insured is to be treated as a weaker party in an insurance contract (Petrović Tomić, 2016, 373; Glintić, 2020, 59-60), which demands rules on unconscionability to be applied in their favor when the given defectiveness was intentionally induced by the insurer or his distributor, which is also in a line with the fact that the consumer is usually unaware of the mistake and is not able to notice it.[19] It is the insurer who controls the insured's online environment by creating and controlling technological infrastructure and outsourcing its application (Południak-Gierz & Tereszkiewicz, 2023, 39).

[17] Term taken from Południak-Gierz & Tereszkiewicz, 2023.
[18] For example, a person finds out his friend lost a house during an earthquake and an insurer offer a more expensive premium even though the risk of an earthquake is very low.
[19] The client is persuaded that the offer he gains is in correspondence with his concrete needs which lead to the conclusion of the contract.

All the problems arising from the digitalization and personalization of an insurance contract are still not completely investigated and a new issue may appear on a daily base. Speaking in the terms of legislation, it is still a developing field in legislation field, both on national and international level in the whole world. Since the concept of legal certainty requires complex prediction models, on has to rely on the existing legislation on the insurance contract and on consumer protection at this moment. In case of the Republic of Serbia those would be Law on Contract and Torts and Consumer Protection Law.

4.1. Incorrect premiums stemming from the mispersonalization

The most expected consequence stemming from the wrongly personalized insurance product is a premium wrongly charged in return for cover. In order to calculate the premium, insurer has to collect information on the insured, starting from his personal information, required type of insurance cover and other factors determining the possibility of risk realization and the extent of sum insured's payout (Petrović Tomić, 2023, 70). The usage of digital technologies and given tools moves the burden from the insured to disclose all the information relevant for the assess of the risk, despite the fact that an insurance contract is synallagmatic contract with both parties having duties towards each other. Technological development goes hand in hand with the modern trend of the insurer's duty to collect all the relevant information from the future insured, which slowly replaces the insured's disclosure duty (Petrović Tomić, 2013, 184). By accepting their information being collected and processed by the insurer for the purpose of personalization, it is the assumption that the insured has fulfilled his disclosure duty due to his limited possibilities for a pro-active approach and engagement (Alkistis & Chatzara, 2020, 49–82, 60).

Misuse of digital tools and technologies may provoke the situation where the insured pays higher or smaller prize for his risk that is to be covered through an insurance contract, while ignoring the real value of the insurance product set by the laws of the market (Bar-Gill, 2019, 217-254, 246-249). As a result, premium can be overpriced or underpriced. Insurance cover in these situations is still suitable for the insured and in line with his need to conclude an insurance contract. The only issue from the perspective of the insured.

4.2. Inadequate Insurance Cover

As afore mentioned, the consequence of the malfunctioning process of the personalization may also lead to an offer of an insurance product, i. e. insurance cover inadequate to the actual needs of the insured. Despite having a contract concluded, the insured may find himself in a situation of not being covered by his policy, like he hasn't concluded the contract. The other unwanted consequence maybe the excessive cover that was neither required nor necessary. Similarly to inadequate premiums, the insured's

decision-making autonomy is strongly influenced by the process of personalization, leaving him without information necessary for deciding on the insurance cover required.

Mispersonalization of the premium and cover may count as an unfair commercial practice (Jovičić, 2017, 589-600), since the consumer's willingness to pay a higher premium or to choose an inadequate cover is unlawfully stimulated. Serbian Consumer Protection Law defines different forms of unfair commercial practice (Consumer Protection Law, 2021, art. 17-22)[20] and it is clear that in these cases of wrongful personalization of an insurance contract we have an example of a misleading commercial practice (Jovičić, 2019, 448). There is a trader (i.e. insurer) that induces the consumer (insured) to make an economic decision that he wouldn't otherwise make by providing him with incorrect information or by creating a general impression, or by causing fallacy regarding price or the manner in which it was calculated or the existence of certain benefits in terms of the price (Consumer Protection Law, 2021, art. 18). The whole mechanism of doing business by the insurer is designed to unlawfully stimulate an increase in client willingness to pay in order to abuse it.

Incorrect premium and cover can also be a consequence of unfair exploitation in the sense of article 21 of the Consumer Protection Law since the insured makes an economic decision that he would not otherwise have made as a result of an insurer's undue influence.[21]

In the legislation of the Republic of Serbia the misdemeanor law protection (along with administrative law protection) is a subsidiary mechanism of legal protection of consumer rights (Mrvić Petrović & Jovanović, 2020, 153). The primary one is protecting right in litigation and for that reason the main focus of the next chapter will be on this aspect.

4.3. Legal responses

The party whose financial interests are infringed can firstly seek protection of his rights within th**e** individual protection mechanisms provided by national private law regulation. The possible legal responses of this kind of mispersonalization could be invalidity or voidability of the contract, damage claim and contract adjustment (Południak-Gierz & Tereszkiewicz, 2023, 41).

[20] These articles reflect art. 11 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

[21] Undue influence is to be undersood as the abuse of a position of power in order to exert pressure on the consumer in a way that significantly limits the ability to achieve an appropriate level of informed decision-making. An example can be already given example on higher premium due to knowledge on earthquake.

The strictest sanction could be the nullity of the contract, i.e. the contract is to be considered void and null from the beginning when it is contrary to compulsory regulations, public policy or fair usage (Law of Contract and Torts, 2020, art. 103). When one considers the explanation of the undue influence on the insured, on one hand, and the duty of the insurer to provide advice on the contract, on the other hand, it is clear that mispersonalization of an insurance contract may be contrary to the law which would lead to nullity of the contract. In the context of mispersonalization in insurance industry, however, this kind of sanction does not play a significant role since it leaves the insured without insurance cover. Consequence of nullity is the duty of each party to restitute the received, but it still doesn't respond to the need of the insured to be covered by an insurance contract. This idea is also in line with the principle that the consequences of nullity should not be more harmful to those they protect that the breach of the legal doctrine (Południak-Gierz & Tereszkiewicz, 2023, 41). The main issue is that, in case of mispersonalization of insurance cover, the insured finds that his insurance cover wasn't an adequate one at the moment of the occurrence of the insured event when he can't conclude the new contract because the risk is not insurable anymore. Only then when there is no possibility of insurance case materializing or when certain risks are not covered despite the will of the insured, the nullity of the contract is an adequate measure that would not deprive the insured of the protection that inspired him to conclude an insurance contract in the first place.

Maintaining the binding effect of the contract is an option mostly in line with the interest of the insured to be protected from certain risks. This could be the case when an insurance contract was rescindable (Law of Contract and Torts, 2020, art. 111). One of reasons for a contract to be rescindable is a shortcoming in terms of intention of the party. Taking into account the aforementioned concept of consumer protection, insured can claim that he was misled about the insurance product (either the premium or the cover) and the offer stemming from the personalization. In that case the mispersonalization would be an example of an unfair commercial practice that led to concluding an insurance contract under the conditions that wouldn't be accepted otherwise. This is a better option from the point of view of the insured since he is entitled to decide whether he remains bound by the contract (Law of Contract and Torts, 2020, art. 112). Another level of protection for the insured is offered by an article 115 of the Law on Contract and Torts, which makes a contracting party at fault for the cause of rescinding (insurer) liable for the loss sustained due to the contract being annulled if the insured wasn't aware or didn't have to be aware of the existence of the cause of rescission.

Finally, the insured is always entitled to request damage compensation stemming from insurance law, tort law, precontractual liability of the insurer. In those cases, contract would still be valid and damage claims would arise, being based on different grounds.

5. CONCLUSION

The main question could be whether the personalization tool is a tool for consumer protection, which would mean that it can't lead to increase of the obligations of the insured. Only the insurer should be bearing the risk of using such a tool and its possible effects of malfunctioning because it was provided for the enhancement of the business in the first place.[22] However, it shouldn't "increase the scope of liability of the business beyond the level that should have been expected when the process of personalization was initiated." (Południak-Gierz & Tereszkiewicz, 2023, 45). Understanding that both the insurer and the insured bear the risk of using the technologies, it would be then pretty questionable in the light of the consumer protection how it would affect the position of the insured since his position can be aggravated during the process of adjustment of the contract's content.[23]

Consumer's protection has been challenged on so many levels that it is just a matter of time when both national and international will have to be amended in order to take all the aspects of new digital environment into account. At the moment when certain changes of legal environment have not been undertaken, common ideas and principles of consumer protection can be applied in the new digital surrounding. Expectations that consumers have when concluding contracts won't be changed in the new technological society. Some new regulatory practices will be developed, but the consumer protection principles will remain the same. All the products and services developed and applied in the new era will maintain confidence in them if the law is adequately implemented or modified if necessary (Howells, 2020, 171). New technological environment does not require the disruption of the actual regime of consumer protection (Twigg-Flesner, 2016, 21-48). Certain changes will be definitely made, but some of the extant rules are either flexible enough or are even completely adjusted. Areas in which the consumer protection values will be completely diminished in favor of gains from digitalization are hardly imaginable and are limited since there is always a range for certain enhancements and alignment of traditional consumer protection values.[24] When it comes to "mainstream" consumer market, transactions in online and offline world do not differ tremendously, which justifies maintaining the same rules and principles. Some of them are and still will be duty disclosure, information duty, fairness of contract content, protecting reasonable expectations, market surveillance, providing remedies.[25] Right to be informed will not be changed and the consumers will still expect to be informed on the service or product acquired. The consumers will still expect to be protected from contractual terms imposing broader duties on them in favor of their contracting party. It is undoubtful that certain novelties will have to be explained, certain

[22] For example, premium is not calculated properly and the result is an underprice of the insurance product.

[23] It could clearly happen due to increase of the premiums in the process of the contract's adjustment.

[24] Medicine, bio-technology are definately the areas where regulatoion will have to be adapted.

[25] The evaluation of the Consumer Rights Directive suggested extending it to digital services contracts, clarifying how it applied to digital content contracts and introducing new transparency requirements for online intermedia, European Commission. (2017a). Report on the application of Directive 2011/83/EU (COM (2017) 259).

concepts to be clarified, but maintaining extant rules that consumers are already familiar with will provide them with confidence to engage in a new digital market. Additional protection of the consumers will always be required because the insurers will always have advantages based on access to the data and the ability to control the algorithms used and better understand the legal rights and obligations (Casey & Niblett, 2017, 1401-1447).

It is also questionable whether it makes sense to change the regulation since the technology develops itself so quickly that the newly adopted regulations become outdated and nonapplicable after just a short period of time. Are we inevitably running towards the "process of legal evolution" (Cozzio, 2019, 624) or is everything already regulated?

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Др Мирјана ГЛИНТИЋ*

УТИЦАЈ ДИГИТАЛИЗАЦИЈЕ НА УГОВОР О ОСИГУРАЊУ И ПРАВА ОСИГУРАНИКА

Апстракт

Ауторка анализира правне последице коришћења дигиталних технологија у праву осигурања у контексту заштите положаја осигураника као слабије уговорне стране. Централни део рада посвећен је поступку персонализације, односно могућности понуде уговора о осигурању које у потпуности одговара потребама и профилу осигураника, а подаци о којима су добијени коришћењем управо дигиталних технологија. Међутим, с обзиром да је наведени поступак у супротности са неким од основних начела делатности осигурања, јавља се питање могућности заштите осигурања у случајевима када поступак персонализације није спроведен на адекватан начин и када тако одређена премија и покриће не одговарају потребама осигураника које су га и мотивисале. на закључење уговора о осигурању. Упоредноправна анализа показује да наведено питање још увек није засебно регулисано, што указује да се примењују одредбе прописа о заштити потрошача. Такав је случај и у законодавству Републике Србије, где би се одређени одговори могли пронаћи у Закону о заштити потрошача.

Кључне речи: осигурање, персонализација, заштита потрошача, премија, покриће.

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INTEGRATING GENDER-BASED VIOLENCE EXPERTISE IN SERBIAN PROBATION SERVICE: A COMPARATIVE EUROPEAN PERSPECTIVE[1]

Summary

The article examines the essential integration of gender-based violence (GBV) expertise into the Serbian probation system. It identifies the urgent need for specialized training for probation officers to address GBV effectively, highlighting the disparities and commonalities with practices across Europe. The paper explores legislative reforms in Serbia aimed at combating GBV and assesses their alignment with European standards. Through a comparative analysis, it suggests models for Serbia to enhance its probation services by incorporating successful European practices. The study underscores the challenges faced in the integration process, including legal, cultural, and institutional barriers. It concludes by recommending strategic approaches for Serbia to overcome these hurdles, emphasizing the role of specialized training, policy reforms, and international collaboration in this area to foster a robust response to GBV within the probation services framework.

Key words: Gender-Based Violence, Serbian Probation Service, European Standards, Specialized Training, Legislative Reforms.

1. INTRODUCTION

Gender-Based Violence (hereinafter referred to as GBV), especially domestic and sexual violence, represents a profound and widespread issue globally, manifesting in various forms and impacting individuals, communities, and societies at large. As per the Declaration on the Elimination of Violence against Women, GBV refers to any act that results in, or is

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likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life (United Nations, 1993). In the context of criminal justice and probation services, addressing GBV is critical for the protection of victims and the prevention of further violence. This paper aims to explore the integration of GBV expertise within Serbian probation service, drawing a comparative analysis with European standards and practices.

The primary objectives of this study are to analyze the current state in this area in Serbia, identify the challenges and barriers to effective GBV management in probation settings, examine European models of GBV integration within probation services for potential application in Serbia and propose recommendations for enhancing GBV expertise in Serbian probation service through legislative, policy, and training improvements.

It is important to say that probation service is a legal measure designed to monitor and rehabilitate offenders who are convicted of a crime but are not sentenced to a term of imprisonment. It serves as a critical component of the criminal justice system, aiming at reducing recidivism and facilitating the reintegration of offenders into society (McNeill, 2006, 56).

So, probation concerns what is known as alternative sentencing, which encompasses various procedures and measures aimed at avoiding the conduct of criminal proceedings, or punishment for committed offenses, or, for the purpose of more successful re-socialization of the convicted instead of imprisonment, stipulating the fulfillment of certain obligations, inclusion in socio-educational and outpatient treatment, or partial confinement (Batričević, 2013, 50).

Probation service play a pivotal role in the criminal justice system's response to GBV in many developed probations systems across the world, not just Europe. Probation officers are uniquely positioned to supervise offenders, provide support and protection to victims, and work towards the prevention of future incidents of GBV. Integrating GBV expertise into probation services involves specialized training for probation officers, the development of risk assessment tools, and the implementation of intervention programs tailored to address the root causes of GBV (Day et al., 2009, 203). Furthermore, probation services can contribute to the broader societal effort to combat GBV through public awareness campaigns and collaboration with other stakeholders, such as law enforcement, social services, and non-governmental organizations dedicated to supporting GBV victims (Heidensohn, 2006).

The theoretical framework for this study is grounded in feminist criminology and the social ecological model. Feminist criminology emphasizes the importance of understanding gender dynamics and inequalities in the study of crime and the criminal justice system's response to GBV (Daly & Chesney-Lind, 1988, 526-527). The social ecological model, on the other hand, provides a multi-layered perspective on GBV, highlighting the interplay between individual, relationship, community, and societal factors

(Heise, 1998, 262). This model underscores the necessity of a comprehensive approach to GBV, involving interventions at multiple levels of society.

This study sets the stage for a detailed exploration of the integration of GBV expertise in Serbian probation service. By comparing Serbian practices with those of European counterparts, this research aims to identify best practices and offer insights into improving GBV management within probation services. The following sections will delve into the current landscape of GBV in Serbian judicial reality, challenges and barriers to integration, lessons from European models, and strategic recommendations for the future.

2. GENDER-BASED VIOLENCE IN SERBIAN PROBATION SERVICE: CURRENT LANDSCAPE AND EUROPEAN COMPARISONS

2.1. Current Practices and Challenges in Serbia

The prevalence of GBV in Serbia, akin to global trends, presents a critical challenge to social welfare and justice systems. Despite legislative efforts, such as the Law on Prevention of Domestic Violence (2016), which signifies progress, GBV remains a pervasive issue.

In the Republic of Serbia, gender-based violence, manifesting predominantly as domestic and sexual violence against women, remains a formidable challenge. This issue has garnered attention from various international entities, prompting critical assessments and calls for comprehensive legal and societal reforms. The European Commission's 2023 report critically assesses Serbia's efforts against domestic and gender-based violence, spotlighting significant strategic and operational delays. Key issues include stalled strategy implementation against violence, with an overdue action plan for UN Security Council Resolution 1325. Despite the urgent need for enhanced enforcement of domestic violence laws and establishment of an integrated case monitoring system, Serbia lacks official statistics, with estimated femicides reaching 27 in 2022 and 20 in the first half of 2023. Unaddressed GREVIO recommendations call for stronger legal definitions and responses to violence, including rape and forced marriage. The prevalence of support services, primarily overseen by inadequately funded civil society organizations, coupled with the absence of standardized roles for women's civil society organizations in the development of protection plans, highlights significant systemic deficiencies. Additionally, the report highlights the operational challenges of Serbia's safe houses and underscores the necessity for equitable access to these and sexual and reproductive health services. Urgent improvements in strategy, funding, and legal enforcement are deemed essential for safeguarding women's rights and well-being in Serbia (European Commission, 2023, 47-48).

Echoing these concerns, the Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) highlighted the pervasive patriarchal norms and stereotypes that contribute to the perpetuation of violence.

It advocated for a more robust and inclusive Serbian response to all manifestations of violence as delineated by the Istanbul Convention, extending beyond mere domestic violence. The paucity of victim support services, predominantly operated by non-governmental organizations with limited financial resources, and the absence of systematic coordination and referral mechanisms were identified as significant obstacles. This inadequacy hampers the optimal utilization of expertise in combatting gender-based violence (Jovanović, 2021, 32).

The Serbian Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence for the period 2021-2025 (2021) concedes that the extant victim support and assistance framework falls short of international benchmarks. The social, legal, and institutional responses to violence against women and domestic violence in Serbia remain below satisfactory levels. The main challenges include deeply rooted cultural norms and widespread gender stereotypes that normalize and justify violence against women; a significant underreporting of violence due to fear of stigma, shame, lack of support, economic dependence, and distrust in the effectiveness of institutions; legal frameworks not fully aligned with international standards set by the Istanbul Convention, with missing definitions of "violence against women" and "gender-based violence"; inefficient implementation of policies and measures by institutions; inadequate safety and support services for women and their children; lack of sustainable financing for policies and specialized services; and the absence of a unified system for data collection on all forms of violence against women, including femicide. (Republic of Serbia, 2021,16-17)

The discourse surrounding these issues emphasizes the crucial need for bolstering victim support and rectifying the shortcomings of the criminal justice response. Hence, confronting GBV in Serbia necessitates a comprehensive approach that encompasses legal reforms, improved law enforcement, enhanced cooperation among stakeholders, and a cultural shift towards gender equality and the eradication of violence. The outlined challenges mirror entrenched societal norms and structural inadequacies that impede an effective response and support for victims, advocating for a holistic and sustained commitment to safeguarding the rights and welfare of individuals impacted by gender-based violence.

Incorporating a critical examination of Serbia's legislative and practical responses to domestic violence, it is has to discern notable merits in the Law on Prevention of Domestic Violence. This legislation is commended for its facilitation of prompt interventions, enabling the swift segregation of victims from potential aggressors. Subsequent to its enactment, a discernible diminishment in the prevalence of domestic violence-related criminal offenses was observed, underscoring the law's efficacy. Despite these advancements, the persistently high incidence of femicide within the context of domestic violence casts a shadow over these achievements, signaling a profound societal and systemic issue that remains unaddressed. Furthermore, the inconsistent application of

measures by relevant authorities indicates a significant gap in the systemic response to domestic violence (Kolarić & Marković, 2022, 217-219).

A critical lacuna in the existing framework is the underutilized role of law enforcement in preempting instances of domestic violence. While the legislation provides a foundation for proactive intervention, the execution thereof is hampered by insufficient coordination and synergy among the police, prosecutorial offices, judiciary, and social services. This disjointed approach undermines the potential for a holistic and effective response to domestic violence, emphasizing the necessity for a more integrated and collaborative strategy. Moreover, the effectiveness of protective and support measures for victims, particularly in scenarios with a heightened risk of recurring violence, warrants urgent enhancement. The current measures, though well-intentioned, fall short of providing the comprehensive support and protection needed by victims, indicating a critical area for legislative and operational refinement (Jovanović, 2021, 39; Kolarić & Marković, 2022, 219).

Notably absent in the discourse on domestic violence in Serbia is the discussion on the role of the probation service. This omission is significant, as the probation service could play a vital role in monitoring offenders, providing support for rehabilitation, and reducing the risk of reoffending. The integration of probation services into the domestic violence response framework could provide a more nuanced and effective approach to managing perpetrators of violence, thereby contributing to the overall safety and well-being of victims.

In Serbia, the legislative framework pertaining to the Law on Execution of Non-Custodial Sanctions and Measures (2014) does not explicitly incorporate the inclusion of probation, referred to as the Commissioner Service, in the expertise and treatment of GBV. The service's primary function in practice is the surveillance of the execution of house arrest sentences, operating without a mandate to engage in the treatment aspects of this sanction necessary for addressing GBV. Also, there is a symbolic imposing of suspended sentences with protective supervision in practice (Tešović, 2020, 80) where potentially could be applied diverse measures from Article 73 of Criminal Code in the case of domestic violence. In addition, the fact that the courts also very often impose sanction of house arrest on perpetrators of domestic violence, in contravention of Article 45 paragraph 5 of Criminal Code, also arises as a serious problem (Bojović-Kolaković, Batrićević, & Matić-Bošković, 2022, 39). This all represents a substantial limitation in the holistic management of domestic violence cases, as the role of probation services is pivotal in overseeing rehabilitation and reducing reoffending risks.

While the Commissioner (Probation) Service in Serbia has significant problems with the lack of probation officers and functions under the centralized decision-making system of the Department for the Enforcement of Non-Custodial Sanctions and Measures, itself a component of the Ministry of Justice's Administration for the Execution of Criminal Sanctions (Bojović-Kolaković, Batrićević, & Matić-Bošković, 2022, 25-26; Tešović, 2020, 18-19), there is a stark contrast between this approach and successful European models. In

many European countries, probation services are empowered and tasked with a comprehensive role that includes GBV expertise. This includes not just surveillance, but also rehabilitative support, risk assessment, and the implementation of specialized programs tailored to the needs of offenders and the protection of victims.

As Serbia's probation service is yet to evolve into a more multifaceted, independent body with direct involvement in GBV interventions, it becomes imperative for Serbian policymakers and practitioners to look towards Europe for successful models of GBV integration in probation services. Learning from these European examples extends beyond GBV - it encompasses a wider scope of probationary functions, emphasizing the importance of treatment, offender rehabilitation, and a more nuanced approach to managing criminal behavior.

2.2. Lessons from Europe: Integration Models and Successes

Domestic Violence (DV) and Gender-Based Violence (GBV) intervention programs exists across various European countries, highlighting innovative and effective practices in addressing these pervasive issues within probation services. The lessons drawn from these initiatives emphasize the importance of integrated, evidence-based approaches tailored to the specific needs and circumstances of DV and GBV perpetrators. These programs not only aim to reduce recidivism by fostering behavioral change among offenders but also seek to ensure the safety and well-being of victims and their families. Collaborative efforts among probation services, criminal justice systems, and community organizations are crucial for the successful implementation and sustainability of these interventions.

Perpetrator programs for domestic violence are vital not only because they aim to interrupt violence and break the cycle of intergenerational violence, and respond to the calls of women for intervention in their partners' violent behaviors but also because they emphasize men's accountability within the societal system. These programs are designed to enhance the safety and well-being of women and children by addressing violent behavior through a gender-specific approach, engaging men in the process. They operate as part of a coordinated community response, in collaboration with specialized women’s support services to ensure the accountability of male perpetrators to their partners, support services, and the broader society (Pauncz, 2021, 17).

Perpetrator programs typically include intake and assessment, evaluation of risk factors, screening for violence, proactive contact with partners (in collaboration with women’s support services), group sessions, and individual counseling. Men may enter these programs voluntarily or as part of probation measures. In Europe, these programs vary widely, encompassing social-educational feminist models, cognitive-behavioral approaches, criminological models, restorative justice (often through probation), psychotherapeutic models, family models, and mental health/dependency models.

The effectiveness of these programs is measured by various factors, including recidivism rates, with data collection methods involving re-arrest records, re-offence rates, and reports from offenders or their partners/ex-partners. However, data on program outcomes is controversial, partly due to challenges in measuring different types of violence, detecting re-offences, and comparing diverse treatment programs. The MIRABEL study in the UK in 2018 is one of the largest-scale studies to date, proposing six measures of success: improved relationship, expanded "space for action", safety and freedom from violence for women and children, safe and positive shared parenting, enhanced self-awareness, and safer childhoods (Pauncz, 2021, 22).

As it mentioned, the European context provides a diverse landscape of approaches to integrating GBV expertise in probation services. Three European countries will be presented as examples of good practice:

2.2.1. Good Practice in Sweden: A Comprehensive Approach to Domestic Violence Rehabilitation

Sweden's response to domestic violence is characterized by its comprehensive approach, integrating innovative rehabilitation programs across its prison and probation services. The Integrated Domestic Abuse Program (Idap), initially developed in the UK, has been successfully implemented in Sweden since 2006, emphasizing the importance of changing perpetrator behavior through understanding the impact of their actions on victims and adopting non-controlling behavior strategies (Integrated Domestic Abuse Program - Sweden, 2006).

The introduction of Preventing domestic violence program (Predov), developed by the Swedish Prison and Probation Service during 2018-2019, signifies a shift towards more personalized treatment. Delivered in a one-to-one format, Predov's design allows for individual adjustment, focusing on themes such as emotions, thoughts, and communication. This program aims to address core needs areas like emotion mismanagement and antisocial cognition, with a special emphasis on substance abuse throughout the rehabilitation process (Preventing domestic violence program – Sweden, 2019).

The Relational Violence Program (RVP), developed between 2013-2016 and accredited in 2017, represents a significant stride in treating domestic violence offenders. Utilizing cognitive-behavioral therapy and social learning theory, RVP targets individuals with high-risk behavior patterns across various relationships. This individual-focused program is divided into phases that address emotional stability, relationship patterns, attitudes, and substance abuse, aiming to foster behavioral change and risk management (Relational Violence Program - Sweden, 2017).

A critical component of Sweden's domestic violence intervention strategy is the emphasis on victim safety and support. Programs like Idap and RVP include mechanisms for partner contact, ensuring that victims are informed and involved in safety planning. This

approach is complemented by Sweden's social services, which are responsible for victim support, demonstrating a holistic approach to addressing domestic violence.

The effectiveness of Sweden's domestic violence programs is underpinned by rigorous monitoring, training, and evaluation processes. Facilitators undergo comprehensive training, including motivational interviewing and CBT, ensuring that they are equipped to deliver these complex interventions effectively. Furthermore, ongoing evaluations, including pilot programs like Predov, highlight Sweden's commitment to refining and adapting its approach based on empirical evidence.

Sweden's experience with above mentioned programs underscores the importance of tailored interventions that address the unique needs of domestic violence perpetrators. The country's efforts to integrate these programs into its correctional system, along with the focus on victim safety and interdisciplinary collaboration, serve as a model for addressing domestic violence. As Sweden continues to evaluate and adapt its programs, its holistic and nuanced approach provides valuable insights for policymakers and practitioners worldwide seeking to combat domestic violence effectively.

2.2.2. Good Practice in England and Wales: Addressing Domestic Violence through Innovative Programs

England's approach to tackling domestic violence within its criminal justice system showcases a blend of innovative programs, each uniquely designed to address the complex needs of offenders. These initiatives underscore the commitment to reducing domestic violence through rehabilitation, education, and support, drawing on the latest in psychological and educational research.

Developed by Her Majesty's Prison and Probation Service and accredited in 2017, the Becoming New Me Plus (BNM+) program is specifically tailored for men with learning disabilities and challenges, identified as high to very high risk of committing intimate partner violence. BNM+ program combines individual and group sessions to facilitate understanding and change, focusing on recognizing “Old Me” problems and practicing and reinforcing “New Me” behaviors. It employs a cognitive-behavioral therapy approach, grounded in the bio-psycho-social model, to address domestic violence from multiple dimensions, emphasizing the development of skills for non-violence and community integration (Becoming New Me Plus - England and Wales, 2017).

Piloted in 2010 and gaining accreditation in 2013, Building Better Relationships (BBR) program serves heterosexual male offenders who have committed violence or aggression within an intimate partner context. This program, also overseen by Her Majesty's Prison and Probation Service, is based on cognitive and behavioral skills development, aiming to offer participants a suite of tools and strategies to support non-violent behavior. BBR programs strength lies in its comprehensive approach, which includes coordination

with partner link workers to ensure the safety and support of victims (Building Better Relationships – England and Wales, 2013).

Accredited in 2016, Kaizen program represents a strengths-based, future-focused initiative that transcends specific offense types to address the criminogenic needs of each participant. It operates on a bio-psycho-social model, identifying and targeting underlying processes that contribute to offending behavior, including those related to intimate partner violence, sexual offenses, and general violence. Kaizen is structured into three phases – "Getting Going", "My Journey", and "New Me" - designed to progressively engage participants in recognizing harmful patterns, developing healthy alternatives, and planning for a future that avoids recidivism (Kaizen - England and Wales, 2016).

Like BNM+, New Me Strengths (NMS) program is designed for men with learning disabilities and challenges but focuses on those at a medium to high risk of intimate partner violence, providing a more accessible entry point for those with moderate needs. Accredited alongside BNM+ in 2017, NMS offers a condensed format that still encompasses key components such as understanding behavioral triggers, developing non-violent conflict resolution skills, and fostering positive community and interpersonal relationships (New Me Strengths - England and Wales, 2017).

As a conclusion, it is important to say that England and Wales's innovative programs for addressing domestic violence among offenders illustrate a commitment to rehabilitation and change, drawing on a deep understanding of the complexities of domestic violence. By focusing on cognitive-behavioral therapy, risk assessment, and individualized treatment plans, these programs aim not only to reduce recidivism but also to foster a broader cultural shift towards non-violence and respect in intimate relationships. The emphasis on training, evaluation, and the potential for digitalization points to a forward-looking approach that seeks to continually adapt and improve interventions, ensuring that they remain effective in the ever-evolving societal context.

2.2.3. Good Practice in Slovenia: Addressing Domestic Violence through Integrated Approaches

The Slovenian approach to combating domestic violence is marked by the establishment of the Probation Administration within the Ministry of Justice in 2018, emphasizing the country's commitment to addressing this pervasive issue. With the passage of the Domestic Violence Prevention Act in 2008, later upgraded in 2017, Slovenia has positioned itself at the forefront of legal reform, acknowledging domestic violence as a distinct category and integrating international standards through the ratification of pivotal Council of Europe conventions (Svetin - Jakopič, 2020, 1).

Central to Slovenia's strategy is the convening of multidisciplinary teams, bringing together a wide array of professionals from social work centers, the police, healthcare, non-profit organizations, and the newly formed Probation Administration. This coordinated

effort ensures a holistic response to domestic violence, emphasizing the creation of individualized assistance plans for victims and families while fostering an environment of seamless information exchange and case management. Such collaboration aims to bridge competencies among various services, enhancing the efficacy of interventions.

At the heart of Slovenia's rehabilitative efforts is the Social Skills Training (SST) program, developed by the Association for non-violent communication. This innovative program, available in nine cities across Slovenia, is tailored for individuals who exhibit violent behavior, offering group and individual sessions focused on non-violent communication, conflict resolution, and gender equality. The SST program is distinguished by its comprehensive approach, which includes a special focus on parenting skills for those who have exhibited violence towards children (Social Skills Training - Slovenia, 2004)

Despite the strides made in combating domestic violence, Slovenia recognizes the need for ongoing critique and improvement. The fragmentation of competencies among services remains a challenge, underscoring the necessity for a more unified and coordinated action. The Probation Administration, alongside other stakeholders, is committed to further developing its staff through education and training, as well as enhancing risk assessment models and specialized programs to address the interconnected issues of alcohol and drug dependence (Svetin - Jakopič, 2020, 2).

Slovenia's journey towards addressing domestic violence is characterized by its legislative advancements, multidisciplinary coordination, and innovative rehabilitation programs. However, the path forward demands a more integrated approach, ensuring that all competent authorities collaborate effectively under a single operational umbrella. With continued dedication to training, program development, and critical evaluation, Slovenia aims to strengthen its response to domestic violence, ensuring safety and support for victims while facilitating meaningful rehabilitation for perpetrators.

3. POLICY IMPLEMENTATION AND STRATEGIES FOR INTEGRATION AND EVALUATION OF EFFECTIVENESS

Serbia's legal landscape, with the enactment of the Law on Prevention of Domestic Violence (2016) and adherence to the Istanbul Convention, signals a committed stance against GBV. However, a notable legislative omission pertains to the direct involvement of probation officers in GBV treatment under the current legal provisions, including the Law of Execution of Non-Custodial Sanctions and Measures. This omission presents a structural challenge in embedding GBV expertise within the probation services, critically affecting the system's capacity to offer comprehensive GBV interventions.

European models present a rich tapestry of strategies integrating GBV expertise within probation services, from which Serbia can draw valuable lessons. Countries like Sweden and England and Wales have developed innovative programs, such as the Integrated Domestic Abuse Program (Idap) and Becoming New Me Plus (BNM+), which provide

comprehensive approaches to addressing domestic violence and integrating victim safety measures. These programs emphasize the importance of specialized training, risk assessment, and tailored intervention strategies, aspects that the Serbian system could benefit from adopting. These programs exemplify the potential of probation services to contribute effectively to GBV prevention and response, provided there is legislative support for their involvement.

Despite the critical role probation services can play in GBV prevention and management, Serbian legislation - specifically the Law on Prevention of Domestic Violence and the Law of Execution of Non-Custodial Sanctions and Measures - does not explicitly mandate or facilitate probation officer's involvement in GBV treatment in any stage in which probation officers normally act in developed probation systems - before the criminal procedure, during the process and after its completion. This legislative oversight restricts the capacity of probation services to engage directly in GBV interventions, limiting their role to general supervision and monitoring without a specialized focus on GBV.

This absence of legislative backing for probation officers' involvement in GBV treatment areas stands in contrast to European practices where probation services are integral to GBV response strategies. For instance, in Sweden, probation officers are equipped with specialized training to handle GBV cases effectively, fostering an environment where victim safety and offender accountability are paramount. This discrepancy highlights a critical area for legislative and policy reform in Serbia, advocating for a revision of existing laws to incorporate provisions for probation officers' active participation in GBV treatment and intervention programs.

So, strategies for overcoming challenges in GBV integration should be:

a) *Specialized training programs*

Implementing comprehensive training programs for probation officers and other criminal justice professionals is paramount. These programs should cover the dynamics of GBV, trauma-informed care, legal frameworks, and effective intervention strategies. The European Institute for Gender Equality (EIGE) highlights the necessity of continuous education on GBV for legal professionals, underscoring the role of training in improving the justice system's response to GBV (EIGE, 2019).

b) *International collaboration and best practices*

Learning from international best practices can guide the development and refinement of GBV response strategies. Collaborative projects and networks, such as those facilitated by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), offer platforms for sharing knowledge, resources, and strategies for tackling GBV effectively (UN Women, 2018). It is especially of paramount importance for the Serbian Probation Service to join the ranks of its regional counterparts by becoming a member of the Confederation of European Probation (CEP). This organization acts as the authoritative voice for probation matters within the European Union and the Council of Europe, advocating for the needs and challenges faced by probation services at a continental level.

By providing professional insights and comparative data, the CEP is recognized as the definitive "voice of probation from Brussels," making it an essential platform for the Serbian Probation Service to engage with and contribute to the broader European discourse on probation issues and, among others, GBV problems.

c) *Policy and legislative support*

Developing and implementing supportive policies and legislation that specifically address the needs and roles of probation services in GBV cases is crucial. The Istanbul Convention provides a comprehensive framework for protecting women against all forms of violence and calls for the implementation of fully resourced measures and policies (Council of Europe, 2011). Addressing the legislative gap in probation officer's involvement in GBV treatment in Serbia is imperative for a holistic and effective GBV response strategy.

d) *Evaluation and continuous improvement*

Establish robust mechanisms for evaluating GBV programs effectiveness, incorporating feedback loops for continuous policy and practice refinement. Effective evaluation of GBV programs requires clear criteria, including measures of program fidelity, participant satisfaction, reduction in GBV incidents, and improvements in survivors' well-being. The World Health Organization (WHO) provides guidelines for evaluating violence prevention programs, emphasizing the importance of both process and outcome evaluations (WHO, 2013). Furthermore, the evaluation of GBV programs should employ mixed-methods approaches that not only assess quantitative outcomes, such as recidivism rates and reporting rates but also qualitative impacts on survivors' well-being and satisfaction with the justice process. Adapting and implementing comprehensive evaluation frameworks similar to those used in European contexts could provide Serbia with deeper insights into program effectiveness and areas for targeted improvements.

4. CONCLUSION

In concluding the examination of GBV expertise within Serbian probation service, it is evident that while Serbia has taken legislative strides, such as the Law on Prevention of Domestic Violence, there remains a significant gap in the direct involvement of probation services in GBV interventions. This shortfall contrasts with European models where probation roles are more robust in addressing GBV. The omission of explicit provisions for probation officers in the Law of Execution of Non-Custodial Sanctions and Measures underscores an area ripe for legislative reform.

Aligning with European standards necessitates a multifaceted approach: integrating GBV training for probation officers, fostering interagency collaboration, and embracing a comprehensive, rehabilitative ethos for both offenders and survivors. The efficacy of these measures will rely on systematic evaluations and continuous policy evolution. Serbia's path forward, to enhance its probation services in the fight against GBV, should aspire to reflect the depth of understanding and commitment to innovation exemplified by its European

counterparts. Engaging with the Confederation of European Probation would offer Serbia a platform for collaboration and sharing best practices in addressing this pervasive societal issue.

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ИНТЕГРАЦИЈА СТРУЧНОСТИ ЗА РОДНО ЗАСНОВАНО НАСИЉЕ У ПРОБАЦИОНОЈ СЛУЖБИ У СРБИЈИ: КОМПАРАТИВНА ЕВРОПСКА ПЕРСПЕКТИВА

Апстракт

Чланак испитује могућност суштинске интеграције стручности за борбу против родно заснованог насиља у оквиру пробационе службе у Србији. Препознаје се хитна потреба за специјализованом обуком пробационих службеника за ефикасно бављење родно заснованим насиљем, истичући разлике и сличности са праксама широм Европе. Рад истражује законодавне реформе у Србији које имају за циљ борбу против родно заснованог насиља и оцењује њихову усклађеност са европским стандардима. Путем компаративне анализе, предлажу се модели за Србију како би се побољшале њене пробационе услуге укључивањем успешних европских пракси. Студија истиче изазове са којима се суочава у процесу интеграције, укључујући правне, културне и институционалне препреке. Закључује се препоруком стратегијских приступа за Србију у циљу превазилажења ових препрека, наглашавајући улогу специјализованих обука, политичких реформи и међународне сарадње у овој области у циљу подстицања снажног одговора на родно засновано насиље у оквиру пробационих услуга.

Кључне речи: родно засновано насиље, пробациона служба у Србији, европски стандарди, специјализована обука, законодавне реформе.

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CONSTITUTIONAL LIMITATIONS OF SOVEREIGNTY IMPOSED BY FOREIGN POWERS AFTER THE SECOND WORLD WAR

Summary

Modern-day states adopt constitutions in accordance with free political will of their citizens and their representatives, and within their more or less autonomous constitutional-adopting capacities. However, several actual constitutions do not fit into the pattern. Two of them are truly comparatively notable – the constitutions of Germany and Japan –and the other three represent a peace-seeking reflection of foreign powers' political interests included in the fundamental legal basis of post-conflict states. They contain somewhat unique, though not that replicable and reusable institutional frameworks. This is the case with constitutions of Bosnia and Herzegovina, Afghanistan, and Iraq. All of the five analyzed constitutions share one historically original similarity: they were not freely drafted by relevant domestic political representatives. Rather, they were inspired, conceived, or, in fact, written by foreign political or military forces – some legal scholars would say: occupying powers. The paper aims at discovering the truly foreign (imposed) nature of the analyzed constitutions, and intends to search whether these acts were conceived to serve as long-term normative projects, or merely as a temporary basis for enabling more stable, permanent state-building legal documents. Although there are numerous proofs that these states' sovereignty is made to appear limited, some of the components of the analyzed countries' constitutions indicate that those countries, at least nominally, are sovereign, which opens up space for assessing the 'honesty' of the constitution-drafters. Whether the examined constitutions do leave place for national sovereignty to be expressed in practice remains the central point of interest of the paper.

Key words: Constitution, Sovereignty, Occupation, Limitations of Sovereignty, Internationalization of Constitutional Law.

1. INTRODUCTION

Although an overwhelming majority of national constitutions represent manifestation of free and sovereign will of the population, there still remain some constitutions whose historical conception and content reflect the direct influence of external political factors. Truth be said, a closer comparative scrutiny would reveal that frequent ‘borrowing’ of functional constitutional models and the extent of the internationalization of the constitutional law have severely curbed the freedom that a constitution-drafter has enjoyed in not that distant historical times. However, there is a number of constitutions whose writing style and certain political inclinations point to the somewhat obvious conclusion that they were drafted for countries which do not enjoy a fully independent status when it comes to constitutional law. Strongly distancing himself from any distant suggestion that those countries are not fully independent in the sense of international law, author of this paper will try to establish certain historical and normative connections between constitutions of the countries that, in accordance with his assessment, represent the outcome of direct *foreign* constitution-making drafting processes.

Subject of the research analysis are the constitutions of several countries whose population, to a lesser or greater extent, effectively did not participate in the elaboration of their own constitutions. These constitutions were drawn by foreign (or occupying) powers and have been implemented by external administrative authorities and (or) military forces. Namely, these countries are: Japan (Constitution of 1947), Bosnia and Herzegovina (Constitution of 1995), Afghanistan (Constitution of 2004), and Iraq (Constitution of 2005). The paper also relies on the content of one of the most notable documents in contemporary comparative constitutional law, the Basic Law for the Federal Republic of Germany (1949). Even though the Basic Law was adopted by German political representatives (at the *Herrenchiemsee Convention*, assembled in August 1948), its application depended upon the authority of the western Allies of the Second World War, because they were the ones authorized to *approve* it a year later.

In all of the five observed countries, the main political influence standing behind the constitution-making was that of the United States of America (the US). This obviously had an enormous effect in putting one of the fundamental components of the US Constitution of 1787 – the federal structure of the state – into three of the five analyzed constitutions (Germany, Bosnia and Herzegovina, and Iraq). Ethnic homogeneity is present in two of the observed countries (Germany, Japan), but states with plural ethnic composition constitute majority in the analysis. However, the most important feature of the external (American or, broadly put, *international*) constitution-making *assistance* to the constitution-making process in the analyzed countries is the clear limitation of national sovereignty. This characteristic is detectable in the field of a given nation’s foreign and security policy, internal composition of the elements within its political and legal system, and – first and foremost – its constitution’s drafting process.

2. THE 'FOREIGNNESS' OF THE IMPOSED CONSTITUTIONS

How can one claim that the *structural origin* of the constitutions of Germany, Japan, Bosnia and Herzegovina [B&H], Afghanistan, and Iraq is foreign in nature? Examining the arguments that stand behind the claim that these constitutions were written under the authority or direct supervision of foreign or occupying powers is the central component of this part of the paper. In this regard, the formality of these acts being, in some cases, adopted or approved by local political assemblies, cannot exclude the fact that they are not the product of the work of inherently local, national constitution-making powers. This conclusion is supported by the analysis of the historical process of drafting of the five observed constitutions and their adoption.

Authors of the *Constitution of Japan* were the officials who worked under the authority and supervision of the occupiers of Japan (mainly from the US) after the Second World War ended. In accordance with its Article 73, the Constitution was formally adopted by the Japanese legislature. Text of the most renowned component of the Constitution (Article 9, or the "No-War" provision) was "based on both Japanese (…) and American (…) influences", but it was drafted in early 1946 by an American Colonel (Charles Kades), Deputy Chief of the Government Section in the Allied Occupation apparatus (Beer, 1998, 820, fn. 16; similar conclusions are brought upon by: Chinen, 2005, 90, Gluck, 2019, 49, and Ishizuka, 2019, 8). In fact, "the Constitution [of Japan] in general and Article 9 in particular" were "imposed [*sic*!] by foreign occupation" (Chinen, 2005, 92-93). Bearing in mind that the American drafters of the Constitution "were actually conscious that they were engaged in an unusual and likely dubious enterprise of writing another country's constitution" (Gluck, 2019. 52), one may easily conclude that the Constitution represented "a wholly alien instrument of national governance" for the country (Ishizuka, 2019, 6).

None of the American representatives involved in drafting the Constitution were experts in constitutional law (Ishizuka, 2019, 8), which represents a particularly informal method of curtailing the Japanese role in the constitution-making process. Another modality of bringing the local political influences down was the speed by which the American constitution-makers were driven in presenting the constitutional framework to the Japanese government, and by "the coercive manner in which [the Constitution] was adopted" (Ishizuka, 2019, 9). Although the occupation authorities "feared that public knowledge of foreign imposition would destroy the legitimacy of the new constitution among the Japanese" (Patrick Boyd, 2014, 49), the Japanese negotiators "had virtually no means to reject the reforms imposed", and "were instead compelled to present the document to the public as a Japanese-originated and –endorsed instrument"; they were in no position "to alter the fundamental foundations of the new political and social order [the Constitution had] established" (Ishizuka, 2019, 11). The process led to adopting a truly "reactive constitution" (Gluck, 2019, 49). It is, thus, well-founded to claim that the Japanese Constitution is "a largely "un-Japanese" document", when one reads that the instructions of

General Douglas MacArthur (the Supreme Commander of Allied forces in Japan), who personally approved the text of the Constitution, to its drafters were clear: “keep the emperor, renounce war, remove all vestiges of feudalism” (Gluck, 2019, 53-54).

No prior local authorization was required before setting the framework for adopting the West Germany’s *Basic Law* either. The local (national) body which formally adopted the Basic Law (the Parliamentary Council) was established on the grounds of a six-power conference of the US, Great Britain (GB), France, and the three Benelux countries, which took place in London in the spring of 1948. Basically, the Conference represented “the starting point” (*Ausgangspunkt*) for the foundation of the quasi-legislative body that drafted the Basic Law. It was decided in London that the Western military governors in Germany should authorize the executive branches of government of the West German federal units to convene a Constituent Assembly with the task of preparing the foundation of “a free and democratic form of government” (Görtemaker, 2007). The “Frankfurt Documents” followed suit, by the authority of which the military governors of three Allied powers (US, GB, and France) ordered West German nascent authorities to convene the required constitutional convention (Görtemaker, 2007). The Basic Law, therefore, hardly represented the manifestation of a sovereign constitution-making will of the German people, even the one residing in the territories occupied by the Western Allies.

Although formally the constitution-making power resided with the German people, it never directly expressed itself about the document, which rendered “the constitutional process somewhat internationalized” (Simović, 2020, 177). Consequently, it was the decision of the Western Allies that the (West) German people were to be given “full government responsibility” (“die volle Regierungsverantwortung”) only gradually. This responsibility (limited sovereignty) was coupled with two restrictions: the Allies would retain international control of the Ruhr area, and were authorized to intervene militarily in case of instabilities in West Germany (Görtemaker, 2007). The amended Basic Law after unification in 1990 “required approval by the four Allied powers” (Gluck, 2019, 61).

The *Constitution of B&H* is technically the Fourth Annex of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), which served to end the war that went on in that country from 1992 to 1995. The Agreement (i.e. the Constitution) was signed by official representatives of the US, Germany, GB, France, the European Union, Russia, former Federal Republic of Yugoslavia (FRY), as well as the former Republic of Bosnia and Herzegovina (which was conclusively abolished by the adoption of the Dayton Agreement). The Constitution also represents the product of negotiations held in Dayton (Ohio, the US), in November 1995, between the President of the-then Republic of Bosnia and presidents of the Croatia and FRY, under the auspices of the enumerated foreign entities. One can justifiably argue that foreign (international) subjects, and, in particular, “the American diplomacy”, represented “the real Constitution-makers” in B&H, whose Constitution “was negotiated as part of the international peace

treaty", constituting, thus, an example of the "international negotiation of a constitution" (Šarčević, 2010, 38)

Although the dismemberment of the *Islamic Republic of Afghanistan* in 2021 effectively put out of action the pre-Taliban legal system, the country's Constitution adopted in 2004 formally still remains unabolished. The Constitution represented the product of the engagement of national transitional administrations which came to power as the consequence of the US-led invasion in 2001 (authorized by the United Nations Security Council [the UNSC] Resolution No. 1386). The competent constitutional commission was given the proper authority by the Bonn Agreement, adopted under the auspices of the United Nations (UN)-led *international conference* held in 2001.

Similarly to the Afghani experience, the *Constitution of Iraq* was adopted by the Transitional National Assembly of Iraq, replacing the Law of Administration for the State of Iraq for the Transitional Period (signed in 2004). The adoption of both of these fundamental legal documents of Iraq was enabled by the aggression the US operated against Iraq in 2003. The occupying administration and military forces effectively held control on Iraqi politics, including the drafting of the current Constitution. The Iraqi Transitional Administrative Law (the TAL), which "was written and imposed without the proper involvement of Iraqis", was drafted by the US nationals "assisted by two expatriate Iraqis holding US and British nationalities, and who had not lived in Iraq since they were young children", and, therefore, in 2005, "Iraqis went to vote on a permanent constitution they had not seen, read, studied, debated, or drafted" (Jawad, 2013, 7, 13 & 25). Not much different from the German, Japanese, or Bosnian constitutional experience, the TAL, thus, "was essentially drafted by US officials and a number of Iraqis, most of whom had just returned from decades-long exile and none of the principle actors had been elected at that point." (Zaid & Yussef, 2020, 29).

3. TEMPORARY NATURE *VERSUS* THE STABILITY OF THE IMPOSED CONSTITUTIONS

Are the five constitutions imposed by foreign powers *temporal* in nature? Were they written in order to govern the country for a shorter, transitional period of time, or was their primary purpose to continuously serve to stabilize war-ridden political and institutional systems? There, of course, exists no unique and simple answer, but the history of the Basic Law may serve as an indicative example.

Authors of the German constitutional document named it *Basic Law* (*Grundgesetz*) – the expression suggested by Max Bauer, the mayor of Hamburg, and a representative at the *de facto* constitutional convention (Görtemaker, 2007) – contrary to the previous historical practice,[1] precisely because they wished to outline the *temporary* nature of the

[1] With the exception of the "German Federal Acts" (*Deutsche Bundesakte*) of 1815 (the first German constitution), all basic legal documents in German history have had the word "Constitution"

document. The more dignified term “constitution” (*Verfassung*) would be reserved for a document “applicable to the nation as a whole and designed to last in perpetuity” (Kommers, 534). The same was the reason for naming the Constitutional Convention of 1948 the “Parliamentary Council”, instead of using a more appropriate, yet politically challenging, title of “National Assembly” (“Nationalversammlung”) (Görtemaker, 2007). The provisional character of the Basic Law, it was planned, would be surpassed once the two parts of occupied Germany were reunited, in accordance with the open-ended clause claiming that the Basic Law would “cease to apply on the day on which a constitution freely adopted by the German people takes effect” (Basic Law, Art. 146). However, when reunification came four decades later the original title of the constitution remained preserved, and the cited provision was erased from the Constitution. One of the reasons for the post-Cold-War “survival” of the Basic Law may be that it “has become the part of united Germany’s national identity, thus outliving its own original mission” (Simović, 2020, 185). Similar conclusion may be drawn in Japan from the fact that the highest legal act of that country is referred to as the “Peace Constitution” by its own population (Beer, 1998, 815).

Although the Basic Law has been exposed to extensive partial revisions (more than 60 amendments), it still contains some extremely anachronistic provisions, such as the one claiming the primacy of the federal law over the law of the federal units “insofar as it applies uniformly within one or more occupation zones (*Besatzungszonen*)” (Basic Law, Art. 125, Para. 1). At the same time, Art. 1 (Human dignity and Human rights) and Art. 20 (Constitutional principles and Right to resistance) are protected by the so-called eternity clause (*Ewigkeitsklausel*), contained at the Art. 79 Sect. 3, which prohibits any change or removal of, *inter alia*, the principles laid down in those two articles.

Japan’s Constitution is comparatively distinctive in one regard: it is the longest living constitution in the world that has never been amended. From the global comparative perspective, the procedure of its revision is not very demanding. It suffices that, upon the initiative of the two thirds of members of the parliament, the citizens approve the revision at the referendum, with no more than affirmative majority of all votes cast required (*i.e.* relative, or simple majority) (Constitution of Japan, Art. 96 Sect. 1). The subsequent promulgation of the amendment by the Emperor, as prescribed by Sect. 2, represents a mere formality, given the symbolic constitutional status attributed by the Constitution to the monarch. This conclusion does not suggest that the history of contemporary Japan

(*Verfassung*) included in their title: Constitution of the German Empire (*Verfassung des Deutschen Reiches*) of 1849, North German Constitution (*Verfassung des Norddeutschen Bundes*) of 1867, Constitution of the German Confederation (*Verfassung des Deutschen Bundes*) of January 1871, Constitution of the German Empire (*Verfassung des Deutschen Reiches*) of April 1871, and – probably the most prominent among previous German constitutions – Constitution of the German Reich (*Verfassung des Deutschen Reichs*), or the Weimar Constitution (*Weimarer Verfassung*) of 1919.

does not include certain pages depicting moves in the direction of the constitutional revision, for there existed several of them, including the ones initiated in the parliament (Chinen, 2005, 56). The Constitution "survived unscathed serious revision attempts in the 1950s and 1960s" (Patrick Boyd, 2014, 55), although "the clamor for revision began almost immediately, on the grounds that the constitution was indeed imposed by the occupation", because "its alien provenance was hard to miss and just as hard to bear" (Gluck, 2019, 55). Most recently, in a speech in May 2019 (exactly on Constitution Day), the then Prime Minister (Shinzo Abe) "repeated his pledge to have a new constitution in effect by 2022" (Gluck, 2019, 61), which was obviously a misplaced promise. The general public has most fervently resisted amendments to the notable Art. 9 (Chinen, 2005, 82), a subject which will be more thoroughly examined in the next part of this paper (Chapter 4). It is quite possible that the absence of the constitutional revision is owed to "a deep distrust of conservative intentions, rooted in historical memory", held in the minds of the opponents of the revision (Ishizuka, 2019, 21). Yet, important components of the constitutional system (the electoral system and the judiciary), have effectively been amended since the Constitution's adoption, by means of legislative (sub-constitutional) techniques (Gluck, 2019, 59).

Similarly, the Constitution of B&H has never been amended. This might appear surprising, because of the even less-demanding procedure for the revision. The Constitution requires the approval of two-thirds of those members of the parliament who are *present* and *voting* (Constitution of Bosnia and Herzegovina, Art. X Sect. 1). Neither a tighter qualified majority, nor the referendum approval is needed. Although from the comparative perspective this document represents one of the most flexible constitutions in the world, it has never been amended most probably because the sensitive nature of the post-war consociational plurinational democracy in the country prevents the constitutional revisions to emerge. Also, it is in the nature of every *agreement* to sort out a solution to a precise problem, while a *constitution* has for purpose the projection of a vision for a society it is invited to govern (Šarčević, 2010, 47). Paradoxically, it has never been changed even though "it should not be disputed that Annex 4 is valid as a temporary regulatory document which maintains a provisory of the state of the constitution in an unfinished social-political phenomenon (Šarčević, 2010, 49).

Constitutions of Afghanistan and of Iraq have also never been subject to the constitutional revision process, although the former was *de facto* abolished in 2021 with the Taliban forces effectively ending the Islamic Republic of Afghanistan.

4. EXPRESSIONS OF LIMITED CONSTITUTIONAL SOVEREIGNTY

A limited sovereignty and a national constitution-making process seem to stand in a mutually contradictory relation. Nonetheless, there is an ample amount of the provisions contained in the analyzed constitutions which were drafted with a specific role to restraint

the sovereignty, external as well as domestic, of the states on which the constitutions were imposed.

These provisions regulate the *tropes* of the states' aspiring to universal peace, the special role given to the political and military administrations of the foreign (occupying) powers, and the stipulated primacy of the international law. Plural specific similarities are expressed in the five constitutions, which can be attributed to the fact that an occupying power (or powers) represented more than just an intervenor in the observed constitutional-making processes.

Several analyzed constitutions contain provisions reflecting given states' pronounced aspiration to participate peacefully in international relations. Due to its deep transgressions against international law, the Constitution of Japan has been marked with a quite unique normative feature – the No-War Clause (Beer, 1998, 817). In it, it is stipulated, that "aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes" (Constitution of Japan, 1947, Art. 9, Sect. 1). In addition, "in order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained", while "the right of belligerency of the state will not be recognized" (Sect. 2). These provisions have "stirred controversy since the Constitution went into effect", because "like the rest of the 1947 Constitution, Article 9 is a product of the Occupation" (Chinen, 2005, 56-57). It is of no small importance that Article 9 is the *sole* article contained in Chapter II, the title of which is "Renunciation of War".

Limitations of sovereignty have, in a bigger or lesser extent, curtailed the nations' ability to play an institutionally significant role in international arena. Thus, the No-War Clause still stands "as an impediment to Japan's ability to play a greater role" in the system organized within the UN. Thus, "for years, Japan has wanted a permanent seat on the [UNSC], believing its economic power and participation in world affairs merits such a recognition", but the Article 9 continues to halt this ambition. Namely, "its ambiguous language makes it unclear whether Japan would be able to meet its responsibilities as a permanent member" of the UNSC (Chinen, 65), and the pacifist constitution "has constrained Japan's ability to chart an independent path on foreign policy" (Ishizuka, 2019, 7). There is a degree of probability that the very composition of the Article 9 came from the highest military officials of the US in Japan, including General MacArthur (Gluck, 2019, 51). It is also very informative that the Constitution includes no provision relating to the procedure for declaring war or concluding a peace agreement.

In a comparable fashion, West Germany had also for a long time "lived in a state of 'semi-sovereignty' by virtue of its Nazi past and its division into two states", right up until it reached a position to have its own foreign ministry in 1951 and defense ministry four years later (Mény, Knapp, 1998, 386&371). Both Germany and Japan, being "responsible for mass crimes during the Second World War, explicitly express their devotion to peace" in the

texts of their preambles (Simović, 2020, 185-186). In the Basic Law it is announced that the German Federation "shall establish Armed Forces for purposes of defense", while employing of the Armed Forces is restricted "only to the extent expressly permitted by this Basic Law" (Art. 87a, Para. 1-2). A significant revisionist political movement in Japan during the 1990s called for the abolition of the Article 9, recognizing "war as a sovereign right of the nation" (Beer, 1998, 820).

The Article 27E of the Constitution of Iraq contains a much-disputed provision on the non-proliferation and non-use of forbidden weapons (nuclear, chemical, or biological) (Istrabadi, 2005, 293). Consequently, the final composition of the provision "contained a strong rejection of the proliferation of weapons of mass destruction, but couched that renunciation in terms of the limited duration of the transitional period" (Istrabadi, 2005, 293). Similarly, Afghanistan is obligated to "prevent all kinds of terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants" (Constitution of Afghanistan, Art. 7) – a highly unique provision in a constitution of any sovereign country.

In B&H, foreign constitution-makers established, *via* Annex II of the Dayton Agreement ("Transitional Arrangements"), a *Joint Interim Commission* "with a mandate to discuss practical questions" connected to the implementation of the Constitution, the General Framework Agreement, and its Annexes (Constitution of Bosnia and Herzegovina, 1995, Art. 1 Para. "a"). Although the Commission is composed of 8 local (B&H) representatives (Para. "b"), its meetings are chaired "by the High Representative [HR] or his or designee" (Para. "c"). This is the unique spot in which HR is mentioned in the Constitution. At the same time, the signatory parties have designed, in Annex 10 Art. 1 Sect. 2, "a High Representative, to be appointed consistent with relevant [UNSC] resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a [UNSC] resolution (…)". In addition to his other powers and responsibilities, in Art. 10 of the Annex it is stated that "the [HR] is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement". It is hardly surprising that "there is a widely spread attitude that the [HR] is obligated to implement the decisions of the Constitutional Court or to intervene in the legal system of the country" (Šarčević, 2023, 20). Although this intervention of his cannot be arbitrary, but must be based on the decisions of the Constitutional Court and the European Court for Human Rights (Šarčević, 2023, 20), it still resembles an institute of steady foreign intervention in the local and national (as well as ethnic) political composition of the newly-born country. Hence, the Agreement "derives from [a position that B&H] is outwardly sovereign", but it still "suspends sovereignty of [the country's] organs in favor of the authority of the [HR]", which led to the "outwardly proclaimed sovereignty [being] neutralized by the deprivation of the internal sovereignty" (Šarčević, 2010, 66).

In some of the observed constitutions international law takes precedence over the national (sovereign) law. Such is the express message delivered by the Basic Law (Art. 25), while in B&H the basic rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe and its Protocols have a *direct application* and stand above “all other law” (Art. II Sect. 2). At the same time, “all competent authorities” in B&H need to “cooperate with and provide unrestricted access” to international human rights monitoring mechanisms and the supervisory bodies established by any of the international agreements listed in Annex I, including the International Tribunal for the Former Yugoslavia, as well as “any other organization authorized by the [UNSC] with a mandate concerning human rights or humanitarian law” (Art. II, Sect. 8). The Section’s title is, perhaps somewhat cynically, entitled “Cooperation”. The Japanese Constitution states that “laws of political morality are universal”, as well as that “that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations” (Preamble, Sect. 3).

The analyzed constitutions also aim at diminishing the powers of the head of state. Thus, the command over the Armed Forces is not vested in the Federal President, as usually is the case, but in the Federal Minister of Defense (Basic Law, Art. 65a, Sect. 1). The parliament is “the highest organ of state power” (Constitution of Japan, 1947, Art. 41), and it “shall manifest the will of its people as well as represent the entire nation” (Constitution of the Islamic Republic of Afghanistan, 2004, Art. 81 Sect. 1). The composition of the Constitutional Court of B&H reflects a vastly limited power of the judicial self-organization of the country, because out of 9 of its members, 3 are to be selected by the President of the European Court of Human Rights after consultation with the Presidency”, and those members cannot be citizens of B&H or of any of its neighboring states (Art. VI Sect. 1-2)**,** ***i.e.*** Croatia, Serbia, or Montenegro.

Foreign constitution-makers, did, however, have enough political wisdom to nominally proclaim the sovereignty of states whose legal system they aspired to regulate from the top. Some constitutional provisions proclaimed *formal* national independence within *factual* limited constitutional sovereignty. In accordance to this method, the adoption of the constitution in question was unmistakably declared as the action of the local population, the people, by the means of exercising “their constituent power” (*seiner verfassungsgebenden Gewalt*) (Basic Law, Preamble, Sect. 2). Similarly, Iraqi Constitution was enacted by “the people of Iraq” (Preamble, Sect. 7). Additionally, the constitutions contain the claim that the political authority in the state resides in the people. Thus, “all state authority derives from the people” (Basic Law, Art. 20; similar statement is made in the Constitution of Japan, 1947, Preamble, Sect. 1, and Art. 1 Sect. 1). Similar to that, “national sovereignty (…) shall belong to the nation (…)” (Constitution of the Islamic Republic of Afghanistan, 2004, Art. 4). Nominal sovereignty of the *state* is also proclaimed

(Constitution of Bosnia and Herzegovina, Preamble, Sect. 6; Constitution of the Republic of Iraq, 2005, Art. 1, 50&109).

5. CONCLUDING REMARKS

In modern circumstances, constitutions should not be imposed by any foreign power. This anomaly would contradict to one of the classical functions of any constitution, which aims at adequately assessing a given population's political and basic rights demands and needs, as well as to transferring a functional normative document in a democratic and pluralistic society.

Within the confines of the constitutions observed in this paper, the sovereignty of the five nations appears to be *limited*, in the field of *international* politics, as well as in the domain of management of *internal* affairs. In particular, the constitutions of Japan, Germany, and B&H are truly *foreign* in their very core, having been drafted and adopted under the auspices of the outside powers which bore responsibility for security of those countries at the time of writing of their constitutions. Domestic political influences were effectively downsized, even though in certain constitutional provisions it is somewhat cynically underlined that the constitutions do represent normative reflection of the proverbial popular will.

With the exception of Germany, none of the analyzed constitutions has ever been amended, although it is doubtless that, by the arguments that rely on common sense, local and international circumstances, a space has been carved out for necessary constitutional revisions. All of the constitutions awkwardly seemed at the same time to serve only as provisional documents, aiming at stabilizing the war-ridden territories until more suitable constitutional arrangements were ready to be put into effect.

Limited constitutional sovereignty is manifested in a particularly highlighted tendency for the states whose political and legal system was established by a foreign power to claim their fervent respect for peace in international relations. In this regard, particular comparative authenticity must be ascribed to the No-War Clause of the Constitution of Japan, as well as to the role of the HR in the Constitution of B&H. Although all of the five analyzed constitutions contain provisions which specifically proclaim sovereignty of the state or people in question, it is clear that impressions derived from the analysis of the content of the majority of numerous other provisions point to the opposite conclusion. An official normative announcement that a country is sovereign and that it freely adopts its own constitution does not mean much if the historical circumstances and the institutional framework bear witness to the contrary claim.

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УСТАВНА ОГРАНИЧЕЊА СУВЕРЕНОСТИ НАМЕТНУТА ОД СТРАНЕ ИНОСТРАНИХ СИЛА НАКОН ДРУГОГ СВЕТСКОГ РАТА

Апстракт

Устави савремених држава усвојени су у складу са слободном политичком вољом грађана и њихових представника и у оквиру мање-више аутономних уставних државних капацитета. Ипак, у овај образац не убрајају се неки међу важећим уставима. Упоредно посматрано, два таква устава су веома важна – реч је о уставима Немачке и Јапана. Истовремено, друга три представљају одраз политичких интереса иностраних сила које првенствено теже за миром у пост-конфликтним државама. У њима су садржане донекле јединствена, мада не толико генерално упоредноправно употребљива решења. Ово је случај са уставима Босне и Херцеговине, Афганистана и Ирака. Историјски куриозитет који спаја анализиране уставе огледа се у томе што их нису слободно израдили релевантни политички представници посматраних држава. Ове су уставе надахнули, осмислили или, чак, написали представници иностраних (може се рећи и: окупационих) политичких ауторитета и војних снага. Истраживање које стоји иза овог чланка тежи откривању у којој је мери природа анализираних устава уистину инострана (наметнута), као и да ли су ти правни акти имали за сврху да буду трајног или привременог карактера. Премда је јасно да је анализираним уставима суверенитет држава ограничен, некима од уставних одредаба указује се на то да су неке од тих држава, макар формално, суверене, што отвара простор за посматрачку процену искрености уставописаца. Средишња тачка истраживања састоји се у утврђивању да ли је анализираним уставима уистину остављен простор за испољавање државне суверености.

Кључне речи: Окупационе власти, сувереност, устав, ограничења суверености, интернационализација уставног права.

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LECTURERS' AWARENESS OF LEGAL ISSUES IN THE DIGITAL LANDSCAPE OF HIGHER EDUCATION

Summary

In today's higher education environment, the implementation of modern technologies becomes an integral part of the educational process. This research focuses on the legal aspects of pedagogy and teaching methodology, particularly in the context of learning and teaching in virtual space. Key themes encompass privacy and security issues, analyzing how information about students is collected and used in the context of online teaching. Additionally, it explores the legal responsibility of lecturers in virtual environments, including relationships with students, content sharing, and online interaction security. The right of students to access technology is also examined, considering legal norms that either support or restrict students' access to technological resources. Finally, legislation on copyright in a digital context is analyzed.

The study aims to examine the level of awareness among lecturers in higher education about these key legal issues in teaching practice by surveying lecturers at the University of Priština in Kosovska Mitrovica. The analysis of results will identify crucial issues and support the understanding of legal implications of digital technology integration to ensure compliance with regulations, protect students' privacy, and ensure high-quality education.

Key words: digital technology; higher education; legal issues; privacy; lecturer responsibility.

1. RATIONALE

In today's higher education environment, the implementation of modern technologies has become an integral part of the educational process. Furthermore, the institutions of higher education are encouraged to focus on developing digital competence among both students and teachers (Hamutoğlu et al., 2020). This digital competence, encompassing both technical and pedagogical skills, enables lecturers to enhance their teaching, foster the digital competence of their students, and adapt to the challenges of the digital society (Zhang et al., 2020). Thus, it is essential for lecturers to have a strong awareness of the legal issues that arise in the digital landscape of higher education so they can protect the privacy and security of their students. Additionally, lecturers must be aware of their legal responsibilities in virtual environments, including their relationships with students, the sharing of content, and online interaction security.

Moreover, lecturers should be familiar with the rights of students to access technology and ensure that they adhere to legal norms in this regard. In order to successfully integrate educational technology in a pedagogical manner within the curriculum, it is crucial for higher education institutions to provide the necessary instruction and guidance to develop and enhance the digital literacy skills of their academic staff (Mon et al., 2020). By doing so, lecturers can effectively utilize technology in the teaching and learning process, thereby providing students with a meaningful and engaging educational experience. This research highlights the importance of lecturers' awareness of legal issues in the digital landscape of higher education, which is crucial for ensuring the protection of students' privacy and security in online learning environments, as well as for understanding and fulfilling their legal responsibilities as educators. In addition, lecturers need to be equipped with the necessary digital literacy skills to effectively integrate technology into their teaching practices. This will not only enhance the quality of education but also empower students to directly engage with data and expand their knowledge in a meaningful way.

Furthermore, it is well supported in literature that both students and teachers have a basic level of digital competence and there is room for improvement in terms of using technologies for teaching and professional development. Therefore, it is important for universities to invest in the professional development of lecturers, providing them with the necessary training and support to enhance their digital teaching competence in all its scope. Overall, lecturers must be knowledgeable about the legal aspects of teaching in a digital landscape in order to protect student privacy and security, fulfill their legal responsibilities in virtual environments, and effectively integrate technology into their teaching practices.

2. LEGAL ISSUES THAT NEED CONSIDERATION

In the digital landscape of higher education, there are several legal issues that lecturers need to consider such as their level of familiarity with legal norms in general, their

compliance with privacy and security norms, as well as their perception of their legal responsibilities in virtual teaching environments, student access to technology, and copyright issues (Gagné & McGill, 2010).

Privacy concerns in the digital landscape focuses on two critical components: the collection and use of student information and the legal standards related to privacy in online education. The collection and use of student information pose challenges in the context of online education, where student data are frequent and subject to various privacy laws and regulations (Doyle, 2022). The practices surrounding the gathering and utilization of student data vary depending on the educational institution and the specific platforms or tools used for online teaching. Generally, educational institutions collect student data to facilitate learning, monitor progress, and personalize educational experiences, Stahl and Karger (2016, 81) emphasize the valuable ж insights digital learning systems can provide, but warn that they "require careful data privacy policies to ensure the safety of sensitive information". This data may include personal information such as names, contact details, academic records, and sometimes even sensitive information like health records or behavioral data.

However, this practice must comply with legal frameworks governing privacy in online teaching environments. Laws such as the Family Educational Rights and Privacy Act (FERPA) in the United States or the General Data Protection Regulation (GDPR) in the European Union set guidelines for the handling of student data (Östlund et al., 2015). These laws typically require educational institutions to obtain consent before collecting personal data, ensure data security, limit data access to authorized personnel, and provide mechanisms for students to access and correct their information (Zeide, 2018). Additionally, educators must be aware of the specific privacy policies and terms of service of the digital tools or platforms they use, as these may also dictate how student data is collected, stored, and utilized.

Secondly, lecturer responsibilities in virtual environments are focused on content dissemination and ensuring the security of online interactions. It examines how instructors navigate the dissemination of educational materials while adhering to legal guidelines and safeguarding the privacy and security of students in digital environments (Chang et al., 2021). Educators face multifaceted responsibilities in maintaining a safe and secure online learning environment. These responsibilities encompass various aspects, including content sharing, communication, data protection, and student well-being. Firstly, educators must ensure the authenticity and integrity of the content they share, respecting copyright laws and intellectual property rights (Ludlow, 2003). Secondly, they need to foster secure communication channels (Jones et al., 2011), promoting respectful and inclusive interactions among students while mitigating risks such as cyberbullying or inappropriate behavior (Anderson & Simpson, 2008). Finally, educators play a crucial role in supporting student well-being by monitoring for signs of distress, providing resources for mental health support, and fostering a supportive online community conducive to learning and growth (Singh & Ramutsheli, 2016).

The third concern are students' rights to access technology in education. Considerations of accessibility and equity in the digital learning environment are essential to "enhance the full emergence of students as active, engaged, critical citizens" (Plumb, 2010, 270). Firstly, educators must address technological barriers by providing access to necessary devices and reliable internet connections for students who may not have them at home. This could involve initiatives such as loaning out devices or partnering with community organizations to offer subsidized internet access (Masmali, 2020). Secondly, educators should ensure that digital materials and platforms are designed with accessibility features in mind, accommodating diverse learning needs and preferences. This includes providing alternative formats for content, such as audio or Braille, and implementing features like screen readers or captions for students with disabilities (Masmali, 2020). For example, the EU Web Accessibility Directive (2016) requires member states to ensure that websites and mobile applications of public sector bodies, including educational institutions, are accessible to people with disabilities. This directive aims to promote equal access to digital content and services for all individuals, including students with disabilities, across the EU. Thirdly, educators must be mindful of "socio-economic disparities that may impact access to technology and digital resources" (Chen & Kidd, 2007, 130). They can work to minimize these disparities by advocating for equitable funding for technology initiatives and providing support for families in need, such as offering technology training or assistance with acquiring affordable devices (Masmali, 2020).

Finally, copyright laws govern the use of digital resources and materials in teaching and learning contexts by "providing legal protection to the creators of original works, such as textbooks, articles, videos, and software" (Ludlow, 2003, 133). Educators must adhere to copyright laws when using these materials in their teaching, whether in traditional classrooms or online environments. This includes obtaining permission from the copyright holder before reproducing, distributing, or displaying copyrighted works, unless their use falls under specific exceptions or limitations, such as fair use (Loock & Grobler, 2006). Additionally, educators need to be aware of licensing agreements associated with digital resources, which may dictate the terms of use, such as the number of users or the duration of access. Failure to comply with copyright laws can result in legal consequences, including fines or lawsuits for copyright infringement. Therefore, educators must navigate copyright laws carefully to ensure that their use of digital resources and materials is legal and ethical (Gagné & McGill, 2010).

To cultivate digital competence among the academic staff, higher education institutions can facilitate workshops, training programs, and resources that specifically address the legal and ethical aspects of technology integration in teaching. Providing continuous support in this area will empower lecturers to navigate and leverage digital tools effectively while upholding legal and ethical standards and help institutions foster an environment where students' privacy, security, and rights are protected.

3. CROSS SECTIONAL STUDY

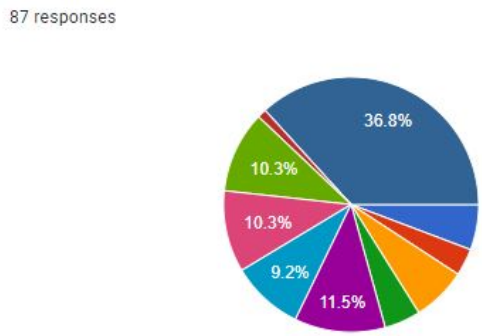
3.1. Research methodology

The research problem revolves around the need to assess lecturers' awareness of legal implications associated with the integration of digital technology in higher education. As the use of digital tools becomes more prevalent in teaching, understanding the legal aspects becomes crucial to ensure compliance with regulations, protect students' rights, and maintain the quality of higher education. Based on the research problem, this study posits several hypotheses:

- Lecturers who frequently use digital technology in their teaching have a higher awareness of legal issues associated with its use.
- There is a positive correlation between lecturers' awareness of legal issues and their perception of their legal responsibilities in virtual teaching environments.
- Lecturers who prioritize student privacy and security concerns demonstrate a higher level of awareness of legal aspects.

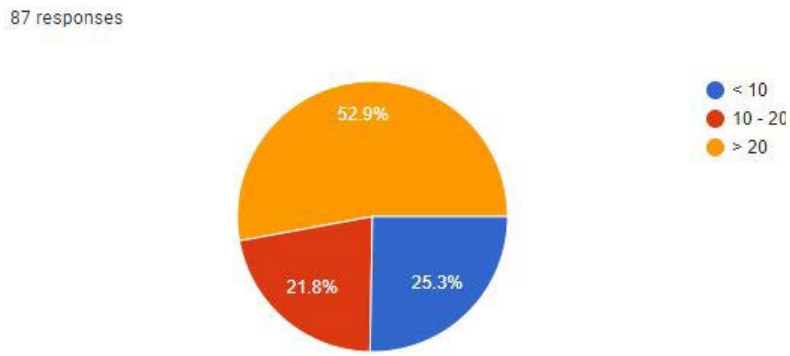
The research instrument is a questionnaire designed to assess lecturers' awareness and comprises a series of Likert-scale statements covering various aspects of legal implications in teaching with technology in addition to gathering demographic data on respondents' gender and years of work experience. Topics addressed include lecturers' experience with using digital tools in teaching (3 items), their level of familiarity with legal norms in general (2 items), norms related to privacy and security (3 items), as well as their perception of their legal responsibilities in virtual teaching environments (3 items), student access to technology (3 items), and copyright issues (3 items). The questionnaire aims to provide a comprehensive understanding of lecturers' awareness of legal issues in the digital landscape of higher education, serving as a valuable tool for identifying areas for further support and development. The collected data was analyzed by means of descriptive statistics.

The study sample comprises lecturers (N=87) from all ten faculties at the University of Priština in Kosovska Mitrovica (Graph 1) with notable majority from the Faculty of Philosophy (36.8%), followed by equal measure of respondents from the Faculty of Technical Sciences, the Faculty of Physical Education, the Faculty of Teacher Education, and the Faculty of Mathmatics and Natural Sciences.



Graph 1. Distribution of the sample based on affiliation

Based on gender, two thirds of the sample are women (F=64.3%, M=35.6%). As for the years of work experience (Graph 2), the majority of the sample has over 20 years of teaching experience (52.9%), while the other two categories are mostly of equal distribution. The respondents also varied in their experiences with online teaching using digital technology, indicating a diverse pool of participants from different academic backgrounds and teaching contexts. However, five respondents declared having no previous experience in using digital technology in their teaching practice and were excluded from further consideration.



Graph 2. Distribution of the sample based on years of work experience

3.2 Analysis of the results

Based on the analysis of the results concerning the first category, *Experience with technology* (Table 1), it is evident that a significant portion of respondents frequently use various digital tools in teaching, with 45.12% indicating that they often utilize such tools and an additional 37.80% stating that they do so frequently. This suggests a widespread

integration of digital technology in their teaching practices. Furthermore, a majority of respondents (56.10%) expressed feeling extremely confident about using digital technology in education, indicating a high level of proficiency and comfort. These results underscore the importance of educators' proficiency in utilizing digital technology, reflecting a positive trend towards embracing technological advancements in higher education.

Table 1. Experience with technology

Item / response	1	2	3	4	5
I use different digital tools in teaching	2.44%	6.10%	18.29%	45.12%	37.80%
I feel confident enough to use digital technology in education	3.66%	7.32%	15.85%	26.83%	56.10%

The results in the second category, *Knowledge of legal aspects* (Table 2), indicate a notable trend among respondents towards a moderate to high level of familiarity with legal aspects related to digital technology in education, with 50% reporting being familiar and 51.22% indicating regular updates on legal issues. This suggests a generally positive level of awareness and engagement with legal considerations in this instance. However, it is noteworthy that there is a portion of respondents who rated themselves at the lower end of the scale, 10.98% indicated low familiarity. This highlights the importance of ongoing professional development and training initiatives to ensure educators remain abreast of legal frameworks governing digital technology use in education.

Table 2. Knowledge of legal aspects

Item / response	1	2	3	4	5
I am familiar with the legal aspects related to the use of digital technology in education.	10.98%	31.71%	50.00%	7.32%	0.00%
I regularly update my knowledge on legal issues related to digital technology in education.	15.85%	34.15%	51.22%	0.00%	1.22%

The third category, *Legal aspects of privacy and security* (Table 3), reflects varying levels of self-perceived competence and application of privacy-related legal guidelines among respondents. The majority of respondents expressed awareness of legal norms regarding privacy (59.76%), and also reported feeling confident in their ability to protect students' privacy (58.54%) and actively apply privacy legal guidelines during online teaching activities (54.88%). However, some respondents rated themselves at the lower end of the scale for each statement, suggesting room for improvement in terms of awareness and application of privacy-related legal considerations and highlighting the importance of

ongoing professional development initiatives to enhance educators' understanding and implementation of privacy legal guidelines in digital education settings.

Table 3. Legal aspects of privacy and security

Item / response	1	2	3	4	5
I am aware of the legal norms regarding privacy related to the use of digital platforms and tools in education.	12.20%	47.56%	59.76%	43.90%	36.59%
I can protect students' privacy when using digital tools and platforms.	7.32%	35.37%	58.54%	46.34%	30.49%
I actively apply privacy legal guidelines during online teaching activities.	9.76%	28.05%	54.88%	46.34%	40.24%

In relation to lecturers' legal responsibility in a virtual learning environment (Table 4), the results reveal varying levels of self-perceived understanding and engagement with legal responsibilities among the respondents. While a significant majority reported understanding their legal responsibility regarding the content they share during online teaching activities (54.88%), fewer respondents indicated similar levels of understanding regarding the legal obligations regarding the responsibility of teachers during such activities (34.15%). However, half of the respondents expressed active collaboration with colleagues and experts to inform themselves about legal issues in the virtual learning environment, suggesting a proactive approach to staying informed.

Table 4. Legal responsibility in a virtual environment

Item / response	1	2	3	4	5
I understand the legal obligations regarding the responsibility of teachers during online teaching activities.	8.54%	10.98%	34.15%	34.15%	12.20%
I understand my legal responsibility regarding the content I share during online teaching activities.	7.32%	12.20%	23.17%	54.88%	10.98%
I actively collaborate with colleagues and experts to inform myself about legal issues in the virtual learning environment.	3.66%	14.63%	20.73%	50.00%	10.98%

Concerning students' rights to access technology (Table 5), the analysis showed that a significantly small portion of the sample rated themselves as informed about students' rights to access technology (7.32%), while a slightly larger segment expressed a clear understanding of the legal responsibility in ensuring such access (30.49%). Similar percentage of the respondents reported actively working on removing barriers to students' access to technology (41.46%), reflecting an acknowledgment of the importance of equitable access. These findings underscore the ongoing need for educators to not only understand the legal dimensions but also actively engage in practices that promote equal access to technology for all students, thereby fostering inclusive learning environments.

Table 5. Right to access technology in education

Item / response	1	2	3	4	5
I am informed about students' rights to access technology within education.	6.10%	36.59%	50.00%	7.32%	0.00%
I understand the legal responsibility in ensuring access to technology for all students.	7.32%	24.39%	37.80%	30.49%	0.00%
I actively work on removing barriers that students may have in accessing technology.	7.32%	18.29%	30.49%	41.46%	2.44%

The results of the survey on lecturers' familiarity with copyright law and its application to digital teaching materials (Table 6) indicate a relatively low level of awareness and understanding among respondents. A quarter of participants reported being familiar with copyright laws and their impact on digital materials in education. However, a very small percentage (3.66%) reported regularly checking copyright permissions for materials used in teaching. This suggests that educators need further raising of the awareness of the importance of copyright compliance in consistently implementing best practices for obtaining proper permissions.

Table 6. Legislation on copyright in a digital context.

Item / response	1	2	3	4	5
I am familiar with the application of copyright law regarding digital materials in education.	6.10%	15.85%	28.05%	26.83%	23.17%
I understand how copyright laws impact the use of digital materials in education.	4.88%	14.63%	32.93%	28.05%	19.51%
I regularly check copyright pe-rmissions for materials I use in teaching.	3.66%	11.00%	22.44%	33.78%	29.27%

4. DISCUSSION

The results of the study suggest that there is indeed a relationship between the frequency of using digital technology in teaching and the awareness of legal issues related to its use among lecturers. Specifically, those educators who reported having experience in online teaching with the aid of digital tools exhibited a greater understanding of legal responsibilities and copyright laws. This finding implies that the practical engagement with digital technology in teaching contexts may naturally lead to a deeper awareness of the legal considerations inherent in its use as reported by Hamutoğlu et al. (2020). Educators who frequently incorporate digital tools into their teaching likely encounter legal issues more frequently, prompting them to seek out and understand the associated legal frameworks and responsibilities. Therefore, the hypothesis that lecturers who use digital technology more often would possess a higher awareness of legal issues seems to be supported by the findings of the study as well as the study of Zhang et al. (2020) and the reported conclusions of Mon et al. (2020).

The findings of this study provide partial support for the second hypothesis, which posits a positive correlation between lecturers' awareness of legal issues and their perception of legal responsibilities in virtual teaching environments. While the data indicate that there is indeed a connection between these two variables, it is essential to note that the strength of this correlation may vary across different aspects of legal responsibilities. In other words, while educators who demonstrate a higher level of awareness regarding legal issues generally tend to perceive themselves as having greater legal responsibilities in virtual teaching environments, this association may not be equally strong for all aspects of legal obligations as evidenced in the study by Östlund et al. (2015). Nonetheless, the trend observed in the data suggests that increased awareness does translate to a stronger sense of legal responsibility among educators engaged in virtual teaching which aligns with the conclusions reported by Gagné and McGill (2010). This nuanced understanding underscores the complexity of legal considerations in online education and highlights the need for targeted interventions to enhance educators' understanding of their legal duties in virtual teaching environments.

Finally, the results presented here provide partial support for the third hypothesis, which suggests a connection between lecturers' prioritization of student privacy and security concerns and their awareness of legal aspects of online teaching. The data indicate that educators who actively prioritize student privacy and security concerns tend to demonstrate a higher level of awareness regarding legal issues associated with online teaching. This alignment suggests that educators who are more attuned to student privacy and security considerations are also more likely to be cognizant of the legal frameworks surrounding online education (Stahl & Karger, 2016). However, the nature and strength of this relationship require further examination. Future research could delve deeper into the specific mechanisms through which this priority influences lecturers' awareness of legal

aspects, shedding more light on this complex interplay. All in all, Anderson and Simpson (2008) encourage further exploration of potential moderating variables which could provide valuable insights into the nuanced dynamics at play in educators' perceptions and behaviors related to legal considerations in online teaching.

5. CONCLUSION

While this study provides valuable insights into lecturers' awareness of legal issues in the integration of digital technology in higher education, several limitations should be acknowledged. Firstly, the sample size may limit the generalizability of the findings, as it was confined to a specific geographic region. Additionally, the reliance on self-reported data introduces the potential for response bias, as participants may overstate their level of understanding or practice. Moreover, the survey instrument itself may not capture the full complexity of legal issues or nuances in educators' experiences, suggesting a need for more comprehensive measures or qualitative approaches to supplement the quantitative findings.

Bearing in mind the stated limitations, some conclusions could be drawn. The analysis of the survey results underscores the critical role of lecturers' awareness and understanding of legal issues surrounding the use of digital technology in higher education. While the majority of respondents demonstrated a grasp of these legal complexities, there are areas for enhancement, particularly in consistently applying legal guidelines in practice. Lecturers play a pivotal role in safeguarding student privacy, ensuring equitable access to technology, and adhering to copyright laws in educational settings. Therefore, ongoing professional development initiatives and institutional support are essential to empower educators with the knowledge and resources needed to navigate these legal considerations effectively. By fostering a culture of legal compliance and ethical use of digital technologies, institutions can better protect student rights, uphold academic integrity, and promote excellence in higher education.

The findings of this study carry significant practical implications for educators, policymakers, and educational institutions aiming to navigate the legal landscape of digital technology in higher education. Firstly, by identifying gaps in lecturers' awareness and understanding of legal issues, this research underscores the importance of targeted professional development initiatives to enhance their digital literacy and legal competency. Institutions can design training programs and resources to familiarize lecturers with copyright laws, data privacy regulations, and other legal frameworks relevant to online teaching and learning. Additionally, the study highlights the need for clear institutional policies and guidelines that outline the rights and responsibilities of both parties involved in the educational process in using digital tools and platforms, ensuring compliance with legal standards while promoting innovative teaching practices.

Moving forward, there are several avenues for further research to deepen our understanding of the intersection between legal issues and digital technology in higher

education. Qualitative approaches such as interviews or focus groups could offer a more nuanced understanding of lecturers' perspectives and experiences, shedding light on the contextual factors that shape their engagement with legal issues.

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Др Анита ЈАНКОВИЋ*
Слађана РАДОМИРОВИЋ**

ИСТРАЖИВАЊЕ СВЕСТИ ПРЕДАВАЧА О ПРАВНИМ ПИТАЊИМА У ДИГИТАЛНОМ ПЕЈЗАЖУ ВИСОКОГ ОБРАЗОВАЊА

Апстракт

У данашњем високообразовном окружењу, примена савремених технологија постаје неизоставан део наставног процеса. Ова истраживачка тачка фокусира се на правне аспекте педагогије и методике наставе, посебно у контексту употребе дигитилне технологије у високом образовању. Кључне теме обухватају питања приватности и сигурности, анализирајући како се информације о студентима прикупљају и користе у оквиру наставе на мрежи. Такође, истражује се правна одговорност наставника у виртуелном окружењу, укључујући односе са студентима, дељење садржаја и сигурност интеракција на мрежи. Проучава се и право студената на приступ технологији, уз разматрање правних норми које подржавају или ограничавају приступ студената технолошким ресурсима. Коначно, анализира се законодавство о ауторским правима у дигиталном контексту.

Студија има за циљ да испита степен свести наставника у високом образовању о овим кључним правним питањима у наставној пракси кроз анкетирање наставника на Универзитету у Приштини са привременим седиштем у Косовској Митровици. Анализа резултата ће идентификовати кључна питања и подржати разумевање правних импликација интеграције дигиталне технологије како би се осигурала усклађеност с прописима, заштитила права студената и осигурао високи квалитетног образовања.

Кључне речи: дигитална технологија; високо образовање; правна питања; приватност; одговорност наставника.

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IN THE WHIRLPOOL OF ALBANIAN VIOLENCE: FROM THE "BRUSSELS PEACE PROJECT" TO ETHNIC ENGINEERING OF THE SERBS[1]

Summary

The article discusses the inter-ethnic relations of the two main ethnic groups in Kosovo and Metohija in the period of reconciliation and „normalization of relations" under the auspices of the European Union in Brussels. Based on the material obtained through the analysis of media content, results were obtained that indicate intense ethnic violence perpetrated against the Serbian people in Kosmet. Comparing it with the course of the dialogue that took place over the past ten years, the author concludes that the so-called the normalization of relations conditioned by various forms of violence, from legal and political pressures to the bare abuse of Serbs on the so-called Kosovo, which reduced them to a minority with insignificant rights within the Community of Municipalities, which is offered to them as an „empty shell" in the final agreement.

Key words: Serbia, Kosovo and Metohija, Kosovo*, Brussels Agreement, „dialogue" between Belgrade and Pristina.

1. INTRODUCTION: "PEACE PROJECT IN BRUSSELS" AND/OR THE COLLAPSING OF THE STATE OF THE REPUBLIC OF SERBIA IN KOSOVO AND METOHIA

The post-war environment in Kosovo and Metohija, embodied in institutional parallelism, remained „mired" between the Serbian insistence on respecting UNSC Resolution 1244,[2] i.e. the Albanian insistence on realizing the illegal self-proclaimed

[1] The paper was created as part of scientific research work SRO under the Contract concluded with the Ministry of Education, Science and Technological Development No. (451-03-47/2023-01/200184), from 01.01.2023. year.

[2] The resolution of the United Nations Security Council defines the autonomy of Kosovo within the sovereignty of the Republic of Serbia, in accordance with respect for international public law, i.e. inviolability of the territorial integrity and sovereignty of states, then the Final Act from Helsinki and

secession personified in Ahtisaari's supervised independence from 2008.[3] Keeping in mind the current state of affairs, it can be justified to say that the frozen conflict in practice demonstrated the current „best possible solution“, affirmed in ethnic-geographic division with some kind of security by international forces. The atmosphere of „frozen peace“ began to collapse with the intensification of unconstitutional technical (2011) and political (2013) agreements in Brussels (Мировић, 2019; Ђурић, 2014).

The agreements were signed in the atmosphere of the proclaimed ultimatum of re-entering the war with the Albanians (cf. Janev, 2013, 291), although after many years of dialogue it was concluded that the alleged ultimatum pressures were only a mantra to overcome the current political problems and preserve the ruling coalition since the fall of the government in Serbia (Самарџић, 2018, 139). This is indicated by the fact that due to the long-term failure in the dialogue, the Serbian government at a certain point had to change its orientation and return the Kosovo issue to the UNSC, where it has the support of the sovereigns of Russia and China (Subotić, 2020, 128). However, the comprador political elite (Ђурковић, 2014) maintained the „Kosovo for Europe“ course, and the signed agreements led to the establishment of a hybrid legal order, whereby the RS participated in the integration of its national institutions into the system of self-proclaimed independent Kosovo. Integration took place in place of the (still non-existent entity) Community of Serb Municipalities (CSM), on the basis of which the Serbian people could defend their collective interests and rights by participating in the Government of Kosovo.[4]It is a paradoxical fact that only the agreements that benefited Kosovo's independence were implemented, while the CSM is still the subject of "two sides" dispute over its Statute. In my paper, I start from an attempt to explain the social and legal status of the Serbian community, i.e. the model of the legal form of the agreed entity of the Serbian community, as the ultimate outcome of the „normalization of relations“, through the concept of one-sided ethnic violence of Albanians against Serbs. The aim of the paper is to answer whether the „Brussels peace project“ along with the international favor towards violence against the Serbs, traced the process of "normalization" and thus in practice created a kind of engineering against the Serbs? Finally, in the paper I defend the thesis that unilateral ethnic violence against the Serbian „minority“ is the initial and definitive model that paves the way

the Constitution of the Republic of Serbia, according to which Kosovo and Metohija are an integral and inalienable part of its territory. For more information, see : https://unmik.unmissions.org/sr/rezolucija-ujedinjenih-nacija-1244

[3] Comprehensive Proposal for the Kosovo Status Settlement (2007). For more information, see: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kossev.info/wp-content/uploads/public/dokumenti/Sveobuhvatni%20predlog%20Martija%20Ahtisarija.pdf

[4] The agreements actually defined Kosovo as a new legal entity with customs, judicial, police and other state-building systems, on the basis of which it forms territorial integrity on the entire territory of the Serbian Province. More about the agreements, see at: https://kim.gov.rs/pregovaracki-proces.php

for the „normalization of relations“ and directs it towards the ultimate independence of Kosovo.

2. AGREEMENT ON THE COMMUNITY/ASSOCIATION OF SERBIAN MUNICIPALITIES OR ON ITS AMBIVALENT UNDERSTANDING

The Brussels Agreement from 2013.[5] and the draft from 2015, although again in an ambivalent manner, defined the legal abilities of the CSM.[6] The community is a legal entity that has its own Assembly, Council and Board with a president, vice-president and members in accordance with the laws of Kosovo, whose Statute will be reviewed by the Constitutional Court of Kosovo after its establishment (section 1, 2, 3). The Assembly with the President will have supervisory powers in strengthening democracy, education, economy, health, social protection in accordance with its own interests, and in the spirit of Kosovo laws (section 4, point j). The key thing is that the CSM has the right to propose amendments to the law, to participate in the processes before the Constitutional Court, and to own movable and immovable property.[7] The point of contention, due to which the agreement on the CSM has not been fully implemented to this day, concerns the alleged "executive powers" that, at least according to the Serbian negotiators and their interpretation of the Agreement, should have the CSM, whose Statute is formed by the Management Team from Belgrade (Vujačić, 2024).

Although the drafts are not explicitly defined in the Agreement, after its signing, the Serbian side highlighted in the foreground the executive powers that the Serbs from Kosovo will have in all areas based on the Republic of Srpska, and that the North, as Dačic stated, „will be part of our of the constitutional-legal system in the sense that a law on essential autonomy should be passed“ (Јединство, 2013, no. 15-16, p. 2), which ensures, as Vučić pointed out at the time, that with the verbal guarantees of NATO, the Albanian boot will not be able to set foot in the north of Kosovo (Јединство, p. 2).Such a course has been maintained, recently the director of the Office for Kosovo and Metohija, commenting on the statement of Matthew Palmer,[8] who emphasized that the CSM should be defined in accordance with the Constitution of Kosovo; argued that „it is important to understand that Serbian officials come to Brussels to negotiate because they do not recognize the so-called Kosovo and their constitution“ (Petković, 2021). Janjić also claims that it is still necessary to define whether the CSM will have executive or legislative power or only the possibility

[5] Officially, the first agreement on the principles governing the normalization of relations between Belgrade and Pristina.

[6] It is about the Agreement on the Association of Municipalities with a Serbian majority. The legal entity includes 10 municipalities with a Serbian majority, including the Dragaš Municipality inhabited by Muslim Goranians. For more information, see: https://kim.gov.rs/lat/p17.php

[7] Text emphasized by the author. See the Articles on Relations with Central Authorities and the section on Legal Capacity in the Agreement on: https://kim.gov.rs/lat/p17.php

[8] Deputy of the US Assistant Secretary of State for Western Balkan.

of coordination (Janjić 2021), because Serbia renounced its institutions in order to receive executive powers in return (Mitić, 2022). In fact, its essence is the legal framework, essential competencies and goals, so it cannot be reduced to an „empty shell“ (Petković, 2023). Although it has been established that the current course of the dialogue has been „seasoned“ with a national-populist approach with the aim of concealing unconstitutional agreements aimed at the independence of Kosovo (cf. Мировић, 2019), however, if the position is taken, as Đurić said, that „the Agreement is a turning point in a sincere Serbia's struggle to preserve its existence in Kosovo and Metohija (Đurić, 2019: 6 et seq.), and due to the ongoing dispute over executive powers, it is necessary, based on the acquired socio-political relations and current positions, to consider opportunities and opportunities that will undoubtedly direct the further course of the dialogue .

3. THE SERBIAN PEOPLE IN THE KOSOVO LEGAL SYSTEM AND/OR HOW ETHNIC VIOLENCE CONDITIONED THE OUTCOME OF THE DIALOGUE

For the unconstitutional First Agreement, an introduction has already been created to the previous so-called The technical dialogue from 2011, in which the negotiating team in front of the DP government made fatal obstructions to the territorial integrity of the RS. The key points of the „Technical“ agreement defined the borders and customs of Kosovo, eliminated UNMIK in its regional representation and handed over the cadastral books. The government from Belgrade thereby formed a kind of ramparts on the administrative line with Kosmet, which, in a boomerang effect, prevented it from having an adequate connection with the Serbian institutions in the Province.

Today, twelve years after the signing of the agreement, it is clear to everyone that Thaci[9] was right when he declared that the Agreement on Integrated Border Management under the supervision of EULEX[10] is in the service of rounding off national sovereignty and a practical demonstration of law and order in the North of Kosovo (RTS , 2011). As one foreign diplomat stated, the Agreement also serves to dismantle Serbian institutions in this part of the territory (Jevtić 2011), thus in the fight for the preservation of the state, the Serbs from the North were struck from behind (Мировић, 2019, 54). However, despite the concessions from the „Technical“ agreements[11] in the period before the signing of the First

[9] The former leader of the terrorist organization (UÇK-"KVK") was accused of war crimes and crimes against humanity. With the support of the West, he held numerous political positions in self-proclaimed Kosovo, even the position of "President of Kosovo", so that the Serbian Prime Minister and President would later be so humiliated that despite that, they talk to him in Brussels. For more information, see: https://sr.wikipedia.org/sr-el/%D0%A5%D0%B0%D1%88%D0%B8%D0%BC_%D0%A2%D0%B0%D1%87%D0%B8

[10] EULEX - EU mission for the rule of law in Kosovo.

[11] Due to the implementation of the agreement on customs of Kosovo in 2012. by the new SPP-SPS coalition government, the so-called The July crisis in the north. The general rebellion of the Serbian people was calmed by the intervention of the Serbian police and gendarmerie and plainclothes men

Agreement, the continuation of violence against the Serbs was visible, a significant part of which was carried out at the checkpoints taken over by the JIS in Pristina. The weekly newspaper "Jedinstvo" alone recorded 21 cases of various types of violence, from the desecration of religious and cultural heritage to one-way physical attacks, arrests and restrictions on freedom of movement.

Table 1.

Former Minister for Kosovo and Metohija G. Bogdanović states that the suffering of the Serbs during that period was a kind of „demonstration exercise", which demonstrated to Belgrade that the Albanians from Kosovo, with European support, are ready to do

YEAR OF PUBLICATION OF THE MEDIA JEDINSTVO – K.MITROVICA ; KOSSEV	JEDINSTVO – PRIŠTINA – K. MITROVICA DIFFERENT TYPES AND FORMS OF ATTACKS ON SERBS	IN TOTAL
2013. year. (period from 01. January to 19. April).	21	21

anything to achieve their goals (Bogdanović, 2011). The use of live ammunition by KFOR members in dealing with non-violent Serb protests is only part of the same campaign (Ђурић, 2019). The special blackmail and pressures of the Kosovo structures on the Serbian people, but also on its officials from Belgrade who led the first and second Brussels dialogues, were also implemented on the established border/Adm. line at the Brnjak and Jarinje crossings, because the said crossings were the only ones that enabled the physical connection of the Serbian people with central Serbia. Contrary to the obvious abuse of the Customs Agreement, which seeks to serve for further pressure, and the decade-long experience that the Albanians, with the support of the West, are carrying out on the Serbs, the new SPP-SPS negotiating team continues the diplomatic-negotiating „struggle" in 2013, in the „hope" that with additional (de)sovereignization ensure a normal life for Serbs. Thanks to the verbal guarantees received from NATO about the ban on the entry of paramilitary formations from Pristina to the North, but also the crazy idea that integration into the Kosovo order will provide security for the Serbs, the BA was signed and in it the agreement on the CSM, which should be an additional element in the defense of Serbian rights people. The proclaimed idea of the negotiations was that Serbia would maintain its

sent from central Serbia, of course, against their own natioal interests. For more information, see: https://rtv.rs/sk/politika/zandarmerija-uklonila-barikadu_301981.html

presence in Kosovo,[12] which is why the report of the Office states that the accusations that R. Serbia in the 2013 Agreement:

„agreed to the abolition of their own institutions of local self-government in the north of the Republic of Kosovo (are absolutely arbitrary). Arguments against such a thesis are contained in the fact that in the First Agreement, as well as in any other agreement from the Dialogue, there is not a single word about the local self-government institutions of the Republic of Serbia, which still exist and perform their social functions in the said territory. Moreover, in addition to the aforementioned institutions, the Serbs received the right to form the CSM, as an additional mechanism for the institutional protection of their rights in the Province, whose legitimacy was recognized by the entire international factor“ (Ђурић, 2019, 4-5).

YEAR OF PUBLICATION OF THE MEDIA	JEDINSTVO – PRISTINA – K. MITROVICA DIFFERENT TYPES AND FORMS OF ATTACKS ON SERBS	IN TOTAL
2013. год.	51	51

From the above, one can once again confirm the vagueness of the BA in which „both sides“ interpreted its content according to their own interests. This created a blurred path to the normalization of relations in which violence is the leading factor as a key factor in its implementation. Those familiar with the situation point out that the Serbian negotiating team entered the aforementioned talks ineptly, which is why, even though it „calculated“ that it would keep a certain part of the Serbian structures in Kosovo, it had to have an "ace in the hole" and that during the negotiations, the route of which was coordinated by a one-way stop ethnic violence at a certain moment and start boycotting the Agreement (cf. Subotić, 2020, 128). The following table shows that during the entire first ``agreement" year of 2013, violence was perpetrated against the Serbian community in the form of pressure to push Serbia's position out of Kosmet.

Table 2.

Therefore, the BA from 2013 did not contribute to the realization of peace in practice, even though in its content it clearly referred to the practical acquisition of territorial sovereignty of Kosovo. Despite the complete institutional integration, especially of the northern part, inaccessible to Kosovo Albanians until then, which represented an unprecedented obstruction of centuries-old Serbian statehood in the southern Province, the

[12] Although stated in the official document of the Office, the views on the intention for Serbia to keep its institutions in Kosovo are in contradiction with the Agreement itself, bearing in mind the fact that the text is based on defining the integration of Serbs into Kosovo structures and that it is only possible to establish the so-called horizontal ties with Serbia. In addition, this is confirmed by the fact that shortly after the agreement, the Government from Belgrade formed the Tempooraty Authorities from Serbian municipalities in Kosmet with a mandate of three months after the Agreement.

Serbian people, and thus the state of Serbia, are still subject to serious threats to life and property. Although it was noticed already after the first year that the „legal success“ of the Agreement, which the Government from Belgrade was proud of, did not lead to reconciliation, its implementation continued, which intensively rewrote Resolution 1244, the Constitution of Serbia and its preamble (Мировић, 2019, 42). The implementation of the agreement proceeded one-sidedly, first of all satisfying the interests of the Albanian „side“, thus ignoring the first six key points on the CSM. First, the citizens of the RS were integrated into the Kosovo system through the Albanian electoral system (especially citizens from the North),[13] then the police and civil protection personnel were integrated, then the agreement on freedom of movement by which Serbia recognized license plates with the markings of the Republic of Kosovo, a little later the formation was signed two companies in the field of telecommunications and energy, it is understood, within the Kosovo independent system. Despite occasional crises during the negotiations, Serbia did not significantly obstruct the dialogue, regardless of the fact that the violence against the Serbs did not stop. The intensity of violence against the Serbian people can be seen in the following table.

Table 3.

DIRECT VIOLENCE AGAINST THE SERBS IN KOSOVO DURING THE "NORMALIZATION OF RELATIONS"						
YEAR OF PUBLIC A-TION OF THE MEDIA	PHYSICAL VIOLENCE	PSYCHO-LOGICAL VIOLENCE	VERBAL VIOLENCE	SEXUAL VIOLENCE	ECONOMIC VIOLENCE	IN TOTAL
2013.	10	/	3	/	/	13
2014.	14	/	7	/	/	21
2015.	44	/	4	6	/	54
2016.	56	/	4	/	/	60
2017.	18	/	3	1	/	22
2018.	21	/	4	/	/	25
IN TOTAL	163	/	25	7	/	195

[13] The elections were held on November 3, 2013. Practice has shown that the Serbian people, especially citizens from the North, boycotted the elections in the hope that they would destroy the plans for integration into the self-proclaimed independent Kosovo system. However, with legal trickery and enormous violence directed above all at the employees of Serbian structures, a number of voters were influenced to go to the elections, which was presented in the media as a "satisfactory level" of turnout. For example, in the first round, only 2.1% of Serbs from the North came out, which is why ballot boxes in K. Mitrovica were broken by Serbian structures and the elections were declared invalid.

The greatest pressures expressed in various forms of direct violence, including attempts to rape Serbian girls, intensified in 2015 and 2016, during which most of the agreements were implemented. As many as 195 direct forms of violence against the Serbian community were carried out during the six years of dialogue, of which physical attacks were the most common, which in most cases were not subject to court proceedings. The process of implementing the agreement almost as a rule required the intervention of European mediators; this was certainly influenced by the number of violence, but also by the ambivalence of the agreement.[14]One characteristic example concerns the efforts of the Serbian community that the Statute and seal of the future CSM do not contain the coat of arms of the so-called Kosovo, but to be based on Serbian identity symbols, the tricolor and the coat of arms of the municipality, according to which the Community of Serbian Municipalities should have been a characteristic organization. However, the pressure of the JIS from Pristina to remove the inscriptions and symbols in the Municipal Statutes that contain the name „Serbia“ in their name, because it is not in accordance with the laws and symbols of Kosovo (KoSSev, 01.03.2014), has only once again shown that the implementation of the Agreement it will not follow the model "imagined" by the representatives of the Serbian community. It goes without saying that a significant part of the violence was implemented through the newly installed Kosovo structures. Only one example is related to the integration of the judiciary,[15] and it concerns the ultimate pressures during the „dialogue“. On this occasion, N. Kabašić, president of the higher court in K. Mitrovica states that:

„During the discussion on the implementation of the agreement in Brussels, it was agreed in principle between the three parties that after July 15, 2013, Serbian courts will mediate exclusively in litigation matters, and that EULEX will supervise the work of the courts until new courts are formed, based on the Brussels Agreement . After the signing of the Brussels Agreement in July of last year, the part of EULEX responsible for the judiciary became authorized to monitor the work of the courts of the Republic of Serbia on the territory of Kosovo and Metohija. And that was agreed in Brussels. This means that only EULEX had the right to enter the court, based on prior notice and agreement with us, with the aim of establishing that the Serbian side respects the agreements from Brussels, and that it acts in the manner agreed upon. In the last 6-7 months, EULEX visited the Serbian courts on several occasions and established that the Serbian side respects its obligations“ (Kabašić, 2014).

However, despite the Agreement from Brussels, immediately before the second meeting of the negotiators, the Serbian „parallel“ courts in the Republic of Kosovo were

[14] For example, the Serbian negotiating team tried to implement the Community of Municipalities with a Serbian majority, while the Albanian side insisted on an Association based on NGO powers without any legal legitimacy.

[15]About the integration of the judicial system, see: https://www.kim.gov.rs/p06.php

subject to violent and illegal intervention by the Kosovo special unit ROSU,[16] which directly put pressure on the Serbian negotiating delegation, but also paved the way for an insufficiently defined agreement, from of which the Serbian side, at least by proclamation, „planned“ to obtain greater benefits for the Serbian community. In order to briefly clarify the practice of the negotiation environment in Kosovo, I am showing a report on the aforementioned violence from the daily portal (KoSSev, March 4, 2014). Under the heading *"Members of ROSU storm the court"*, it says:

„This morning, ROSU members stormed the court building in Štrpce, which works as part of the judicial system of Serbia, and searched houses and buildings on Brezovica, in the village of Gotovuša in Štrpce“, while blocking certain road routes in several locations in Serbian areas. As the president of the High Court in Northern Mitrovica, Nikola Kabašić, reported for KoSSev, „we do not know the legal basis for this kind of action by ROSU, KPS, nor what they are looking for in the court building (...) according to Kabašić, the police ransacked the court in Štrpce , took out filing folders and other documentation, and it is currently being determined what was presented from the Court“ (...) „additional violence was perpetrated against the institutions of the Republic of Serbia in Štrpce, namely in the premises of the Republic Health Insurance Fund and the Office for Directorate and Construction. The president of the High Court, N. Kabašić, gave some specifics regarding the aforementioned violence, in which it is stated that: „thirteen police officers of the special unit (Rosu) surrounded the court building. All the police officers wore bulletproof vests, three were in uniform and armed and the other ten, including one woman, were dressed in civilian clothes, but also with bulletproof vests and light weapons. (Kabašić, 2014).

As reported by Serbian institutions and provincial courts, the unauthorized search without EULEX's response was perceived as a threat and directed ethnic violence despite the agreements in Brussels and is understood as an ultimatum before the final agreement. There is no doubt that the mentioned environment speaks of a breakdown of forces, whereby the Serbs and their institutions served as the object of violence, on the basis of which the direction of the dialogue was directed. In addition to direct violence, violence against Serbs was carried out through all possible mechanisms, and the object of violence was both private and public property of the Serbian people.

[16] Special police forces.

Table 4.

VIOLENCE AGAINST PRIVATE AND SOCIAL PROPERTY AGAINST THE SERBS IN KOSOVO DURING THE "NORMALIZATION OF RELATIONS"			
YEAR OF PUBLICATION OF THE MEDIA	VIOLENCE AGAINST PRIVATE PROPERTY	VIOLENCE AGAINST SOCIAL PROPERTY	IN TOTAL
2013.	2	2	4
2014.	22	7	29
2015.	20	4	24
2016.	53	8	61
2017.	38	5	43
2018.	76	13	89
IN TOTAL	211	39	250

The violence in the table shows the pressures in the form of desecration of personal and public property in Kosovo, which are often subject to unilateral institutional demolitions without the prior consent of the owners, who are Serbs according to usual practice. The demolished houses in Djakovica in the former Serbian street, as well as the houses in Vučitrn, are just some of the examples of structural violence against Serbian property. The obtained data show that violence has intensified in the last three years, although it was certainly not absent during the entire „dialogue“. If we add up the figures, 495 acts were committed against Serbs during the dialogue, just from the tables of direct and property violence. If we connect the intensity of the violence with the course of the dialogue, we will conclude that the violence of the Albanians against the Serbs intensified when it was important for the negotiations. Apart from violence in practice, pressures and blackmails were publicly manifested. Due to the insistence of the Serbian side on executive powers during the negotiations on the CSM in Brussels in June 2015, the dialogue is conditioned by the demand that the Serbian List vote for the Kosovo army in a package with the „Association of Serbian Municipalities“, which requires a change in the constitution (KoSSev, May 17, 2015). Just a few days after the mentioned condition, the member of the European Parliament and member of the CDU party of the German chancellor A. Merkel, Doris Pak emphasized that:

„The preamble to the Constitution of Serbia, which specifies that Kosovo is part of its territory, is not only inconsistent with the development of good neighborly relations in the region, but is also in conflict with the tendency of Serbia's membership in the European Union (...) Time will pass and eventually we will reach the point when Serbia has to recognize the independence of Kosovo. The EU cannot accept a state whose borders are not precisely defined. It's just not possible“ (Pak, 2015).

Along with the aforementioned pressures, Merkel's visit to Serbia in June 2015, which Mitić assesses was related to the demand for additional cooperation around the Community of Municipalities, which should be reduced to an „empty shell without essential competences“ (Mitić 2015). That the pressure and blackmail of European diplomats and the violence of Albanian structures did not pass without results is also clearly visible in the reached Agreement on the CSM signed in August 2015. In it, in addition to the ambivalent conclusions that are present again, there is no mention of the so-called executive powers that would be available to the Serbs in Kosovo and Metohija,[17] already in one perfidiously drafted text of the agreement, the fact is placed that according to already well-rehearsed practice and further, the „normalization of relations“ will trace and correct unilateral ethnic violence against the Serbs, with all possible favor and satisfaction of the euro - American promoters of „democracy“.

4. FINAL CONSIDERATIONS: CONSEQUENCES OF BRUSSELS ENGINEERING AND/OR WHAT IS LEFT OF THE LEGAL ORDER IN KOSOVO?

The question arises, what has been done in the name of inter-ethnic reconciliation in Kosovo twelve years after the beginning of the implementation of the „Brussels peace project'“? It was shown that direct violence against Serbs during the dialogue (2013-2018) increased by more than 450%, or by more than 22 times when it comes to endangering private and public property. The dialogue crisis is officially coming in 2018. with the introduction of 100% taxes on the import of Serbian goods, and to this day relations are marked by pronounced inter-ethnic intolerance. Despite NATO's verbal guarantees received by Serbian representatives in Brussels, seven military bases, so-called of Kosovo, embodied in the occupation and terror of the Serbian population. Under the stated conditions, under the physical coercion of the KPS, the agreements on license plates were implemented to the end, although with strong displeasure of the Serbs expressed in the blockade of public roads, after which there was a general boycott of Kosovo institutions (Lazarević, 2023). Albanians were appointed to vacant presidential positions, voted for by less than 3.5% of the voters and with a massive boycott by Serbs, and the most controversial decree on the opening of the bridge over the river Ibar was voted.[18]In addition, the payment of electricity in the North was also agreed, although in the conditions of the still unremoved bans of Kosovo on the import of goods from central Serbia and non-compliance with the CEFTA agreement.[19] The atmosphere of pressure and general dissatisfaction produced an armed rebellion and a clash

[17] About the text of the Agreement, see: https://kim.gov.rs/lat/p17.php

[18] A decision was also made to join "Northern" Mitrovica to the community of Kosovo municipalities, and they also changed symbols, language inscriptions and prepared the ground for the construction of Albanian houses. https://kossev.info/kosovo-vesti-nin-srbi-tatjana-lazarevic/

[19] Free Trade Agreement.

of a part of the Serbian clergy in the North with the special forces of Kosovo.

Ethnic violence against Serbs reached 470 crimes in 2021, and during the reign of A. Kurti, that number increased by 300%, which causally led to an enormous emigration of the Serbian people from a heretofore unrecorded 14% (Vučić, 2024).[20] After twelve years of 2dialogue“, Serbian hospitals and schools are removed under strong violence (KoSSev, 2024), and CSM is reduced in practice to a non-governmental organization, which in the long term resulted in even 40% fewer enrolled students than at the beginning of the dialogue, and only in the past two year, the number decreased by 1000 students (Marinković, 2023). Currently, the RS is under pressure to cancel payment transactions in dinars under the illegal decree of the Central Bank, and Kosovo is strategically approaching membership in UNESCO and the United Nations, which is defined in the offered French-German[21] plan for the final agreement (Vučić, 2023).The tightening of relations and additional pressures on Serbia were carried out by the arming of Kosovo by the USA, ignoring the agreements that explicitly treat Kosovo as an independent state (Milivojević, 2024). Under the aforementioned pressures, the ultimate solution for "normalization of relations" is offered, which is closest to the model that Kosovo and Serbia „recognize each other“ in the form of two Germanys (Proroković and Davidović 2021). The last proposal of M. Lajčak went in that direction, in which the CSM, in defense of its rights, makes itself available to own a lawsuit office, to advise and to propose changes to the law (Lajčak, 2023).

„This means that CSM will not enact laws“ (in the areas of supervision: education, culture, economy, etc.), „it will not enact decrees for the implementation of these laws - that will be done by the Government of Kosovo, but will supervise how these legal and by-laws are implemented in municipalities with a Serbian majority“. What the CSM will get here "only follows from the Constitution of Kosovo on the basis of the once rejected Ahtisaari plan" (quoted in Самарџић, 2018, 171). It can be assumed on the basis of the mutual relations during the dialogue but also the currently acquired negotiating positions, the „executive authorized“ represent just another element of the national-populist tactics of the domestic comprador „elite“ in tearing apart the Serbian people and the state, the consequence of which will be that Kosovo and Metohija remain only „virtual“ integral and an inalienable part of Serbia.[22] That's exactly why, the so-called The „Brussels peace

[20] According to unofficial data, as many as 40,000 have left Kosovo and Metohija in the past ten years, which would mean that only 80,000 Serbs remained. The question arises, isn't this silent ethnic cleansing?

[21] The final solution of the "normalization of relations" was recently offered, according to which Serbia should recognize the territorial integrity of Kosovo. According to numerous opinions, the Agreement is proposed as a condition for the formation of the CSM. For more information, see: https://www.blic.rs/vesti/politika/ovo-je-francusko-nemacki-plan-za-kosovo/34y04dc

[22] For example, Rohde (J. Rohde), the German ambassador in Pristina, recently stated that if Serbia does not recognize Kosovo, we will have a conflict. https://www.kosovo-

project“ does not personify a consensual solution, but a perfidious „ethnic engineering of the Serbs“ that produces an even deeper inter-ethnic rift. The “solution“ that is on the horizon, the Greater Albanian movement and its mentors will interpret not as Serbian willingness to compromise but as weakness. On the other hand, the new Serbian generations will set themselves the national goal of „liberating Kosovo“, and with the change in the hierarchy of world power, they will justifiably interpret this as increasingly likely" (Степић, 2018).

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Др Ђорђе РАДОВАНОВИЋ*

У ВРТЛОГУ АЛБАНСКОГ НАСИЉА ОД БРИСЕЛСКОГ МИРОВНОГ ПРОЈЕКТА ДО ЕТНИЧКОГ ИНЖЕЊЕРИНГА НАД СРБИМА

Апстракт

У раду анализирам део резултата добијених истраживањем српско-албанских односа током периода дијалога Србије и самопроглашеног независног Косова у Бриселу, на основу материјала добијеног применом методе анализе садржаја недељних и дневних медија у периоду од (2013-2018.) године. Добијене податке користим да бих испитао везу између једносмерног етничког насиља и тренутног/будућег социјално-правног статуса Срба на Космету. Резултати показују да је насиље утирало пут „правном моделу“ Заједнице српских општина супротно „очекивањима“ српског преговарачког тима, због чега се испоставља да је потписивање наводног ‘бриселског мировног пројекта’ у пракси довело до етничког инжењеринга над Србима.

Кључне речи: Србија, Косово и Метохија, Косово*, Бриселски споразум, „дијалог“ Београда и Приштине.

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SOCIOLOGICAL METHOD IN THE DYNAMICS OF LEGAL INTERPRETATION[1]

Summary

This scientific paper aims to highlight the theoretical and practical importance of the sociological method in the dynamics of legal interpretation and thereby confirm the greater social responsibility of the sociological method in the face of the challenges of the legal profession. All research techniques and theoretical principles are based on the cause-and-effect analysis of social interactions of social actors in social cohesion, since law is an objective, spiritual and normatively shaped social phenomenon that has a temporal and spatial framework. At the same time, law is also the subject of sociology, so it is not possible to ignore the social nature of law, which is present through the constant and mutual influence of law and society.

As social reality emphasizes that the state and law are always connected with society as a whole or with certain social phenomena, the sociological method in that context enables a better, more concise, more efficient legal interpretation, taking into account the complete social situation that law regulates and examines dominant social interests which are governed by law.

The sociological method, therefore, as the basis of the theoretical-methodological platform in this work, enables a more concise interpretation of law as a normatively sublimated social reality, because it is the only one that succeeds in empirically and sufficiently systematically examining and monitoring the functional laws of law as effective and acting phenomena.

Key words: sociological method, law, society, dynamics of legal interpretation.

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1. SOCIOLOGICAL ANALYSIS OF THE LAW

Legal science is increasingly equalizing the process of creating law with nomothetic or legislative method, that is, with procedural process of legal norm determination and deriving regulations that are strictly formalized, while insufficient attention is given to the content itself as well as application (enforcement) of such regulations. However, the aspect of creation and application of regulations is dynamic, at the same time, and variable, but also the social aspect of the law, thus, in creating and application of the law one can see its essence in the sense of a social phenomenon, that is, a specific method regulating social relations. In this sense, the mere creation of law may be labeled as “providing legal form to social reality” (Bovan, 2014a, 181). In this manner, two methods of creating law are defined: formal and material. The first one is related to the method of creating legal norms itself, that is, procedure of forming a norm, while the second method is labeled as the method of organizing social relationships, that is, specific procedure of defining a norm that regulates social relationships. Therefore, in this case, it can be concluded that we must never neglect the social side of the law even in the process of creating law. It is impossible to leave out social factors in the procedure of creating law, since “considering social factors is necessary for the fact the law is actually created with the purpose of achieving certain effects through its application, to organize the social relationships and stabilize them in a proper manner” (Stanković, 1998, 3).

Dominant traditions in the domain of creating law are the Euro-Continental and Anglo-Saxon. The first one is considered deductive since general legal norms are created based on legislative and other general legal acts, hence their application as such is reduced to individual legal norms. The second one, Anglo-Saxon model of law creating is labeled inductive, since general legal norms are created using precedents in case law. In addition to the aspect of legal science and traditions in the domain of procedure of creating law, this method of law creation may be analyzed from the aspect of consciousness. Therefore, depending on the role of the consciousness in the procedure of creating law we may speak of spontaneous and conscious creation of law. In this sense, spontaneous creation is linked to morale and customs, that is, legal norms that occur as the consequence of daily social interactions with no premeditated plan or awareness on their regulations.

This method of creation is characterized as spontaneous, non-formal, diffuse, disorganized, and the law created in this manner may become part of the positive (state) law when codified by the state. In this way a custom becomes common law, that is, social law becomes state law which confirms it once more as a social phenomenon.

The difference between the procedure of creating the law and the social law certainly exists since the state law is confirmed through judicial proceedings and state sanctions in cases of socially undesirable situations, which with social law this is not the case. Social law is dynamic, spontaneous and alive and it will not require the participation

of courts in regulating social interactions. Still, social relationships are present as factors with both types of the law, hence sociology explores the way social regulation unfolds in both cases.

In order for the law to be examined as a social phenomenon and a phenomenon shaped by norms, it was necessary to observe it from the aspect that would be able to follow the normative and sociological dimension of the law. Relatively new aspect of sociological review of the law analyzes two important elements of the law: essence – social interaction and structure – legal form. Any attempt of a more precise systematization is impossible to perform, thus, this systematization is of a general character. Complex nature of the social interaction phenomena has a very important feature *ars inventoriae*, implying constant creation of new and changing of existing discourse (Visković, 1997, 3).

Sociological and legal aspect therefore manages to unify, in an integral manner, the essence and structure of the law by following its variable social nature. Namely, the law and all its constitutive elements and concepts should be understood in jurisprudence as well as life, from the *internal perspective* (Coleman, Shapiro, Himma, 2002, 15). This actually means that the *internal perspective* means the method of thinking under which a person considers the *reason to act* (*op.cit.*) under a certain rule (norm). Therefore, returning to classical tradition is based on the *theory of reasons to act*, where the reasons are normative, but not in content, but normative in the sense of relationship towards authoritative rules in legal norms (*op.cit.*). The law is, therefore, nothing else than a justified reason for people to act, that is, for the society to react to authoritarian rules labeled as legal norms. Social interactions are therefore consequences of authoritarian character of rules expressed in legal norms. Also, it is important to point out the necessity of existence of the *reason* (rule – legal norm), otherwise, social life would be in defect (*op.cit.*).

In this context, the legal norm – rule, the law or *reason to act* is like a remedy for all defects, as well as potential defects that may arise from social interactions. If the focus is transferred to social interactions, and the law is observed only as a social phenomenon, social relations become a material substrate of the law including the ones that create negative effect such as social conflicts, thus it is agreed upon that the law is under an impact of social existence, and that it is, in this sense, autonomous and formalized through legal norms.

Hence, it can be concluded that "each item, included in the general life of the society, and the same time and in the same interaction must be included in the law" (Rawls & Durkheim, 2019, 28-29). Observation of mutual relationship of the law and the society, the social and legal aspect analyzes in detail and emphasizes the source, goal and functions of the law in the society. Therefore, we can classify three important elements of law: social interactions, values and norms as well as elements of the law, that are the source of the law at the same time. Social relations are, therefore, material sources of the law, legal values are sources of values (ethics) of the law, while legal norms are formal sources of the law (Visković, 1981, 83). But not all social relationships are subject of experience of legal

scholars, only those that allow the possibility of public control and physical enforcement and contain the conflict of interest jeopardizing the current social systems. Conflicts are key to social systems, that arise from interactions that satisfy basic natural and social needs and interests of a man – biological, economic, political (Visković, *op.cit*).

Studying law is implemented through the application of sociology of law by performing an analytical exercise in social interactions, not in legal forms, since "the life of the law is not managed by logic, but experience of social existence" (Gurvitch, 1963, 188), since the actual concepts are relative and methods of interpretation must consider conflicts between social groups (Gurvitch, *op. cit.*). Thus, social interactions are marked as material basis of the law, since such approach to the law entails studying law as a social reality in two ways: from the inside – essentially (content of the law) and from the outside – structurally (constitutional elements of legal norm).

2. COMPLEMENTARY ROLES OF SOCIAL AND NORMATIVE METHOD IN DYNAMICS OF LEGAL INTERPRETATION

The procedure of legal interpretation insists on the mandatory application of sociological method, with joint complementary action with normative method. Even though it is present in different areas of legal interpretation, the application of social method differs in the area of discovering the law and in the area of legal method. The area of discovering the law demands a two-fold role of the sociological method, thus, for the detection of certain social side of the law it shall be applied individually, while in the legal method it can be used as auxiliary method with the normative one or any other method in the procedure of creating and applying law, when it is complementary jointed with other methods.

Process of creating and preparing the law are a matter of case law that "may be studied from different aspects, for example, when exploring the impact of different social factors to decision making of judges, when we question how a sociological expertise (knowledge sociology provides on the society) impacts application of the law, when we explore the place of judiciary within the system of division of power, when we explore social features within the judicial class and its impact to decision making, when, from a subjective, actually social – psychological position, we direct our attention to other participants in the judicial procedure (parties in litigation, victims of a crime, perpetrators, jurors, plaintiffs, defendants) etc." (Bovan, 2014b, 117). It is necessary for the court proceedings, as well as sociology of law, to apply knowledge that has been gained by applying sociological method, since this enables detection of social, psychological, cultural and natural factors that impact the procedure of creation and application of law. In this sense, it can be said that "sociology of law is a special sociology that explores the interaction between the society and the law. Sociology of law is pretty abstract and undefined, imprecise to say the least. In literature we can find it in different variations, thus, for example, it is said that the sociology of law studies social side of the law, the law as a

social concept, social basis of the law, impact of the society to the law, etc." (Bovan, 2004, 109-120).

Key factor in the process of defining positive law is the dynamics of social cohesion, that is, frequency of changes in the society reflected on the content of legal norms during their creation. Dynamics and social variability must be considered during the process of legal norm determination; hence the legal norms shall change in line with social changes. It can be said that the law is nothing else than justified reason for people to act, that is, the society to react to authoritarian rules branded as legal norms. Social interactions are therefore consequence of authoritarian character of rules presented in legal norms. With this, one should stipulate necessity of existence of reason (rules – legal norms) otherwise the social life would be in defect (Coleman, Shapiro, Himma, *op. cit.*). In this context, legal norms must be aligned with social changes regardless of whether they are a result of evolution or revolution. In addition to legal norms, moral norms are also subjected to certain level of transformation (Perović, 1975, 163) since moral norms essentially follow the variability of social cohesion set in time and space since the "time and space are most obvious concepts; thus, they are never disputed" (Lukić, 1992, 54). Space (place) and time are, as Kant points out, *a priori* concepts without which it is impossible to deliberate on the world, since the time is a measure of duration, existence of things, phenomena and the world.

In this concept, the procedure of creating legal norms, that is, creating positive law implies the application of tradition and natural law since the natural law is universal. Therefore, the natural law does not recognize classes since it is super-national, super-positive, original and it serves justice and mankind, not injustice and autocracy. Finally, it is important to point out that the positive law ideologically always relies on the natural law to be considered a law beneficial for a country, that is, a society. In this sense Tasić points out: "Regarding positive law, whatever type it is, it cannot be imagined without social discipline and will, where both are understood as complex and variable concepts. There is a special form of discipline or peaceful will, which means to know how to compromise your own interests and benefits or know how to be tolerant to the opinion of others, in general interest and in the interest of a new legal order. This method of acting may not be branded as betrayal of ideals… This is true idealism" (Tasić, 2002, 81). Also, Tasić states: "Compromise understood in such a way bears the characteristics of solidarity that, after mitigating the strict character of the demand, paves the way for a more solid solidarity" (Tasić, *op. cit.).*

The best example of the law as social phenomenon is the positive law as purely social creation since it is applied among people (society), it exists within the minds of men and regulates their behavior. Therefore, the law cannot be observed only as a normative, or ideal notion that exists on its own and only for its own benefit since the law exists among the people, in their minds, and for the people. The example of creating legal norm, when the creator of legal norm must consider the fact it is part of the society, part of certain social

culture, part of current law, thus the law continues on the creator in positive or negative sense in the process of norm creation, it is clear to what extent and in what way the law is connected to the society. This is the reason why studying law demands the application of not only normative, but also the sociological method.

As such, the sociological method was properly created on the basis of two completely different perspectives on the society with, on one side, the consensual sociological theories – in which the society is based and maintained on the basis of organic solidarity (Диркем, 1972) or interest – agreement on values (consensus) among people, while on the other side we have conflicting sociological theories in which it is proven that the society is based and maintained by forced regulation of interest and value conflicts among the members of inequal ruling and non-ruling social classes and layers (Jogan, 1978). As such, sociological method in law has been created based on two completely different perspectives on the society, with, on one hand, we have consensual sociological theories – in which the society is based on and maintained on the basis of organic solidarity or interest – agreement on values (consensus) among people, while on the other side we have conflicting sociological theories in which it is proven that the society is based and maintained by forced regulation of interest and value conflicts among the members of inequal ruling and non-ruling social classes and layers (Jogan, *op. cit.*). Since the subject of research always determines the methods of research (Visković, 1980, 3), studying law entails all theoretical settings and technical procedures enabling cognition, as well as practical processing of specific and necessary subject of experience of legal scholars (Visković, *op. cit.*).

The set goal of this paper is exactly emphasizing the role and significance of the sociological method in teleological and hermeneutical sense, where the law is analyzed as a complex phenomenon whose nature and structure should be reviewed inter-disciplinary since the law, in addition to its values and norms, has a social nature that occurs from mutual interaction of the law and the society. Social side of the law comes from the mutual relationship between the law and the society, the function of the law in the society and the function of the society in law.

Considering the social side of the law, sociological analysis of the law in theory and in practice applies the sociological method in get results as precise as possible. Sociological method may, therefore, in studying law, find its application in legal theory – science and in legal practice – operation of judiciary. In both cases it explores the sociological context of the law, where in first case this is done in an abstract, and in the second case in a specific, empirical manner. The term “sociological method” is just a common name for a larger number of different theories on the composition and dynamics of social phenomena that are serves a hypothesis for further learning and practical processing of social phenomena in general and separate legal concepts, where there is also a difference between sociological procedures and exploration methods (Gilli, 1974).

Sociology, therefore, cannot study the law using only one method, here we are talking about the application of a large number of different methods to fully investigate the complex, dynamic and variable social essence of the law, based on cause and effect. This is why sociological method is included in the group of cause-and-effect methods that empirically study the law determining causal and also non-causal rules (functional, developmental, etc.) of the law as concepts that cause action (Lukić, 1965, 35). "Since the goal of science is acquiring knowledge, the scientific method is an element internal structure of science that shows us how is the knowledge reached, that is, how scientific activity is developed and performed" (Bovan, 2014a, 18). Finally, the method includes elements that are of significant importance for acquiring new knowledge in science, as well as verification of acquired knowledge.

"The structure of the scientific method includes three elements: theoretical, technical and logical. A method is very often equalized with one of stated elements in literature. Most frequently, the method is aligned with its technical element when the method entails only different techniques of collecting and processing data (these techniques are mostly called scientific method in a narrow sense)" (Gilli, *op. cit.*). These are the tools that may be used to learn a subject, that is, specified procedures, as well as assets used to detect features of the subject that is the goal of scientific research (Lukić, 1975, 47-48). A good portion of modern legal theory opposes separation of any method that is applied in research of legal and other social phenomena. In this manner, sociological and normative method are connected and are mutually complementary and presupposed, even though essentially they are different since one of them is realistic and the other one idealistic, still, they are complementary and share the same function. This is quite justified and understandable since the law is an ideal and realistic notion that exists to achieve certain social goals.

Since the normative method is unable to study law as isolated spiritual creation, outside of time and space, it must consider social elements of the law in addition to its normative structure. The role of the normative method is to detect content through interpretation, that is, law and precise meaning of legal form (Mitrović & Bovan, 2011, 333), used to detect logical nature of legal norm, identify elements that comprise it, search the method of connecting these elements into the norm and finally, normative method explores interactions between norms (legal effect and hierarchy among norms) and in what way the norms are connected into a legal order (*op. cit.*, 334). Unfortunately, the normative method fails to scientifically explain the law and the interaction between the law and the society in full, so the role of the legal method is more of a descriptive nature with the ability to merely describe the law. The essence is reached only with complementary action of the sociological method, since it is necessary to detect social causes of occurrence of the law, and then determine the role of the law in society and vice-versa. The only successful method for this is the sociological method that will be applied when the law is observed is a narrower sense (sum of legal norms).

Sociological method shall, therefore, endeavor to determine the law as a norm that occurs under the impact of a number of social phenomena. Additionally, it will explain the manner in which the law functions, as well as factors of efficiency, goals accomplished by the law and effect of the law on a society. This means that the sociological method is interested in effect of legal norms on the society and causes leading to partial or full failure of effect of legal norms in the society.

Accordingly, sociological method deals with issues related to social powers impacting creation of certain legal norms and their interpretation as normatively arranged interests represented by dominant social groups. As the normative method fails to provide answers to questions related to social causes leading to creation, interpretation and application of legal norms as formal social will, it is necessary to apply complementary joint action of sociological method in the procedure of legal interpretation. Among others, the interpretation of the law cannot be envisaged without the application of normative and sociological method that must be mutually complemented and presupposed.

3. SOCIOLOGICAL METHOD IN THE DYNAMICS OF LEGAL INTERPRETATION

Sociological method primarily deals with observation and exploration of real concepts, which is certainly human behavior and its related interaction with other people, that is, interaction of human reactions to the presented model of behavior in legal norm. In case of comparison between what was presented as a model (rule) of behavior in legal norm, and the legal awareness of a man on such set rule, we can reach a very frequent situation, which is existence of non-conformity between what should be (rules and obligations in legal norm) and what is (legal consciousness of a man, that is, how a man understands and accepts what is presented as a model or a rule of behavior).

As there is dissonance between normative and actual, that is, ideal and real, to detect such differences that cause such dissonance, sociological method is required that detects the norm as a social reality, where the legal norm is an ideal scenario, thus, it is necessary for the legal method to participate in the procedure of research. By detecting differences between the actual social reality and the law determined by legal dogma, a task is given to the sociological method to determine where these differences are coming from. As an empirical method, sociological method explores human legal consciousness when considering written as well as unwritten law. Differences between social reality and written law, as the task of a sociological method is not very difficult since it is easy to see the difference between written law and the law presented in social reality. It is much more difficult to spot the difference between unwritten law and the law existing in human mind, that is, common law. In this case there is a common rule everybody knows and keeps in mind, but still people behave contrary to what they know and what they have in their mind as unwritten norm. Sociological method sees the difference existing as valid (written) and actually valid, that is, the one that is applied.

Procedures followed by the sociological method in research of the law are not significantly different from general procedures of sociological research – they are simply the application of general procedures to the law (Šušnjić, 1973, 307-319). The main methods of collecting, processing and interpretation of data are formulation of the problem, setting hypothesis, operationalization of concepts, records, analysis, interview, survey, experiment, statistics, or conclusion drawing based on deductive and inductive analysis of data received.

These methods are usually present in the domain of investigation of the legal practice, while the procedure of research in legal science is far more complex whether for the purpose of legal education or purely scientific research of the law that may have a very abstract theoretical character. If the sociological method would be excluded from the procedure of law interpretation, the law would be observed as absolutely ideal concept existing outside of space and time, independent, without its beginning and the end, without the cause of occurrence, without the purpose of existence and in this sense, without significance. However, the sociological method cannot provide answers to all questions, such as the content of legal norm and the issue of normative elements comprising the norm, thus the normative method always precedes the sociological method hence the sociological method defines its domain of study in a more precise manner. After the norm becomes known, its link to the society is examined, that is, realistic factors of norm's content, which is the subject of sociological research. When the legal method learns the content of the legal norm, the sociological method explores why the content of a legal form is as it is, specifically, how is it reflected on the social cohesion.

Legal norm has its role in the social function, in the accomplishment of a certain social goal, and this speaks of the social impact to the content of the norm, and the norm to the society. This relation is explored by the sociological method, and which social factors formed the content of the legal norm, and how the norm impacts the society considering full social situation regulated by the law, and then, investigating what are the dominant social interests applied by the law, in an effort to reach the actual meaning of the legal norm. In this sense, the law is a "system of state and social norms that forcefully direct the most important and the most conflicting human interactions to accomplish peace, security, justice and other socially dominant values" (Visković, 2001, 117). Therefore, the structure of a legal norm will not be defined by a logical design, but the necessity, relationship between the powers, goals of the society. Social relationship formed by norms becomes, therefore, a positive law including all aforementioned substrates of social cohesion. The law that has an *a priori* character, to get the positive legal affirmation, must pass *a posterior* filter of justice thus getting its positive legal materialization.

In this way, the law becomes matter and ceases being a theory since its concretization replaces abstract, imagination is replaced by realization through case law, enabling the law to prove and show it's *a posterior* nature using empirical statement of case law.

The process of detecting true meaning of legal norm is the procedure in which the interpreter cannot be free in adopting final decision because if we use the example of judicial regulation, the judge will not be essentially different from any individual, but, his action will be backed by the factual monopoly of enforcement, that is, the state. The judge, in this sense, as any other citizen, has its own view of things when it comes to the interest of the law to protect. However, the procedure of interpretation and application of the law by legal practitioners (judges) starts with the process of collecting and processing facts, followed by classification and determination of the same with the goal of reaching the final decision. After fact processing that is implemented through the process of court expertise, the process of connecting facts follows that is performed based on the estimate of significance of facts for the given case to be resolved. Connecting and assessment, as well as interpretation of facts can only be done using the method of sociological conclusion drawing used by judges in decision making. Each judge certainly knows or feels to what extent relevant experience is important to adopt a court decision (Rüthers, 1999, 377) in order to finalize court proceedings.

Since the criteria of interpretation is within the mind of the interpreter, as Hasemer considered (Rüthers, 2009), even in routine cases the judge must be careful in adopting decisions and must be aware decisions made will impact human destiny. Decision of the court therefore cannot be free; it is necessary to establish method in this freedom to avoid arbitrariness. The judge, as an interpreter, is obligated to consider all circumstances of the given social atmosphere and stick to the opinion of the creator of legal norm during its creation, as pointed out by A. Boeckh, constant research of author’s words is necessary (Böckh, 1972, 11).

True meaning of legal norm must, therefore, be limited with given language and logical interpretation, so the judge, before adopting the final decision, acts within certain limits. In case the judge considers that the law does not protect the interest it should protect, the judge is obligated never to cross the limits set through his arbitrary opinion. Only in case when the decision is adopted with just cause and with sufficient purpose, we may speak of justice that is aligned with current value dynamics of the system of a society that is adequately harmonized with the dynamics of legal interpretation.

4. CONCLUSION

Since the law is created through social interaction, its complex internal structure is a consequence of objective spiritual and social nature formed by norms that, as such, has its time and spatial determinant. The law, as a social concept, is the subject of study of sociology, as well as other social sciences where research methods and theoretical principles are based on the cause-and-effect analysis of social interactions that are a necessity of human existence, that is, society.

Specific link between the law and the society is best seen if the law is observed from the sociological aspect, as the form of social existence. If the law is a solid, coherent and hierarchical system whose structure is greatly impacted by needs, the balance of power and the goals of a society, that is, of a state, it is important to investigate why the content of a legal norm is as it is, specifically, which social factors shape the content of a legal norm. In this case, legal interpretation must follow the dynamics of full social situation regulated by the law, and then, dominant social interests followed by the state are investigated.

Application of a sociological method investigates, in a unique and systematic manner, empirically, the functional rules of the law as acting concepts, in the process of creation, interpretation and application of law. In this manner, sociological method may fully observe the variable social dynamics in the best possible way, and align it with the dynamics of legal interpretation, which means better, more precise and clearer awareness of social interactions as causes and consequences of a complex relationship between the law and the society, in the domain of legal science and legal practice.

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Александра МИТРОВИЋ*

СОЦИОЛОШКИ МЕТОД У ДИНАМИЦИ ПРАВНЕ ИНТЕРПРЕТАЦИЈЕ

Апстракт

Овај рад има за циљ да истакне теоријски и практичан значај социолошког метода у динамици правне интерпретације и тиме потврди већу друштвену одговорност социолошког метода пред изазовима правничке професије. Све истраживачке технике и теоријски принципи заснивају се на узрочно-последичној анализи друштвених интеракција социјалних актера у друштвеној кохезији, будући да је право објективна духовна и нормативно уобличена друштвена појава која поседује временски и просторни оквир. Право је истовремено и предмет изучавања социологије, те није могуће занемарити социјалну природу права присутну кроз константан и узајаман утицај право и друштва.

Како друштвена стварност наглашава да се држава и право увек доводе у везу са друштвом у целини или појединим друштвеним појавама, социолошки метод у том контексту, омогућава квалитетнију, концизнију, ефикаснију правну интерпретацију узимајући у обзир комплетну друштвену ситуацију коју право регулише и испитује доминантне друштвене интересе којима се право води.

Социолошки метод, стога, као основ теоријско-методолошке платформе у овом раду, омогућава концизнију интерпретацију права као нормативно сублимиране друштвене стварности, јер једини успева да емпиријски и довољно систематично испита и испрати функционалне законе права као дејствујуће, али и делујуће појаве.

Кључне речи: социолошки метод, право, друштво, динамика правне интерпретације.

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