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- Standby letter of credit as a means of security
- Media and criminal behavior
- Fraud in the field of industry and production
- Mistake in the criminal law
- The impact of artificial intelligence (AI) on education
- Crimes against humanity
- Aspects of public relations
- Local self-government in Serbia
- Forging payment cards and cybercrime
- Juvenile imprisonment
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- Human rights after the COVID-19 virus pandemic

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STANDBY LETTER OF CREDIT AS A MEANS OF SECURITY IN INTERNATIONAL CONTRACTUAL RELATIONS

ABSTRACT: The subject of this paper is a type of letter of credit that is not commonly encountered in the practices of domestic banks. It is not specifically regulated by domestic legislation; however, its significance is expected to grow in the international business relations of our businessmen with companies from other countries where the use of this payment security instrument is common in the banking industry. This type of letter of credit is theoretically of disputed legal nature, raising questions about whether it qualifies as a letter of credit, a type of guarantee, or a distinct legal institute. The focus of the research is on the standby letter of credit as a security measure in international contractual relations, particularly in sales and construction contracts. In sales contracts, the standby letter of credit serves to secure the interests of the seller, while in construction contracts, it can secure interests of both the client the contractor, depending on the party for whose benefit it was issued. The paper aims to define the standby letter of credit, explain its role in protecting the rights and interests of contracting parties, and explore its legal nature. In particular, we will conduct a comparative analysis between this legal institute and a 'classic' documentary letter of credit and a bank guarantee. In our legal theory, and to a greater extent in American and English legal theory, there are numerous works that deal with the topic of standby letters of credit. However, the legal regulations related to banking operations have changed

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over time, which requires a fresh perspective. The goal of this work is to familiarize our companies and banks engaged in transactions with foreign entities, where the issuance of this type of letter of credit is customary, with the role of a standby letter of credit as an instrument for ensuring contractual obligations. In addition to that, the paper aims to explore the legal relationships established with this type of letter of credit.

***Keywords**: standby letter of credit, documentary letter of credit, bank guarantee, international contractual relations.*

1. Introduction

Standby letters of credit were created in the United States of America (hereinafter referred to as the USA) after the great economic crisis that lasted from 1929 to 1934, as a need for banks based in the USA to provide assurance that their clients – American companies will fulfill their obligations from of the basic work that they have undertaken towards foreign companies. Under the basic work, we understood the sales contract, the construction contract, the contract on the performance of investment works. "In the USA, after the banking crisis of 1929, it was forbidden to issue bank guarantees" (Vukmir, 2007, p. 262), i.e. "according to domestic regulations, American banks are not authorized to issue independent bank guarantees" (Vukadinović 1987, p. 449). Banks in the USA were "not allowed to be sureties, which meant they could not issue guarantees in the traditional common law sense. In such circumstances, it was natural to avoid the nomenclature of "guarantees" in describing this new form of undertaking" (Ellinger & Neo, 2010, p. 303). After the adoption of the Uniform Rules for Documentary Letters of Credit by the International Chamber of Commerce in 1933, American banks, in order to preserve their competitive positions in relation to European banks, began to apply a new instrument of international payment called a standby letter of credit. Pavićević (1999) points out that "banks in the USA are not authorized and therefore do not have the right to issue bank guarantees with the obligation to pay at the first call and without objection, in that case US banks would be uncompetitive, because their clients would be at a disadvantage when participating at international auctions" (p. 208). "Standby letters of credit have been used for many years in the USA, Canada and Japan, but were relatively less known in European banking practice" (Vukmir, 2007, p. 260).

The term standby itself means a state of readiness, i.e. to be in a state of readiness, so this type of letter of credit could be translated as a standby letter

of credit, that is, a letter of credit that is activated when a certain condition is met, i.e. when the debtor from the basic business does not fulfill his obligation or if he does not fulfill his obligation within the agreed period. In our theory, standby letters of credit meant "guarantee letter of credit" (Carić & Hribovšek, 1990, p. 188) or "credit with deferred payment" (Stojiljković, 2003, p. 208). In this paper, we will use the term in English because this term is generally accepted in international business practice, domestic and foreign legal theory, as well as in the international sources of law that regulate this legal institute.

2. Sources of law for standby letters of credit

In our positive law, the letter of credit is regulated by the provisions of the Law on Obligations from Art. 1072 to Art. 1082; however, there are no provisions governing the standby letter of credit. This is understandable because the standby letter of credit appears primarily in international business relations, so this legal institute is regulated by international sources of law, namely: Uniform rules and customs for documentary letters of credit from 2007 adopted by the International Chamber of Commerce, Publication MTK 600 (UCP 600), International Standby Practices ISP 98 adopted by the International Chamber of Commerce in 1998 (ICC Publication No 590) and the United Nations Convention on Independent Guarantees and Standby Letters of Credit, adopted by the UN General Assembly on December 11,1995, which entered into force on January 1, 2000. The UN Convention on Independent Guarantees and Standby Letters of Credit has so far been ratified by eight UN member states, so the dominant sources of law for standby letters of credit are represented by the rules adopted by the International Chamber of Commerce, namely UCP 600 and ISP 98. According to Article 1 of the UCP 600 Uniform rules and customs for documentary letters of credit, Revision 2007 MTK publication no. 600 (UCP) are the rules that apply to each documentary letter of credit ("credit") (including, to the extent applicable, to each standby letter of credit) when the letter of credit expressly indicates that the letter of credit is subject to these rules. They are binding on all participating parties unless expressly modified or excluded in the letter of credit. It follows from this provision that UCP 600 will be applied to the standby letter of credit, provided that their application is foreseen in the contract between the bank and its client who gives the order for the opening of the letter of credit, with the contracting parties having the possibility to provide for modification or exclusion in the letter of credit opening contract application of certain rules. In addition, this provision indicates that not all provisions of these rules can be applied to

standby letters of credit precisely because of their specific legal nature, and for this reason, it is stipulated that these rules will be applied "to the extent that they can be applied to each standby letter of credit". If we look at the structure of the UCP 600 rules, it is evident that these rules primarily regulate issues that are key to the functioning of a documentary letter of credit, and to a lesser extent issues that are important for a standby letter of credit. On the other hand, ISP 98 contains rules that regulate standby letters of credit in more detail, that is, these rules regulate in more detail the issue of mutual obligations of participants of standby letters of credit, submission of documents, types of documents that are submitted during the realization of standby letters of credit. According to Article 1.01 b ISP 98, "a standby letter of credit or other similar undertaking, however named or described, whether for domestic or international use, may be made subject to these Rules by express reference to them" (Goode, Kronke, McKendrick & Wool, 2007, p. 245). Whether UCP 600 or ISP 98 will be applied to the standby letter of credit depends on the will of the contracting parties who conclude the contract on opening this type of letter of credit. The question arises as to which rules will be applied if the contracting parties refer to both UCP 600 and ISP 98. The answer is found in Article 1.02 b of ISP 98 according to which "these Rules supersede conficting provisionsin any other rules of practice to which a standby letter of credit is also made subject" (Goode et al. 2007, p. 245).

3. The concept of Standby Letter of Credit and the legal relationships that exist with Standby Letter of Credit

According to Article 1.06 of ISP 98, a standby letter of credit is an irrevocable, independent, documentary, and binding undertaking when issued and need not to state" (Goode et al. 2007, p. 246). Three basic features of the standby letter of credit derive from this provision, namely irrevocability, independence in relation to the main business and the documentary character of this legal institute. Irrevocability means that "an issuer's obligations under a standby cannot be amended or cancelled by the issuer except as provided in the standby or as consented to by person against whom the amendment or cancellation is asserted" (Article 1.06 b. ISP 98, Goode et al. 2007, p. 246). The independence of the standby letter of credit implies that "the enforceability of an issuer's obligations under a standby does not depend on: i. the issuer' right or ability to obtain reimbursement from the applicant; ii. the beneficiary's right to obtain payment from the applicant; iii. a reference in the standby to any reimbursement agreement or underlying transaction; iv. the issuer's

knowledge of performance or breach of any reimbursement agreement or underlying transaction (Article 1.06 c. ISP 98 Goode et al. 2007, p. 246). The documentary character of the standby letter of credit implies that "an issuer's obligations depend on presentation of documents and an examination of required documents on their face" (Article 1.06 d ISP 98, Goode et al. 2007, p. 246). We note that in this provision the term "required documentation on their face" is used for the review of documents, which could be translated as required documents by their appearance, and the same term is also used in UCP 600 in the part "Standard for Document Review" in Article 14 and where it is stated that a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

"In transactions in which a standby letter of credit is used, the bank agrees to pay the financier if the debtor defaults upon his obligation to pay" (Banks 1984, p. 71).

Pavićević (1999) defines a standby letter of credit as "a letter of credit in which the bank undertakes according to its beneficiary, that on the order of his client (principal), he will pay him a certain sum of money in a certain currency if the beneficiary of the letter of credit submits to the bank, within a certain time, a statement that the debtor (principal) has not fulfilled his obligation from the basic contract when due" (p. 207). Vukadinović (1987) defines a standby letter of credit "as any agreement by which one person (issuer) obligates a third party (beneficiary) to a third party (beneficiary) on the order of another person (the principal) to pay a certain sum of money on the condition that the beneficiary submits a written statement within a certain time that the debtor (principal) did not fulfill his obligation by the due date and to submit any other required documents" (p. 449).[1] A standby letter of credit could be classified as a neutral banking business, given that the bank does not appear here either as a creditor or as a debtor. A standby letter of credit could be defined as a neutral banking business and an irrevocable payment security instrument that is independent of the basic business for which it was issued, and on the basis of which the bank undertakes to the user of the letter of credit to perform remuneration, if the user submits to the bank the documents stipulated by

[1] Vukadinović notes that similar definitions exist in other authors; Rozenberg, Uniform rules and customs for documentary letters of credit, Revision from 1983, Zagreb, 1984, pp. 17-18; Pavićević, Legal forms of economic cooperation with foreign partners, appendix to the "Economic Law Manual", 1987, p. 85.

the letter of credit, and which indicate that the principal has not fulfilled his obligation regarding maturity.

The basic legal relationships that exist with standby letters of credit are the legal relationship between the principal and the bank and the legal relationship between the bank and the beneficiary. In addition to these two basic legal relationships, there may also be a legal relationship between the letter of credit bank (issuing bank) and the correspondent bank, which usually has its headquarters in the country where the beneficiary of the letter of credit also has its headquarters. A correspondent bank can act as a confirming, notifying or nominated bank. In addition to these legal relationships, there is also a legal relationship that precedes the issuance of a standby letter of credit, which is a legal relationship between the principal (debtor from the basic business) and the beneficiary (creditor from the basic business), i.e. it is the basic work that represents the reason for issuing the letter of credit, which is most often: a sales contract, a construction contract, an equipment delivery contract or a contract for the performance of investment works. When it comes to the sales contract as a basic business, Carić and Hribovšek (1990) point out that "the legal relationship between the seller and the buyer is an external letter of credit relationship, it arises on the basis of the contract on the international purchase and sale of goods or on the basis of another legal transaction, it is not yet true credit relationship, it only precedes credit relationships" (p. 168). In order for a standby letter of credit to be issued, it is necessary that the basic contract contains a letter of credit clause which stipulates that one contracting party undertakes to ensure the issuance of a standby letter of credit by the bank as a means of guaranteeing the other party that it will fulfill its obligations within the agreed period. When it comes to the purchase contract, the buyer undertakes that a standby letter of credit will be opened in favour of the seller as a means of securing payment. When it comes to the construction contract, the person ordering the opening of the letter of credit can be either the contractor or the client. "The construction company may require the landowner to procure the issuance of a standby credit to ensure payment for a building" (Graham & Geva, 1984, p. 183). "The landowner might also require the construction company to procure the issuance of a standby credit to ensure completion of the building" (Graham & Geva, 1984, p. 184).

The first legal relationship that is established within this complex legal institute is the legal relationship between the principal and the bank. When we talk about the participants of this legal relationship, we notice that ISP 98 does not use the term bank as the only authorized entity for issuing standby letters

of credit, but uses the term with a broader meaning "issuer", while on the other hand UCP 600 uses the term "issuing bank" to denote the contracting party which is authorized to issue letters of credit, and therefore also to issue standby letters of credit, if the contracting parties have foreseen the application of UCP 600. Given that in international business practice the bank most often appears as the issuer of standby letters of credit, for the purposes of this paper we will talk about the legal relationship between the principal and the bank, without the label "issuing" bank due to the disputed legal nature of this legal institute. This legal relationship is based on the contract between the bank and the principal, by which the bank undertakes to issue a standby letter of credit to the beneficiary named by the principal, and the principal undertakes to pay the bank a fee for issuing the standby letter of credit and to compensate (regress) the bank for the amount paid by the bank to the user in the event of a guarantee event provided for in the letter of credit. The bank's obligations under the standby letter of credit agreement have certain similarities with the documentary letter of credit agreement, which are reflected in the fact that the bank has certain obligations towards the principal, and certain obligations towards the beneficiary, from the moment the beneficiary is informed that the letter of credit has been issued. With a documentary letter of credit, "the bank's obligations to the principal are: a) the obligation to open the letter of credit and b) the obligation to deliver to the principal the documents that the bank has received from the beneficiary of the letter of credit" (Đorđević, 2013, p. 109).

After the bank informs the user that a standby letter of credit has been issued in his favour, the bank enters into a legal relationship with the user and undertakes the obligation to pay the letter of credit sum in the event that the user submits to the bank the required documents proving that the principal, i.e. the debtor has not fulfilled his obligation from the basic contract. With a documentary letter of credit, "the bank's obligation towards the beneficiary of the letter of credit are: a) the bank's obligation to review the documents it receives from the beneficiary, b) the bank's obligation to settle the debt based on the letter of credit (the obligation to honour and the obligation to negotiate) (Đorđević, 2013, p. 109). However, unlike a documentary letter of credit, with a standby letter of credit, the bank has the obligation to review the documents submitted by the user and the obligation to pay the contracted amount only in the event that the principal has not fulfilled the obligation from the basic transaction. As for the documents that the user is obliged to submit to the bank if he wants to exercise the right to the payment of the letter of credit sum, it is important to note that it can only be a written statement that the principal has

not fulfilled his obligation, and there can also be documents proving that the principal has not fulfilled his obligations that he assumed in the basic contract or that he did not fulfil them within the agreed period.

4. The role of standby letters of credit in international contractual relations and the relationship with other banking operations

4.1. General notes

When we talk about the role of standby letters of credit in international contractual relations, it is necessary to mention that this legal institute represents one of the instruments of international goods and payment transactions. International goods and payment instruments aim "to meet the practical needs of business people in payment transactions and to unify their way of issuing, using and interpreting" (Dukić-Mijatović, 2010, p. 485). The basic role of a standby letter of credit in contracts in the field of international commercial law is to provide assurance by the bank to one contracting party that the other contracting party will fulfill its obligations, that is, that it will fulfill its obligations on maturity. A standby letter of credit can refer to guaranteeing the fulfillment of monetary obligations, such as in the case of sales contracts, and it can also refer to guaranteeing the fulfillment of non-monetary obligations, such as in the case of construction contracts or contracts for the performance of investment works. The question arises as to what is the bank's interest in providing security to its client's creditor that he will fulfill his obligations. The main interest is in the payment of the fee for the issuance of the standby letter of credit by the client – the principal. However, by assuming the obligation to issue a standby letter of credit, the bank assumes a significantly higher risk than the income it will generate by charging the issuing fee. Therefore, in practice, the bank most often asks the principal to provide it with certain payment security instruments, such as a mortgage, a pledge on movable property, a deposit, etc. In earlier presentations, we stated that the standby letter of credit belongs to the group of neutral banking transactions, however, the documentary letter of credit and bank guarantee also belong to this group, so it is necessary to delineate the role of the standby letter of credit as a neutral banking transaction in relation to the role of the documentary letter of credit and bank guarantee. However, before entering into the discussion of this issue, it is important to note that there is also a similarity between a documentary letter of credit and a bank guarantee, which is reflected in the fact that "both a

documentary letter of credit and a bank guarantee are instruments for securing the fulfillment of obligations from the basic business" (Dukić-Mijatović, 2010, p. 487). "However, while in bank guarantee it is the basic and only function, the documentary letter of credit primarily represents a means of payment and only in parallel with it a means of securing payment" (Dukić-Mijatović, 2010, p. 488).

4.2. Relationship between standby letter of credit and documentary letter of credit

With standby letters of credit, we can distinguish between those in which the bank ensures the performance of payment obligations (financial standby), which occur in sales contracts and those in which the bank guarantees that the contractor will fulfill its obligations, which occur in construction contracts with a foreign element. In American legal theory, the name "performance standby" is used for the second type of standby letter of credit, which could be translated as standby for good work performance. Kozolchyk (1995) points out that performance standbys "assure the seriousness of a supplier's, contractor's or subcontractor's bid or the successful completion of the contract awarded to them" (p. 406). In the case of the financial standby "its issuer must pay the beneficiary if the tendered documents conform with terms and conditions that solely reflect the maturity of the applicant's underlying financial obligations or the applicant default" (Kozolchyk, 1995, p. 406). It is obvious that the performance standby has very few points of contact with the documentary letter of credit, while the financial standby letter of credit has many more similarities.

When we compare a standby letter of credit with a documentary letter of credit, the first question that arises is whether a standby letter of credit is a type of letter of credit at all or is about another contract of international commercial law. The common feature of these two legal institutes is that they were created as a need to ensure the mutual obligations of the contractual parties from the basic business and to achieve a certain balance when taking risks by participants in international business relations. Banks played a key role in the creation of both legal institutes as a necessary link in international trade relations. "Standby letters of credit and traditional letters of credit are both mechanisms for allocating risks among the parties in commercial transaction" (Stern, 1985, p. 222). "The traditional commercial letter of credit is used as a payment service and is expected to be drawn upon, whereas the

standby letter of credit acts as a means of securing payment if the bank's customer defaults on the underlying obligation" (Banks, 1984, p. 74).

Similarities also exist in the sources of law by which these legal institutes are regulated, given that UCP 600 contains rules for both standby and documentary letters of credit. There is also a similarity in the economic function of these two legal institutes because both aim to ensure the seller that the buyer will pay the purchase price when the seller submits certain documents to the bank. The difference is reflected in the fact that the documentary letter of credit primarily has the role of an instrument for payment of the purchase price from the contract for the sale of goods, while the standby letter of credit has the role of a payment security instrument and is "activated", i.e. realized only in the event that the buyer does not pay the purchase price within the stipulated period. Vukmir (2007) states that "a documentary letter of credit is a normal way of payment for the performance of an obligation, most often related to the delivery of goods or services, while a standby letter of credit is insurance in case of non-performance of an obligation" (p. 266). With a documentary letter of credit, "the specificity of the legal relationship between the letter of credit and confirming bank on the one hand and the user of the letter of credit on the other is reflected in the fact that only one party has obligations (the letter of credit and the confirming bank), and the other party (the user of the letter of credit) has the right to request payment letter of credit amount, but in order to realize his right, he must fulfill certain conditions" (Đorđević, 2013, p. 155). The same is the case with the standby letter of credit, considering that the issuing bank undertakes obligations towards the beneficiary regarding the payment of the letter of credit sum, and the beneficiary does not undertake obligations towards the bank, except that in the case of submitting a request for payment, he should attach the documents provided for in the announcement on the issuance of the letter of credit. The difference between these two legal institutes can also be seen in terms of the documents that the user is obliged to submit. With a documentary letter of credit, one or more documents proving the delivery of the goods can be provided, namely: commercial invoice, transport document covering at least two different types of transport, bill of lading (bill of lading), non-transferable maritime bill of lading, charter party bill of lading, air transport document, documents on transport by road, rail or inland waterways, courier receipt, postal receipt, or confirmation of shipment by post, insurance document. "With standby, all the documents required for payment usually come from the standby user himself and are not collected from various sources, as is the case with a commercial letter of credit. These documents usually consist of evidence that some obligation has not been

fulfilled" (Vukmir, 2007, p. 266). Schutze and Fontane (2001) point out that there is a difference between these two legal institutes in terms of the type of document that needs to be presented, "for payment under a standby letter of credit the beneficiary needs to provide payment demand stating that the applicant has not meet his obligations under the secured transaction and possibly some supporting documents to substantiate the claim" (p. 17). Documents that prove that the principal or the debtor from the basic business did not fulfill their obligation can be "an arbitral award, a statement by an expert, a reservation in a certificate of delivery or a written refusal to grant such a certificate" (Houtte, 2022, p. 282).

4.3. The relationship between standby letters of credit and bank guarantees

When we talk about the role of the standby letter of credit in international commercial law contracts, it is obvious that it has more similarities with a bank guarantee than with a documentary letter of credit. The economic function of the standby letter of credit is to ensure the fulfillment of the principal's obligations, i.e. debtor from the basic business. A bank guarantee has the same economic function. In particular, we notice the similarities between the standby letter of credit and the type of bank guarantee with a "no objection" or "on first call" clause, and it is a type of bank guarantee that "deprives the bank of the right to raise objections against the beneficiary of the bank guarantee, which could be raised by the bank's client, such as the debtor towards his creditor, who in this particular case is the beneficiary of the bank guarantee (Carić, Vitez, Dukić-Mijatović & Veselinović, 2016, p. 303). "Such bank guarantees appear in foreign trade exchange in order to protect the interests of creditors, which can be seriously threatened by the initiation of court and arbitration disputes" (Carić et al., 2016, p. 303).

"In the case of a bank guarantee, submitting a request for payment with the prescribed documents shows that the debtor from the basic business, that is, the principal of the guarantee, has not fulfilled his contractual obligations" (Dukić-Mijatović, 2016, p. 263). The case is identical to the standby letter of credit, where the user of the letter of credit submits a written request to the issuing bank for the payment of the letter of credit amount due to the fact that the principal has not fulfilled his contractual obligation. Schutze (2001) points out that "a standby letter of credit has function and commercial effects of a guarantee" (p. 17). Vukadinović (1987) believes that "standby letters of credit in the legal sense do not represent final legal transactions, and

given that they are increasingly used in continental law, it could be expected that business practice expands them in the direction of independent bank guarantees" (p. 457). Stojiljković (2003) also takes the position that a standby letter of credit "is essentially equal to an independent bank guarantee (p. 208). "Between standby letters of credit and bank guarantees on a first call, there is a complete similarity both in terms of functionality and legal characteristics" (Vukadinović, Anđelković & Vuković, 2000, p. 18).

Although the standby letter of credit and the bank guarantee have the same role in the goods trade contract, we cannot completely equate them because there are certain differences. "The distinction between a standby letter and guarantee lies in the documentary nature of the letter of credit.The bank issuer will pay the beneficiary not when the customer in fact defaults, but when it receives documents which notify it of that default" (Miryam, 1980, p. 615). "Standby credits also tend in practice to be used for more varied and complex purposes than independent guarantees generally. It is common for the issuer's obligation under a standby credit to be advised, confirmed, paid or negotiated by a correspondent bank, whereas this is more unusual in an independent gurantee" (Ellinger & Neo, 2010, p. 304). "While the bank guarantee on the first call is payable only upon a simple call of the user, i.e. only on the basis of a written call, the standby letter of credit is essentially a documentary letter of credit with all the features that letters of credit have. This means, for example, that a standby letter of credit can be connected to the issuance or redemption of a bill of exchange, that it can be fully or partially transferable, that it can be connected to the presentation of a series of documents that are subject to a special examination, and that, in short, it can also be subject to most other rules to which documentary letters of credit are subject" (Vukmir, 2007, p. 267). There is also a difference in terms of the source of law that regulates these legal institutes, considering that the guarantees are regulated by the Uniform Rules for Guarantees on First Call (URDG 758) adopted by the International Chamber of Commerce, which are applied from 01.07.2010. and standby letters of credit are regulated by the Uniform Rules and Practices for Documentary Letters of Credit from 2007 (UCP 600) and the International Standby Practices (International Standby Practices ISP 98) from 1998. A standby letter of credit "could not be fully equated with a bank guarantee, especially when it comes to proving the occurrence of a guarantee case, where it is more appropriate to use the rules that apply to documentary letters of credit, and which refer to the assessment of the compliance of documents with the letter of credit conditions" (Đorđević, 2013, p. 58).

5. Conclusion

A standby letter of credit is a complex legal institution that is unknown to our obligation law and can only appear in foreign trade between our and foreign businessmen. We find the reasons for its existence in the need to protect the contractual party that first fulfils its contractual obligation (e.g. the seller who delivers the goods in the case where advance payment is not provided for) so that the third party – the bank will guarantee that the other contractual party that according to the contract will later to fulfill an obligation (e.g. a customer who pays the price after receiving the goods), to fulfill that obligation within the maturity date. A standby letter of credit can refer to both financial obligations and performance obligations. In the sales contract, the bank undertakes the seller to pay the letter of credit amount in case the buyer fails to do so after receiving the goods. In the case of construction contracts, the user of the standby letter of credit can be both the client of the works and the contractor.

The primary function of a standby letter of credit is to ensure that the principal will fulfill contractual obligations to the beneficiary. A standby letter of credit is a means or an instrument for ensuring the fulfillment of obligations. If the principal does not fulfill its obligations, the issuing bank will be obliged to pay the letter of credit amount to the beneficiary, and then it becomes a means or instrument of payment, which means that its secondary function in economic relations is the payment of the agreed price.

In order to determine its legal nature, we compared this legal institute with a documentary letter of credit and with a bank guarantee and concluded that it has more similarities with a guarantee than with a letter of credit. However, despite significant similarities with the guarantee, we could not equate it with a bank guarantee because there are differences in terms of the source of law, the form in which it is issued and the documents that are presented. When it comes to the legal nature of the standby letter of credit, we are of the opinion that this is a special contract of international banking law that contains to a lesser extent the elements of a documentary letter of credit, and to a greater extent contains the essential elements of a bank guarantee. This means that the role of standby letters of credit is the same as guarantees, to provide assurance to one contracting party that the other party will fulfill its obligations, but regulations related to guarantees cannot be applied to standby letters of credit – Uniform rules for guarantees at first call, but only the International Standby Practices (International Standby Practices ISP 98) or the Uniform Rules and

Practices for Documentary Credits of 2007 (UCP 600) depending on which rules are provided for in the standby letter of credit agreement.

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STANDBY AKREDITIV KAO SREDSTVO OBEZBEĐENJA U MEĐUNARODNIM UGOVORNIM ODNOSIMA

REZIME: Tema ovog rada je vrsta akreditiva koju ne srećemo u praksi domaćih banaka, i koja nije posebno regulisana domaćim zakonodavstvom, ali se može pretpostaviti da će imati sve veći značaj u međunarodnim poslovnim odnosima naših privrednika sa kompanijama drugih zemalja gde je upotreba ovog instrumenta obezbeđenja plaćanja uobičajena u bankarskom poslovanju. Reč je o vrsti akreditiva kod koje je u teoriji sporna pravna priroda, odnosno sporno je da li se ovde uopšte radi o vrsti akreditiva, ili je reč o vrsti garancije, ili je ovde u pitanju poseban pravni institut. Tema istraživanja je standby akreditiv kao sredstvo obezbeđenja u međunarodnim ugovornim odnosima. Kada govorimo o međunarodnim ugovornim odnosima kod kojih se javlja potreba uspostavljanja sredstva obezbeđenja ispunjenja međusobnih obaveza ugovornih strana u obliku standby akreditiva, pre svega mislimo na: ugovor o prodaji i ugovor o građenju. Standby akreditiv kod ugovora o prodaji obezbeđuje interese prodavca, dok kod ugovora o građenju može obezbeđivati interese i naručioca i izvođača, u zavisnosti od činjenice u čiju je korist izdat. U radu ćemo pokušati da definišemo standby akreditiv, da objasnimo njegovu ulogu u zaštiti prava i interesa ugovornih strana iz osnovnog posla a koji predstavljaju i razlog njegovog postojanja, da pokušamo da odredimo pravnu prirodu standby akreditiva istovremeno upoređujući ovaj pravni institut sa „klasičnim" dokumentarnim akreditivom i bankarskom garancijom. U našoj pravnoj teoriji, a još u većem obimu u američkoj i engleskoj pravnoj teoriji postoje brojni radovi koji obrađuju tematiku standby akreditiva,

međutim, tokom vremena pravna regulativa koja se odnosi na bankarsko poslovanje se menjala, a pored toga cilj ovog rada je da upoznamo naša privredna društva i banke koji posluju sa stranim kompanijama i stranim bankama kod kojih je uobičajeno izdavanje ove vrste akreditiva sa ulogom standby akreditiva kao instrumenta obezbeđenja ispunjenja ugovornih obaveza, kao i sa pravnim odnosima koji se uspostavljaju kod ove vrste akreditiva.

Ključne reči: *standby akreditiv, dokumentarni akreditiv, bankarska garancija, međunarodni ugovorni odnosi.*

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MEDIA AND CRIMINAL BEHAVIOR – BETWEEN SOCIAL RESPONSIBILITY AND DESTRUCTION

ABSTRACT: This paper examines the interplay between media and criminal activities, highlighting the numerous stereotypes and misconceptions about criminality that often originate from the media's construction of reality, driven by sensationalism and profit-seeking. In scrutinizing the media's engagement with criminal matters, the paper comprehensively analyzes the intricate dynamic between providing informative content and the allure of sensationalism. The paper accentuates the pivotal role of the media in disseminating information to the public, promoting justice, and stimulating discourse on the causal factors and repercussions of criminal behavior. The paper underscores the adverse societal impacts of the media, including the propagation of disinformation, the endorsement of violence and aggression, the cultivation of media dependency, and the ramifications for mental health. It meticulously explores the dissemination of false news, identifies sources of disinformation, and formulates strategies to mitigate this predicament. The nexus between the media's portrayal of violence and tangible instances of aggressive conduct is scrutinized, delving into industry self-regulation and the roles played by family, education, and society in addressing this issue. Furthermore, the paper conducts an in-depth analysis of how the media portrays criminal activities, with a particular

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emphasis on popular television genres centered on criminal themes. It elucidates the psychological dimension of the appeal of such narratives, offering insights into diverse motivators prompting viewers to identify with criminal acts. In conclusion, the paper presents an empirical research into the perceptions of citizens in Serbia concerning the influence exerted by both legacy and new media.

Keywords**:** *media, criminal behavior, social responsibility, perception of crime.*

1. Introduction

Media wield significant influence in shaping public opinion on critical societal issues, including criminality as a negative social phenomenon. The majority of stereotypes and misconceptions surrounding criminal behavior are a consequence of the media's portrayal of these phenomena. Behind many media reports lies the need for sensationalistic depictions of criminality, particularly violence, and the pursuit of profit. By adopting such an approach towards criminality, the media jeopardize the normal functioning of the justice system, which must strike a balance between the "right to know" and the freedom of the press on one hand, and the presumption of innocence on the other. The phenomenon of moral panic, which has garnered the attention of scholars in recent decades, is closely tied to the issue of media construction of a reality that does not necessarily align with the truth.

Media coverage of criminal events and personalities exerts an intense and continuing impact on people's understanding of security, justice, and social cohesion. Given that criminality is often perceived as a threat to society, the media plays a crucial role in shaping attitudes toward this phenomenon and bears the responsibility to inform the public about crime in a manner that promotes justice, legal security, and constructive discussions about the causes and consequences of criminal behavior. This dual role of the media, encompassing reporting on crime and the promotion of social responsibility, creates a complex framework for analysis and discussion. This text will analyze various aspects of this problem, providing deeper insights into propaganda, disinformation, the promotion of violence and aggression, media addiction, the effect on mental health, and the link between media and criminal behavior.

Lorimer (1998) highlights that mass media easily engender an uncontrolled dynamic of influence on a broader audience. These media become a means of manipulation, employing diverse techniques such as propaganda,

disinformation, and associative methods. Propaganda is often used as a tool for shaping public opinion, while disinformation can significantly undermine social cohesion. Movies, video games, and news frequently depict violence in ways that can influence the aggressive behavior of viewers. How can the promotion of violence in the media be reduced, and which strategies can be effective in this regard? Regulatory frameworks, media industry self-regulation, and the role of families, educators, and education all have a place in addressing this problem.

The ubiquity of digital media and smart devices has led to media addiction, which presents an additional problem and prompts consideration of preventive measures and treatments for media addiction. The effect of the media on psychological health also requires attention, given the establishment of unrealistic standards and the idealization of perfection. Constant exposure to violent content can increase levels of anxiety and depression. Although research indicates a moderate causal link between exposure to television violence and real aggressive behavior, the issue remains complex because the popularity of certain programs suggests that the audience desires such content. With the aim of exploring the perception and awareness of citizens in the Republic of Serbia regarding the influence of the media on them and their families, we conducted an empirical study, the results of which we will present in this paper.

2. Types of Negative Impact of Mass Media on Society

Although the media plays a positive role in providing information, entertainment, and education, there are times when their negative influence prevails, whether by promoting competitive ideologies or supporting the erosion of moral values. Electronic media, general computerization, mobile phones, music, and "many other technological advancements designed to make life and work easier for modern humans not only categorize their alienation as a "new age" phenomenon but also instruct and compel the "new man" not to always treat other people as individuals" (Bjelajac & Filipović, 2020a). According to Lorimer (1998), mass media encompasses a diverse range of activities concerning their fundamental, underlying function of signifying or constructing reality. Electronic mass media, in particular, stand out due to their capacity to signify and shape reality. Consequently, their influence is exceptionally significant and essentially challenging to control, given the continuous growth of the audience and the availability of content. This phenomenon leads to the mass adoption of the attitudes communicated by

the media, whether through core programming or advertising, often without critical evaluation (Bjelajac & Filipović, 2020d).

Methods of manipulation. Due to their biological nature, humans are susceptible to suggestion, imitation, and misinformation. Individuals and social groups that control the media recognized this potential early on and made it available to various groups, often in exchange for money or social power. Such media activities aimed at producing the expected opinions of individuals and large segments of society are not ethical because people cannot control the influence exerted on them and are generally powerless against such suggestions.

One of the negative impacts is propaganda, which has developed a variety of techniques to manipulate public awareness and influence the masses. According to Laswell (1979), "propaganda is in any case always a deliberate act, associated with a pre-defined controversy, that is, a fundamentally conflictual situation, as a kind of given." One of the negative impacts on people's awareness is the method of disinformation that affects the human subconscious. However, the method of disinformation is coarse and therefore easily recognizable, so it is less frequently used in modern media, unlike the influence associated with associations. The method of association involves careful selection and a specific arrangement of concepts that evoke either positive or negative associations, enabling influence over information selection. Since the method is based on specific associations, it facilitates influence on an individual due to their habits and beliefs. This subsequently leads to the formation of stereotypes. Stereotypes effectively control the entire process of information perception. Stereotypes are formed under the influence of two factors: unconscious collective processing and individual sociocultural environment, as well as deliberate, sometimes subliminal media influence. With the help of stereotypes, it is easy to manipulate human awareness because stereotypes are closely linked to society's life. Arendt (2023) points out the close connection between stereotypes and the significant influence of the media on behavior that reproduces the actions of "heroes" created by print, radio, or television.

Fake news. Mass media, especially social media, is often criticized for spreading disinformation and fake news. This phenomenon can have serious consequences for society, including polarization, reduced trust in the media, political instability, and risks to public health. Fake news can exhibit a wide range of negative effects on society (Aïmeur, Amri & Brassard, 2023). Disinformation can lead to societal polarization because people often accept and spread information that confirms their existing beliefs, regardless

of its accuracy, leading to increased social divisions and a reduced ability for constructive discourse. Disinformation can threaten political stability and the legitimacy of institutions. Disinformation can be used to destabilize societies and often poses risks to public health. During the COVID-19 pandemic, the spread of false information about the virus, treatments, and vaccines could lead to dangerous situations. Disinformation can originate from various sources, including individuals, organizations, political groups, and foreign actors. Social media often performs a crucial role in the spread of disinformation. Individuals may spread disinformation out of ignorance, misunderstanding, or deliberate misuse. Organizations and political groups often use disinformation for political purposes, using it as a tool to manipulate public opinion. Foreign actors may also spread disinformation to destabilize other countries or promote their interests. Algorithms that show users the content that engages them the most often favor the spread of sensational or controversial information, regardless of its accuracy. Fighting disinformation is essential to limit its negative impact on society. This includes educating the public on recognizing disinformation and developing critical thinking. Collaboration between governments, civil society, and technology companies can help the development of effective strategies to combat disinformation. Addressing disinformation is crucial for preserving the integrity of the information space and upholding democratic values.

Promotion of Violence and Aggression. Media content, including movies, video games, and news, sometimes depict violence in ways that can influence aggressive behavior and violence among viewers, especially young people. People can be more sensitive to violent media content, and prolonged exposure to such content can lead to increased anxiety, fear, and trauma. Media violence can distort perceptions of the real world, especially in terms of risk perception. Continuous exposure to depictions of violence can create an exaggerated fear of crime and real-world violence. Research (Reissler, 2006) studies measures that can be taken to limit the promotion of violence in media content, including regulatory frameworks and self-regulation within the media industry. Besides the state, the role of the family and schools in promoting media literacy and critical thinking in viewers should be emphasized. Through a better understanding of these issues, society can work toward creating media that adhere to ethical standards and promote positive values rather than violence and aggression.

Media Addiction. The ubiquity of digital media and smart devices can lead to media addiction. Media addiction is a phenomenon that develops gradually due to the ubiquity of digital media and smart devices. Media

addiction shapes individuals' behavior patterns, often developing gradually, frequently hiding factors contributing to its formation. Media addiction can manifest in various ways, including addiction to social media, video games, online shopping, and more. Different components of media addiction correspond to technological and behavioral aspects, particularly the influence of information and communication technology (ICT). Media addiction can impede productivity, consume time that would otherwise be spent in the real world, and affect relationships with family, friends, and partners. Research (Bhargava & Velasquez, 2021) has shown destructive effects on mental health and the perception of quality of life. Proposed prevention strategies include education, the promotion of healthy media usage, and therapeutic options, such as cognitive-behavioral therapy and group support (Bhargava & Velasquez, 2021).

Impact on Mental Health. Mass media often play a role in shaping body images and idealizing perfection, which can contribute to a negative impact on mental health, including eating disorders and low self-esteem. Media create standards of good and bad, desirable and undesirable, and can harm individuals with these standards. Media beauty standards and the idealization of perfection are often associated with negative effects on mental health. Research conducted at University College London (UCL, 2023) indicates that media body image perception can contribute to eating disorders. The negative emotional effects of media standards can affect self-confidence and self-esteem. Media content that depicts violence, tragedies, and other stressful situations can increase levels of anxiety and depression in viewers. Research (Lambert et al., 2022) indicates that continuous exposure to such content can affect mental health, especially in the context of media reporting on current events.

3. Media and Criminal Behavior

Criminality has been an intrinsic element of popular mass media from the very inception of fictional films and later on television. Within these media, the central subject often revolves around criminal activities, frequently marked by excitement or violence. In recent times, psychological thrillers have emerged, offering a story from the criminal's perspective, providing a "deeper understanding of their motives" (VanArendonk, 2019). Such content creates an illusion of the power of criminals, suggesting to the audience that criminal behavior is desirable and profitable. The fascination with crime shows comes from their ability to portray the darker aspects of the human psyche positively. This phenomenon enables the observation of the darkest aspects

of human nature while simultaneously providing a sense of security within one's home (VanArendonk, 2019). It allows people to engage in hypothetical scenarios, allowing for imaginative role-playing that steps outside the bounds of legal constraints (more in: VanArendonk, 2019). The allure of crime in the media is born from the inherent attraction to what is forbidden. The motivations behind this appeal are complex, combining fascination, often associated with death and destruction, which includes the enjoyment derived from the sense of "corrupt" satisfaction (IvyPanda, 2022). As part of a study by the University of Augsburg and the University of Wisconsin-Madison (International Communication Association, 2013), 482 participants, ranging in age from 18 to 82, with various educational levels, analyzed film trailers with varying degrees of bloodshed, assessing the likelihood of watching the entire film while providing their perceptions of the movie. The researchers proved that "there is a greater likelihood that people will watch movies with violent scenes if they believe it makes sense to confront violent aspects of real life." Specific types of violent portrayals attract audiences by promising to satisfy their desires for truth through meaningful insights into certain aspects of the human condition (Bartsch & Mares, 2014).

Since the mid-20th century, violent TV programs have been the subject of extensive research, often concluding that there is a moderate but consistent causal connection between exposure to television violence and real-world aggressive behavior. Different theoretical explanations include social learning, excitation transfer, disinhibition, or desensitization (Mass Media and Crime, n.d). The central debate develops in two directions. The first direction, associated with the "general aggression model" (see: Bushman & Anderson, 2002; DeWall, Anderson & Bushman, 2011), argues that exposure to media reporting of violent crimes can "trigger" the development of aggressive attitudes or behaviors, leading people to real violence (see more: Phillips & Hensley, 1984; Laser, Luster & Oshio, 2007; Anderson et al, 2015; Gentile, 2016). In contrast to this theory, proponents of approaches such as "uses and gratifications" (Sherry et al., 2006) and "self-determination" (Przybylski, Rigby & Ryan, 2010) have not found solid evidence of such effects. These researchers argue that media reporting of violent crimes is better interpreted as a "crime steerer," a factor that can shape criminal behavior through influencing the style of crime but is not a factor that triggers criminal behavior (see more in: Ferguson et al., 2008; Savage & Yancey, 2008; Surette, 2012). To understand the phenomenon of crime fascination and the propensity for imitation, a good example is the American documentary TV series "CopyCat Killers."

While there are various contradictory viewpoints, we can conclude that the media can contribute to aggressive behavior. The media subtly guide us to adopt a distorted perception of reality, and as a result, our perception of reality becomes skewed, with digital violence having the "power to blur the boundaries between the virtual and the real world" (Bjelajac & Filipović, 2021a). It is essential to emphasize the challenges that children face due to exposure to inappropriate content on the internet, exposing them to numerous security challenges, risks, and threats (Bjelajac, 2012; Bjelajac & Filipović, 2021b; Bjelajac & Filipović, 2020b). The approach to protecting children from online abuse should encompass physical, psychological, and moral dimensions of safety (see more: Bjelajac & Filipović, 2020c). Mitigating the influence of media on criminal behavior involves promoting media literacy, critical thinking, and responsible media consumption among individuals, especially the youth. Additionally, implementing regulatory frameworks for age-appropriate content and self-regulation within the media industry can help limit the exposure to violent or criminal content that may contribute to criminal behavior.

4. Discussion

In order to obtain data on the extent of citizens' awareness of the media's influence, we conducted a direct empirical study to gain a clear understanding of how citizens perceive the media's impact. The study was conducted in the form of a random sample survey and included 504 respondents who were selected randomly and contacted by phone between September 1, 2023, and November 1, 2023. Initially, 1,244 respondents were contacted, but only 504 of them agreed to answer the questions. The study consisted of one primary research question, and additional questions were asked to segment the results into various categories, including gender, age groups (less than 30, 30-50, and older than 50), urban or rural living environments, educational levels (primary and secondary education or higher education), and family size (single individuals, couples without children, couples with one child, and couples with more than two children). These parameters proved significant as they revealed variations in the perception of media influence and responses to the primary research question. The primary research question was, "Are mass media good or bad for your family?" Below, we provide an overview and interpretation of the research results, beginning with a breakdown of the respondents based on the parameters mentioned in the previous text, followed by a tabular representation of the research findings.

In the study, 228 respondents were male, and 276 were female, representing 45% and 55% of the total sample, respectively. The total sample

included 104 individuals under the age of 30, 171 individuals aged 31 to 50, and 229 individuals older than 50. Out of the total number of respondents, 345, or 68%, lived in urban areas, while 159, or 32%, lived in rural areas. In the total sample of 504 surveyed citizens, 370 respondents, or 73%, had basic or secondary vocational education, while 134 respondents, or 27%, had a college education, including those with completed postgraduate studies at both levels. It should be noted that households with five or more members account for only 6% of the total number of households in the Republic of Serbia, so we combined that category, which typically represents families with three children, with the category of individuals or couples with two children to increase the representativeness and size of that part of the sample. Out of the total number of respondents, 146, or 29%, lived in households without children, 262 respondents, or 52%, lived in households with one child, and 96 respondents, or 19%, lived in households with two or more children.

Table 1. Are mass media good or bad for your family, total results

Good	Bad	Don't know/No answer
227 (45%)	171 (34%)	106 (21%)

Authors' Research

Table 2. Are mass media good or bad for your family, results by gender of respondents

Gender	Good	Bad	Don't know/No answer
Male	92 (40%)	81 (36%)	55 (24%)
Female	135 (53%)	90 (27%)	51 (18%)

Authors' Research

Table 3. Are mass media good or bad for your family, results by age group of respondents

Age	Good	Bad	Don't know/No answer
<30	61 (59%)	24 (23%)	19 (18%)
31-50	81 (47%)	60 (35%)	30 (18%)
>50	85 (37%)	87 (38%)	57 (25%)

Authors' Research

Table 4. Are mass media good or bad for your family, results by the area of residence of respondents

Area	Good	Bad	Don't know/No answer
Urban	145 (42%)	131 (38%)	69 (20%)
Rural	82 (52%)	40 (25%)	37 (23%)

Authors' Research

Table 5. Are mass media good or bad for your family, results by the education level of respondents

Completed education level	Good	Bad	Don't know/No answer
Elementary or high school	167 (45%)	124 (34%)	79 (21%)
Higher education	60 (45%)	47 (35%)	27 (20%)

Authors' Research

Table 6. Are mass media good or bad for your family, results by number of children in households of respondents

Number of children	Good	Bad	Don't know/No answer
0	76 (52%)	36 (25%)	34 (23%)
1	116 (44%)	89 (34%)	57 (22%)
2+	35 (36%)	46 (48%)	15 (16%)

Authors' Research

In interpreting the results, we will begin with the overall total, where 45% of citizens believe that the media has a positive impact on them and their families, while 34% consider the influence to be negative. The percentage of respondents who did not provide an answer falls within somewhat standard limits for this type of research. The fact that nearly half of the respondents believe that the media has a positive impact on their families is multifaceted and sometimes mutually exclusive because each individual selects the media content they will consume, making it difficult for individuals to believe that what they have personally chosen from the wide range of media content is harmful to them. The same explanation applies to responses based on respondents' gender, although we cannot directly conclude why women have more confidence in the positive impact of the media than men. This leads us to the limitations of this study because it does not provide the psychological context behind respondents' answers.

However, when we consider the broader picture and when respondents took into account the effect of media content that is not personally selected by them but by their family members, we notice a decline in the number of positive responses to the survey question. The highest percentage of respondents who answered that the media has a negative impact on them and their families falls within the category of respondents living in households with two or more children. This may imply that they believe the media has a negative influence on the upbringing, education, and socialization of their children. Trust in the positive impact of the media decreases with the age of the respondents and is lower in urban than in rural areas. The reasons for this lie in the types of media content consumed by people of different ages, as well as in the availability and time spent consuming media content when it comes to place of residence, as differences between urban and rural areas, although significantly reduced, still exist, especially concerning the proportion of legacy media and new media usage.

Although it has clear limitations, this study has provided answers to the main research question, while also opening other questions that deserve further investigation. Based on the results obtained in this study, additional questions can be constructed to provide a much more detailed picture and a clearer understanding of why respondents provided the answers they did during the survey.

5. Conclusions

In addition to their multifaceted functions and significant role in society, it is imperative to acknowledge media's undeniable adverse effects on the collective and individual levels. A noteworthy aspect underscoring the subtlety of media influence is the fact that a substantial portion of the citizenry perceives media as having a positive impact on their lives and familial environments. While the media fulfill crucial roles in information dissemination, entertainment, and education, it is unquestionable that their potent capabilities can be susceptible to misuse. The advent of electronic media, computerization, mobile technology, music, and other technological innovations, despite being ostensibly designed for life facilitation, frequently contributes to societal alienation and fosters an altered reality that occasionally verges on dehumanization, thereby impacting human relationships. Manipulation through media channels has emerged as a methodological tool extensively employed to shape the perceptions of individuals and, collectively, society as a whole. Propaganda, disinformation, and the perpetuation of stereotypes stand as formidable instruments that wield significant influence over the collective consciousness, often resulting in homogeneity of thought and

the attenuation of critical thinking. Furthermore, our research has undertaken a meticulous examination of specific adverse consequences stemming from mass media. This includes the pernicious dissemination of disinformation, the tacit endorsement and dissemination of violent and aggressive content, the cultivation of media addiction, and the ramifications for mental well-being. Disinformation, notably, carries profound repercussions for society at large. These encompass the perilous phenomena of polarization, the erosion of public trust in media institutions, and the fomentation of political instability. Concurrently, the promulgation of violence within media content wields the potential to exert a discernible influence over aggressive conduct and the populace's apprehension of genuine societal hazards. The issue of media addiction, particularly salient in the contemporary digital era, has become a pervasive concern, impacting the daily lives of countless individuals. Mass media, spanning the spectrum from traditional legacy forms to modern digital outlets, occupies a pivotal role in shaping society's perceptual framework and norms. In essence, it is imperative to comprehend their influence, both the constructive and detrimental facets thereof, to foster the growth of a society characterized by information dissemination, receptivity, and the cultivation of critical thinking.

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MEDIJI I KRIMINALNO PONAŠANJE – IZMEĐU DRUŠTVENE ODGOVORNOSTI I DESTRUKCIJE

REZIME: Rad daje pregled interakcije medija i kriminala. Autori naglašavaju da mnogi stereotipi i netačne predstave o kriminalu proizlaze iz medijske konstrukcije stvarnosti, motivisane senzacionalizmom i profitom. Proučavajući odnos medija prema kriminalu, rad analizira kompleksnu dinamiku izveštavanja između informativnosti i senzacionalizma.

Naglašava se odgovornost medija da, informišući javnost, promovišu pravednost i raspravu o uzrocima i posledicama kriminalnog ponašanja. Posebno poglavlje obrađuje negativne uticaje masovnih medija na društvo, poput dezinformacija, promocije nasilja i agresije, zavisnosti od medija i uticaja na mentalno zdravlje. Detaljno se istražuje širenje lažnih vesti, identifikacija izvora dezinformacija i strategije za suzbijanje ovog problema. Obrađuje se veza između medijskog prikaza nasilja i stvarnog agresivnog ponašanja, istražujući samoregulaciju industrije i ulogu porodice, obrazovanja i društva u rešavanju ovog pitanja. Rad produbljuje analizu medijskog prikaza kriminala, istražujući popularne TV žanrove koji se fokusiraju na kriminalne aktivnosti. Naglašava se psihološki aspekt privlačnosti ovakvih priča, pružajući uvid u različite motive gledalaca da se identifikuju s kriminalnim radnjama. Na kraju, rad predstavlja empirijsko istraživanje o percepciji građana Srbije o uticaju koji na njih vrše podjednako i tradicionalni (legacy) i novi mediji.

Ključne reči: *mediji, kriminalno ponašanje, društvena odgovornost, percepcija kriminala.*

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CHARACTERISTIC PHENOMENA OF ECONOMIC CRIME IN LEGAL THEORY – FRAUD IN THE FIELD OF INDUSTRY AND PRODUCTION

ABSTRACT: Economic crime is a constant and rather dynamic negative social phenomena which skillfully adapts to the social-economic and political situation in society. Fraud in the field of industry and production is a characteristic and a conspicuous form of economic crime in the legal doctrine. The motive behind committing fraud is typically personal gain, with perpetrators utilizing their positions in business or official authority within a state or public institution to obtain an illegal advantage in the form of money or goods. This paper, focusing on the subject, begins with defining the term and describing the characteristics and main classifications of economic crime. This part is followed by an in-depth analysis of a characteristic form of economic crime in legal theory, specifically fraud in the field of industry and production. Despite adequate legislation at both the European and national levels, current control systems in the field of industry and production may be perceived as insufficient to prevent fraud in a timely manner. Besides, the modalities of committing fraud in this sphere have continuously evolved and adapted to current business circumstances and the legal framework, which is why the perpetrators very often succeed in evading detection and sanctioning of the committed fraud. Considering the transnational nature of fraud in the field of industry

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and production, it has become evident that security procedures need to extend beyond national frameworks and include international measures.

Keywords: *economic crime, fraud, industry and production, business.*

1. Introduction

Criminal behaviour is determined by various factors. The social setting, education, science and culture are the structural components of social consciousness, which, directly or indirectly, forms the affinities of every individual. Through social consciousness, "a community and society take their stand to the phenomena of personal and social pathology. Social consciousness shapes the moral, religious and custom-related norms of reaction to the phenomena of delinquency, whereas the incrimination or decrimination of certain forms of such behaviour is just a legal expression of the differentiated stands of social consciousness when those issues are concerned (Bošković & Marković, 2015, pp. 145-146). A major determinant in this process is cultural identity as "it provides individuals with what is peculiar to the human species and doubly so: as a generic culture, i.e. the manner in which human beings have been organized, and as a differential culture, i.e. a historical specification of the former and an interpretation of the general (human) way of living" (Miljković, 2015, p. 158). Whether someone will commit a crime very often depends on the circumstances surrounding that person, on their way of living, on their personal or family circumstances, on their health condition, financial situation or emotional state and on other circumstances" (Matijašević & Zarubica, 2021, p. 29). In accordance with the aforesaid, the criminal behaviour of an individual or a group, in any sphere, may be, in principle, determined" as the socially most difficult deviation" (Rašević & Jakovljević, 2022, p. 179).

Looking backwards, every form of human activity so far has been exposed to various concealed or direct attacks or detrimental influences. Not a single field of activity could have been protected in full, either through business rules or through current legal solutions. In accordance with the aforesaid, the business field as well has been exposed to various frauds or detrimental impacts. In time, the methods of perpetration have changed and so has the circle of potential perpetrators, but in principle, the exposure of this field to various manipulations and frauds has not declined.

Historically speaking, "from the Roman law, through the medieval criminal code to the modern criminal laws of the 18th and 19th century,

certain types of behaviour, such as: curbing competition, manipulations with various goods (accumulating or removing goods for the purpose of price increase), especially manipulations with food staples and grain, breaching price regulations, bankruptcy, money counterfeiting, etc., were regarded as impermissible and, in their essence, corresponded to the impermissible types of conduct which are today called economic crime (Banović, 2002, p. 14).

In foreign literature, one of the most frequently quoted definition of economic crime has been provided by Edwin Sutherland, the president of the American Sociological Association, who, in his presidential address of 1939, when describing economic crime, introduced the concept of"white collar crime". Sutherland describes white-collar criminality as being"expressed most frequently in the form of misrepresentation in financial statements of corporations, manipulations in the stock exchange, commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislations, misrepresentation in advertising and salesmanship, embezzlement and misapplication of funds, short weights and measures and misgrading of commodities, tax frauds, misapplication of funds in receiverships and bankruptcies" (Sutherland, 1940, p. 2., quote taken from: Banović, 2022, p. 15).

Economic crime is a constant and rather dynamic negative social phenomena which skillfully adapts to the social-economic and political situation in society. Throughout history,"economic crime has assumed different forms, but always had a specific character – from the aspect of the perpetrators, who were always privileged and powerful and/or exercised high offices in the socio-economic and political structures. It is the position, status and power of these perpetrators in society that render this type of crime "invisible" in a manner of speaking, which is why this type of crime has been marked as criminality of the "privileged", who deviously take advantage of their own position to generate "immense personal wealth and power" (Nikoloska, 2014, p. 361).

According to Nicević and Ivanović, however,"economic crime in the sense of the criminal law and criminology, constitutes all the delicts (crimes, economic offences and economic misdemeanours) that threaten the normal organization, administration and functioning of the economic system (relations and processes) in a social community" (Nicević & Ivanović, 2012, pp. 93-94; Ivanović, 2009, p. 154).

Bearing in mind the subject of this paper, the paper will focus on the major classifications of economic crime, after which it will analyse in more

detail a characteristic phenomena of economic crime in legal theory – frauds in the field of industry and production.

2. Major Classifications of Economic Crime

There are different classifications of economic crime in legal theory. Taking into account the available classification criteria and by applying the generality principle, Šikman and Domuzin believe that "economic crime is dominantly manifested through the following forms: crimes against economy and the economic system, crimes against finances and the financial system, white-collar crimes and corporate crimes, organized crime in economic and financial transactions, corruption in economic and non-economic activities" (Šikman & Domuzin, 2013, p. 6; Jovičić & Šikman, 2013).

A classification of economic crime has been provided byBošković and Marković as well. According to them, economic crime includes the following types: abuse of position and authority, financial frauds (counterfeiting, credit card frauds, tax evasion, intellectual property frauds, bank frauds, stock exchange frauds and other types of fraud – e.g. in trade in flats by means of establishing fictitious or actual agencies, in mediation in the regulation of visas or immigration or work permits or foreign citizenships, abuse in humanitarian fundraising and distribution of aid, taking grace period goods, resale of stolen cars and other industrial commodities, frauds at tollbooths on highways, bookmaking frauds, games of chance frauds, white collar crimes, corruption, trafficking and illegal trade" (Bošković & Marković, 2015, pp. 213-216).

According to the Council of Europe Recommendation No. R (81) 12 on Economic Crime, economic crime includes the following offences: "1. cartel offences; 2. fraudulent practices and abuse of economic situation by multinational companies; 3. fraudulent procurement or abuse of state or international organisations' grants; 4. computer crime (e.g. theft of data, violation of secrets, manipulation of computerised data); 5. bogus firms; 6. faking of company balance sheets and book-keeping offences; 7. fraud concerning economic situation and corporate capital of companies; 8. violation by a company of standards of security and health concerning employees; 9. fraud to the detriment of creditors (e.g. bankruptcy, violation of intellectual and industrial property rights); 10. consumer fraud (in particular falsification of and misleading statements on goods, offences against public health, abuse of consumers' weakness or inexperience); 11. unfair competition (including bribery of an employee of a competing company) and misleading advertising;

12. fiscal offences and evasion of social costs by enterprises; 13. customs offences (e.g. evasion of customs duties, breach of quota restrictions); 14. offences concerning money and currency regulations; 15. stock exchange and bank offences (e.g. fraudulent stock exchange manipulation and abuse of the public's inexperience); 16. offences against the environment."

When speaking of the classification and forms assumed by economic crime, one should emphasize the fact that, in practice, there is no form of this type of crime existing by itself. Any classification can be conditional only and related to the doctrinal study of certain forms of manifestation. The most frequent forms in practice are mutually intertwined, involving several mutually intertwined perpetrators, who, most often, have excellent connections with people at certain influential positions in society and business.Consequently, the forms assumed by economic crime are difficult to detect and even when they have been detected, the procedure of collecting evidence is by no means easy for the acting investigative authorities. We shall hereinafter deal in more detail with one specific form of economic crime in legal theory.

3. Fraud in the Field of Industry and Production

Fraud in the field of industry and production is a characteristic and a conspicuous form of economic crime in the legal doctrine.

To put it more specifically, the field of industry and production "has always been and shall always be the object of various criminal attacks through the perpetration of specific criminal offences from the field of economic crime" (Carić & Matijašević Obradović, 2017, p. 112). These are, most often, "the criminal acts of abuse of office, embezzlement, negligence in business and impermissible production. The forms of criminality in industry and production are related to the main production activities and processes and are thus manifested accordingly" (Šikman & Domuzin, 2013, p. 7).

The motive for committing these types of fraud is one's own personal benefit and the perpetrator's decision to use their own position in business or their official authority within a state or public institution with a view to obtaining an illegal advantage in the form of money or goods.

According to Bošković and Marković (2015), "the usual and mass forms of appropriation in the field of business through the abuse of one's office (business position and professional authorities) take place in several characteristic fields of economic and financial activity. Some of these forms constitute system-based breaches of economic and financial activity norms, such as: causing market disturbances by concluding a monopolist position,

negligent work and deliberate causing of bankruptcy and inflicting damage on creditors, creating or keeping an impermissible value in money, goods, etc., forging documents on balance and flows, disclosing or obtaining a trade secret, producing banned goods" (p. 214).

Attaining success in market economy "has been conditioned with the rational use of production factors and capital and with the speed of capital flows in production. The focus is on accumulation, with a view to increasing production scope, constant investments and the rational use of invested capital" (Radosević, Carić, Bejatović, Marković, Matijasević & Jovanović, 2013, p. 104). In that sense, the main form of criminality in production is considered to be "the appropriation of raw materials, waste, defective products, finished products, tools and small inventory. One of the forms of appropriation is appropriation on the basis of the average calculation of permitted losses on goods and production norms. To put it more specifically, for each type of goods there is a percentage of permitted losses and the material waste norms, in order that the goods be produced. As the losses, i.e. expenses, are calculated on an average basis and the actual loss or costs depend on varying factors, a loss, in practice, may be around average, i.e. the costs of materials ranging within technical norms, but also being above or below the average level, i.e. the technical norm" (Banović, 2002, p. 63).

In the manner of their appropriation, according to Bošković (2009), "there are no significant differences – what is important is the various conditions and circumstances influencing the perpetrator. In this procedure of potential criminal activities in the form of appropriation of goods, emphasis is laid on the mutual intertwining of several persons, above all between those in charge of the production process and warehouse keepers and record keepers, which obstructs the process of detecting and proving illegal appropriation of goods" (p. 42). By the way, "appropriation of goods may result in a deficiency, on which occasion the basic documentation has been counterfeited. The essence of this type of attack is the following misrepresentation: to show in the documents that the quantity of the materials entering the production process is lower than the actual one, or that the quantity of the finished products leaving the factory is higher than the actual one" (Banović, 2002, pp. 64-65).

According to Đekić (2016), a typical industry fraud "entails the production and sale of low quality goods for which, through a false declaration, it is claimed that it is of high quality, whereby its price is increased – the product or service, on the basis of its declaration, being fictitiously included among high quality goods" (p. 783). Thereby "a conflict is created with the interests of consumers, who, naturally, want to obtain something stipulated with a

declaration in exchange for their money, instead of being deceived in the process of purchase. Such cases demand well-trained forensic teams, whose task is to prove the real quality of the product or service and to assess the amount of money that has been illegally taken from a consumer in terms of the price difference and the amount of the benefit that the business entity derived by performing such a criminal act" (Đekić, 2016, p. 783; Patrick, Jensen & Tinsley, 2015). Besides the aforesaid, the production process itself "has seen cased of negligent and unconscientious conduct which inflicts extensive damage either to production means, reproduction materials and other raw materials or to finished products" (Šikman & Domuzin, 2013, p. 7).

The forms of economic crime which are characteristic of the field of industry and production may also include:

- appropriation of tools and parts of machines and plants "covered with a false write-off and depreciation, fictitious exchange of tools, appropriation due to inadequate control" (Banović, 2022, p. 65). There are cases of "deliberately misrepresenting certain goods as out of date or defective for the purpose of selling them later for a fee or to one's friends or relatives" (Bošković, 2009, p. 43);
- keeping unregistered employees and not keeping records of payments of earnings in the business ledger;
- "using working hours, materials and equipment of state-owned companies for private purposes on the part of certain employees and obtaining a fee for such purposes or services" (Bošković, 2009, p. 43);
- not recording a certain quantity of products and selling those products in an illegal market for cash later. Thus, "there are some characteristic forms of criminality that mainly result from "grey economy". More specifically, certain companies evade tax by means of fictitious documentation and use the cash they obtain for purchasing certain reproduction materials and the necessary raw materials and thus, through the production process, a new product is created and is not recorded anywhere" (Šikman & Domuzin, 2013, p. 7).

The so-called "grey economy" is also manifested through "production by business entities that have not been authorized for production or have not been authorized for the production of a specific type of products; production in factories which do not meet the stipulated requirements; non-compliance with elementary technical and technological rules in the production of products and the use of low-quality, even detrimental raw materials and subsequent misrepresentation of the type, origin or quality of a product,

applying counterfeit labels of well-known manufacturers of similar products and putting the goods in the market with prices lower than the original ones" (Carić & Matijašević Obradović, 2017, p. 116).

What was emphasized before is that fraud in business activities attains its full dimension exactly because it is committed (or endorsed) by people with certain authorities in state bodies, institutions or organizations, as well as people at the leading positions in the business entities in which fraud is committed.

According to Bošković and Marković (2015), "the aforementioned acts of fraud occurs most often at the three basic levels of position, office and status: administration and management, control and performance (operative function)" (p. 215).

The most practicable type of abuse lies in the "merging of the aforesaid functions, although each constitutes a risky area of potential abuse. A concentration of functions, or the so-called conflict of interests may manifest itself as follows:

- horizontal concentration: merging of several functions of the same type, such as purchase, sale and storage;
- vertical concentration, such as executive and control forms of business activity;
- horizontal and vertical concentration: in various forms of merging, which enable concentration of the power of decision-making, control and execution" (Bošković & Marković, 2015, p. 215).

4. An Example from Practice – Fraud in the Food Industry and the Reaction of Institutions

The concept of business in modern industry, the food industry in this case, and the set of customer rights, is highly demanding for the companies operating in this field and puts a great deal of responsibility on their shoulders. Food quality and safety is an imperative and the application of the appropriate standards in this fields (ISO and HACCAP standards) is something on which the companies' business activities are founded.

There are, however, many examples in practice pointing to various acts of abuse and fraud on the part of manufacturers in the food industry. On this occasion, we shall analyse one of such examples in more detail. This example puts in focus the timely and adequate institutional reaction, which by all means has a positive impact both on the special and the general prevention of such illegal activities.

Batrićević (2019) writes that "in January 2016, two Georgian companies exported roasted hazelnuts to the EU. Between 15% and 22% of those hazelnuts had been replaced with peanuts. That was because peanuts are relatively cheap, i.e. much cheaper than hazelnuts and their characteristics are such that, by being mixed with hazelnuts, they contributed to the increase of the quantity of the products, reducing its qualityat the same time. The fraud was detected thanks to a complaint filed by a consumer from Germany, who developed an allergic reaction to the peanuts after consuming the product. An investigation showed that the manufacturer had been storing large quantities of peanuts without a declaration, together with hazelnuts and the hazelnut powder. After the German authorities were informed of the fact, the information was forwarded to the EU network for combatting food production fraud. Then the Georgian authorities were ordered to ban the companies involved in this fraud from exporting their products to the EU as long as the persons committing the fraud remain at the same positions. Not only did the aforesaid Georgian companies infringed upon the*acquis*by deliberately and knowingly putting peanuts among hazelnuts without reporting it, in a quantity between 15% and 22%, but they also derived an illegal profit therefrom in an approximate amount of 400 $ per ton and also created a risk to public health by causing allergic reactions among consumers. Nevertheless, this case represents an example of good cooperation between the EU and Georgian authorities. As soon as they received information on the complaint filed by the German customer, the Georgian authoritiesadopted, in an urgent procedure, a regulation intensifying the control of hazelnuts intended for exports. The Georgian authorities also conducted an investigation which confirmed that fraud had been committed in the two companies (which belonged to the same owner) and sanctions the persons in charge for the fraud and also for forging tax documents (between two and four years of imprisonment). Besides, the EU member-states themselves intensified the control of import of the aforesaid products from Georgia" (pp. 195-196).

5. Conclusion

The analysis of the term, characteristics and the forms assumed by economic crime represents a very complex issue. Above all, in practice, the collection of all the important information on the types of economic crime requires a lot of effort, a multidisciplinary approach and a properly established methodological concept of investigative authorities' action. Consequently, the identification and the proper differentiation of forms of economic crime is a

rather significant previous issue in the process of tackling this phenomena. There are various approaches to the identification of the forms assumed by economic crime, but they mostly refer to the identification of some important elementsfirst and only then to the identification of a specific form of economic crime.

What can be perceived at first glance is the fact that economic crime is characterized by an exceptional versatility of forms. There are numerous definitions and classifications of economic crime. Not for a single one can be said for certain that it is completely accurate or definitive. This is confirmed by the numerous approaches of different authors of the legal and security theory, both the local and foreign ones.In addition to this characteristic, criminal acts in the sphere of economic crime are also characterized by a high degree of a detrimental impact on the national economy and also by the fact that the acts and their perpetrators are concealed. This is especially true when one bears in mind the most frequent type of perpetrators who are able to commit such a crime most easily, i.e. who have the best opportunity to commit an economic crime. As the paper has already emphasized, such perpetrators belong to the privileged classes of society and they exercise their actual or assumed influence, authorities and position to commit the crimes in this sphere.

Another characteristic of these crimes is a difficult process of detection of the victims, considering the fact that such crimes do not draw so much attention as the crimes of violence or other criminal acts in the sphere of conventional crime. All this points to the conclusion that the crimes, i.e. the criminality forms in the field of economic crime are extremely dangerous and may inflict extensive damage to the national economy and to the business activities of legal entities.

Considering the subject of this paper, the definition of the term and the description of the characteristics and the main classifications of economic crime are followed by an in-depth analysis of the characteristic form of economic crime in legal theory, namely fraud in the field of industry and production.

Despite adequate legislation at both the European and the national level, one may perceive that the current control systems in the field of industry and production have not been conceived enough to prevent fraud in time. Besides, the modalities of the commission of fraud in this sphere have been continuously modified, improved and adapted to the current business circumstances and to the current legal framework, which is why the perpetrators very often succeed in evading detection and sanctioning of the committed fraud. Fraud in the field of industry and production often having a transnational character, it has

become clear for a long time now that one should apply security procedures which, besides the national framework, should also involve the international one.

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KARAKTERISTIČNI POJAVNI OBLICI PRIVREDNOG KRIMINALITETA U PRAVNOJ TEORIJI – PREVARNE RADNJE U OBLASTI INDUSTRIJE I PROIZVODNJE

REZIME: Privredni kriminalitet je stalna i veoma dinamična društvena negativna pojava koja se vešto prilagođava društveno-ekonomskoj i političkoj situaciji u društvu. Prevarne radnje u oblasti industrije i proizvodnje su karakterističan i vrlo zapažen pojavni oblik privrednog kriminaliteta u pravnoj doktrini. Motiv vršenja ovih prevarnih radnji jeste koristoljublje i opredeljenje učinilaca ovih dela da iskoriste položaj u privrednom poslovanju ili službena ovlašćenja u državnim organima ili ustanovama da nezakonito prisvoje određenu korist u vidu novca ili materijalnih dobara. Imajući u vidu temu rada, nakon osvrta na pojam, karakteristike i najznačajnije podele privrednog kriminaliteta, detaljnije je analiziran karakterističan pojavni oblik privrednog kriminaliteta u pravnoj teoriji – prevarne radnje u oblasti industrije i proizvodnje. Iako postoji adekvatna legislativa kako na evropskom, tako i na nacionalnom nivou, može se uočiti da postojeći sistemi kontrole u oblasti industrije i proizvodnje još uvek nisu u potpunosti koncipirani tako da se prevarne radnje pravovremeno preveniraju. Uz to, modaliteti izvršenja prevarnih radnji u ovoj sferi modifikuju se u kontinuitetu, usavršavaju se i prilagođavaju trenutnim okolnostima privrednog poslovanja i aktuelnim zakonskim okvirima, tako da učinioci vrlo često uspevaju da uspešno

izbegnu otkrivanje i sankcionisanje izvršenih prevarnih radnji. Budući da prevare u oblasti industrije i proizvodnje često imaju transnacionalni karakter, odavno je postalo jasno da treba primeniti bezbednosne procedure koje ne uključuju samo nacionalni okvir, već i međunarodni.

***Ključne reči**: privredni kriminalitet, prevarne radnje, industrija i proizvodnja, privredno poslovanje*

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MISTAKE IN THE CRIMINAL LAW OF THE REPUBLIC OF SERBIA

ABSTRACT: The paper presents the institution of mistake (*error*) in our criminal law, focusing on its legal regulation as a ground for exculpation. The fact that mistake is a psychological and legal concept whose meaning includes several substantial elements is acknowledged. The legal relevance of mistake contributes to its various treatment in legislation. Given that criminal law, as a branch of legislation, deeply engages with human rights, mistake becomes a crucial institution for excluding the guilt of a perpetrator.

Depending on the type of mistake, and the legal and situational circumstances in which it is considered, two main categories can be recognized: mistake of fact (*error facti*) and mistake of law (*error iuris*). Their effect must be evaluated in the contest of a specific criminal case. This paper will elucidate the general term and types of mistakes, exploring their effects on the culpability of the perpetrator of the criminal act.

Keywords: *criminal law, mistake of fact, mistake of law, culpability.*

1. Introduction

Error is a wrong, false or unrealistic understanding in a person in relation to various kinds of objects, people, situational circumstances, legal regulations, etc. In order to fully understand it, the situation must be observed through a wider spectrum which would purposefully situate the

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previously formed misconception in the context in which it occurred. In legal nomenclature, mistake is considered in the context of its legal significance. Depending on the type of legal relationship, delusion may be present in civil, criminal, economic, misdemeanor or other branches of law. There are numerous examples in practice when a person commits a mistake while concluding a contract, committing a criminal act, concluding an economic contract, committing a misdemeanor, etc. If the existence of a mistake in these cases is proven, the legal transaction is considered null and void, and thus cannot produce a legal effect.

A mistake in criminal law is one of the grounds for exculpation for the perpetrator of the crime. Therefore, a mistake is considered to be a wrong, faulty or unrealistic understanding of someone or something that has significance for criminal law. Its presence leads to the exclusion of guilt as a statutory element of a criminal offense. The existence of a wrongful or faulty understanding (awareness) can refer to the circumstances related to the commission of a criminal offense, or, on the other hand, to the prohibition of a certain criminal offense. In accordance with the aforementioned, we can distinguish two types of mistakes in criminal law: mistake of fact (*error facti*) and mistake of law (*error iuris*). Both types of mistakes exist in our criminal legislation, but they are treated differently in criminal law.

2. Mistake of fact (error facti)

2.1. Basic forms of mistake of fact

Mistake of fact (error) means the existence of wrong or faulty idea about a circumstance. There are two types of mistakes in criminal law that can have legal significance: mistake of fact and mistake of law. Mistake of fact (*error facti*) is a misrepresentation of a real circumstance that refers to the very nature of the criminal act or the reasons excluding illegality. Accordingly, mistake of fact appears in two forms.

The first form is mistake in the narrow sense, or mistake regarding the essence of the criminal act. Here, the perpetrator has wrong or faulty idea regarding some real circumstance that is a feature of the criminal offense. This means the absence of conscious action by the perpetrator, which indicates the lack of an intellectual element of intent. Hence, this form of mistake of fact is a negation of the perpetrator's intent. This practically means that this form of mistake exists when the perpetrator had a wrongful understanding

of any constitutive element of the criminal act, including its basic, possibly privileged or qualified forms (Srzentić, Stajić & Lazarević, 1998, p. 278).

An unrealistic representation of an element that is not a constitutive part of a criminal offense does not constitute a mistake of fact in the narrow sense. This means that the existence of mistake of fact is irrelevant in relation to the form in which one of the elements of the criminal offense can be realized. Thus, for example, the criminal offense of Theft (Article 203 of the Criminal Code) exists regardless of whether the perpetrator was mistaken when taking personal property of one person, thinking that it was another person (Criminal Code, 2005). This form of mistake of fact exists when the perpetrator was mistaken regarding certain circumstances that are part of the legal features of a specific criminal offense. Such is the case with the criminal offense of Preventing Opposition to the Enemy (Article 420 of the Criminal Code), that can only be committed during war or armed conflict. When a special characteristic of the victim is foreseen in a criminal act as its feature, then the delusion about the circumstance is relevant under criminal law. Such is the case with one of the forms of criminal offense of Aggravated Murder (Article 114 of the Criminal Code), where the death of a child or a pregnant woman was caused (para. 9). In the example given, the special feature of the victim is related to the age (child) or the special condition (pregnancy).

The second form is mistake in the broader sense, or mistake regarding the reasons for excluding the illegality of a criminal act. In this form, the subject of mistake is the circumstance that, had it existed at the time of the action, would have rendered such an act permissible. Namely, the perpetrator here is aware of the legal characteristics of the criminal offense but is unaware of the outside circumstances related to it, which can be the reason for exculpation. In literature, cases of putative necessary defense and putative necessity are cited as examples of this form of mistake of fact.

a) Putative necessary defense exists when the perpetrator is mistaken due to wrongly believing that another person has committed an unlawful attack against them. This is the case when person A mistakenly thinks that they have been attacked by person B and therefore takes an action by which they take the life or injure person B, believing to be repelling an unlawful attack. Considering that this is an imaginary and not a real threat of attack, it constitutes putative necessary self-defense. Accordingly, a wrong or false misconception of an attack constitutes mistake of fact regarding the circumstances that, had they actually existed, would have been the reason for exculpation.

b) Putative necessity exists when the perpetrator is mistaken due to falsely believing that danger is imminent, that it has occurred and that it is still ongoing. In this case, the danger is not real but imagined, which points to the fact that the perpetrator is truly mistaken in terms of the circumstances (danger) that would, had it existed, be the reason for exculpation. In such circumstances, the perpetrator is attempting to protect their own asset by removing the danger. Such is the case when person A mistakenly or faultily believes that someone (person B) is calling for help from a closed space (apartment), so they break into the apartment in order to rescue person B.

2.2. Special forms of mistake of fact

In criminal law, in addition to the basic forms of mistake of fact, its special forms are also known. These include: mistake regarding object, person, or causation. These forms are based on a misrepresentation of a fact that is not criminally relevant. Their presence, in a specific criminal case, does not exclude guilt, meaning that they do not produce an effect in criminal law.

Mistake of object (*error in objecto*) exists when the perpetrator has a wrong or faulty idea about the object on which the crime is committed. This form of mistake of fact exists in practice when, for example, the perpetrator steals someone else's wristwatch thinking it is a prestigious brand, and it is in fact an ordinary watch of little value. The fact that the perpetrator intended to steal an expensive item, and instead stole an ordinary wristwatch, does not affect the existence of the criminal offense of theft (in both cases, it is someone else's personal property). Here, the perpetrator was not mistaken in regard to the essential features of the criminal act, but in relation to the type of object, which is irrelevant for the existence of mistake of fact.

Mistake of person (error in persona) exists when the perpetrator has wrong or fauly idea about the person against whom they have committed the crime. Thus, the perpetrator thinks that they have committed a crime against person A, but in fact the crime was committed against person B. As in the previous case, this form of mistake of fact is not criminally relevant either. This means that, as in the previously mentioned examples, the crime of theft exists regardless of the fact that the perpetrator had intended to steal a watch from one person, and instead has stolen it from someone else. In criminal law, mistake regarding a person is considered a special form of mistake about the subject of a criminal offense.

The prevailing understanding in criminal law, which denies the relevance of mistake of fact regarding an object or person, is not without exception. This

is the case when special characteristics of an object or a person constitute an essential element of a certain criminal act. Thus, for example, the criminal offense of Assassination of the Highest Government Officials (Article 310 of the Criminal Code), has as its legal feature the special characteristic of the person against whom the criminal offense was committed (President of the Republic, member of Parliament, Prime Minister, member of the Government , President of the Constitutional Court, etc.) If the intent of the perpetrator was focused on committing the above-mentioned criminal act, and instead of these persons, he mistakenly (error in persona) murders a person who does not belong to the circle of representatives of the highest government authorities, the perpetrator will be responsible for the criminal offense of Murder. Therefore, in this case, the existence of a mistake of fact about a person is relevant in criminal law, as the essence of this offense is included among the legal features of a specific criminal offense.

Mistake of causation exists when the perpetrator envisioned for the course of the offending act to happen one way, but in a specific case it happened in another way. This means that the unlawful consequence occurred in an unplanned manner or differently than envisioned. Depending on the degree and nature of the deviation of the cause-and-effect relationship, the relevance of the mistake of causation is assessed. Therefore, if the deviations are significant, this is a case of mistake that excludes intent in relation to the consequence (Babić & Marković, 2013, p. 261).

In criminal law, a special type of mistake of fact regarding causation that is better known in literature as a missed hit or missed shot (*aberratio ictus*). This means a real situation in which the perpetrator aims and shoots at one person but hits a completely different person. According to the prevailing opinion, this case contains the ideal confluence of criminal acts, namely: one that the perpetrator attempted with intent, and another that they negligently committed. In criminal doctrine, there is an opinion that, in the truest sense, this is not mistake of fact but a deviation in performance of the action, a deflection of the blow, the wrong course of action because it was poorly executed and had missed the desired goal (Bačić, 1998, 262).

2.3. The effect of mistake of fact on the culpability of the perpetrator

The effect of mistake of fact on the perpetrator's culpability is not uniformly regulated in the Criminal Code. Namely, mistake of fact in the narrower sense (mistake regarding the nature of the criminal act) and mistake of fact in the broader sense (delusion regarding the reasons for exculpation)

always exclude intent on the part of the perpetrator of the criminal act. In this sense, mistake of fact represents a complete negation of intent. Regarding the effect of mistake of fact, in the case of negligent actions of the perpetrator, it is necessary to start by separating it into: compelling and avoidable. This division is fully in the spirit of the legal provisions that regulate the institute of mistake of fact in our criminal law (Article 28 of the Criminal Code).

A compelling mistake of fact completely excludes the guilt of the perpetrator of the criminal offense. This means that this type of mistake excludes both intent and negligence as possible forms of culpability. In our criminal law, it si prescribed that *an act done out of a compelling mistake of fact is not to be considered a criminal offense* (Article 28, paragraph 1 of the Criminal Code). This means that a compelling mistake of fact in the narrower sense (mistake regarding the essence of criminal offense) and the broader sense (delusion about the reasons for exculpation) excludes guilt. In this sense our legislator declares that *a compelling mistake of fact exists where the perpetrator was not required or could not avoid a mistake about particular circumstance, which is a statutory element of the criminal offense, or about particular circumstance, which, had it existed, would have rendered such act permissible*. (Article 28, paragraph 2 of the Criminal Code).

An avoidable mistake of fact exists when the perpetrator had a wrong or faulty idea regarding the legal features of a criminal offense or the grounds for exculpation, despite being obliged to be informed or having an accurate idea regarding the circumstances of a specific criminal act. This is the case of a careless perpetrator, as a result of which he or she had misled him/herself and committed a criminal act. It is the stance of our legislator that an avoidable mistake of fact does not exclude negligence. In this sense, it is stipulated that *if the perpetrator's mistake was due to negligence, he shall be guilty of criminal offence committed by negligence, if such offence is provided by law* (Article 28, paragraph 3 of the Criminal Code).

Finally, mistake refers only to the actual circumstances that are a feature of a criminal act. With regard to other circumstances, which are outside the concept or nature of the criminal offense, it has no significance for criminal law (Tahović, 1962, p. 67).

3. Mistake of Law (error iuris)

3.1. Definition and forms of mistake of law

Mistake of law is a wrong or faulty idea regarding the prohibition of a criminal act. A person who commits a mistake of law mistakenly believes that their actions or non-actions are legally permissible, without knowing that they are committing a criminal act. The lack of awareness of the perpetrator regarding the prohibition of the act can be the result of direct or indirect mistake of law. *Direct mistake of law* exists when the perpetrator has the wrong idea that the actions undertaken do not constitute a criminal offense. This type of mistake of law exists when the perpetrator knows about the existence of legal norm, but misunderstands it and believes that it does not include their behaviour. We can come across numerous examples of direct mistake of law in practice. For example, a person does not know that they are committing the criminal offense of evasion if they misappropriate the higher sum of money mistakenly given by a bank clerk (Stojanović, 2007, p. 148). *Indirect mistake of law* exists when the perpetrator is under a misconception regarding one of the grounds for exculpation (act of minor importance, necessary defence and necessity). This is the case when the perpetrator mistakenly believes that the actions undertaken are permissible due to the small importance of the criminal offense or when the perpetrator mistakenly believes that a necessary defense is legally allowed.

The aforementioned types of mistake of law are connected by the lack of awareness of the prohibition of the act on the part of the perpetrator. In this sense, the lack of awareness in the perpetrator excludes their culpability. However, one should be careful when dealing with a criminal offense where there was no awareness of the perpetrator regarding its unlawfulness. There are criminal acts that are recognizable to every person as they have a long tradition and harm individual and societal interests. Such is the case with the criminal offense of murder, theft, robbery, etc. With regard to these crimes there is little chance that the perpetrator can successfully prove the existence of mistake of law. In addition, these criminal acts simultaneously violate social norms, which leads to the condemnation by the environment where the perpetrator lives and works. The second group includes more recent criminal acts. They affect certain spheres of social and personal relationships, and, as such, are unknown to the general public and laymen.

This is, for example, the case with the criminal offense of Violation of the Right to be Informed on the State of the Environment (article 268 of the

Criminal Code), which is unknown not only to most of the general public but also to the people dealing with law. In addition, there is a large number of criminal offenses in the field of computer data security, foreign exchange business, health, etc., that significantly differ from commonly known criminal offenses with a much longer tradition. With regard to these criminal acts, the perpetrator may act in mistake of law, i.e. can prove its existence in a specific criminal case.

3.2. The effect of mistake of law on the culpability of the perpetrator

Mistake of law was given varying legal significance in criminal law. In older criminal theory and legal monuments, the well-known principle of *ignorantia iuris nocet* (ignorance of the law is harmful), i.e. *ignorantia legis non excusat* (ignorance of the law is no excuse) was strictly applied. This means that a person could not refer to their own ignorance of legal regulations in which certain behavior is considered a crime. Disregarding mistake of law as a basis that exculpates the perpetrator of a criminal act has long the prevailing opinion in criminal theory. It was based on the psychological theory of guilt which has become obsolete in European and our criminal law. Newer psychological and normative theories of guilt show a radical turn in relation to the previous purely psychological understanding of guilt. On the basis of these theories, the existence of culpability requires the awareness of illegality of the criminal act on the part of the perpetrator. The understanding of mistake of law in the Criminal Code is based on psychological and normative theories of guilt.[1]

The effect of mistake of law on the culpability of the perpetrator is not uniformly regulated in our criminal law. It is possible to distinguish between two types of mistake of law: a compelling mistake of law and an avoidable mistake of law. This division is fully in the spirit of the legal provisions regulating the institute of mistake of law (Article 29 of the Criminal Code).

A compelling mistake of law exists where the perpetrator was not required or could not be aware that this act was prohibited (Article 29, paragraph 2 of the Criminal Code). Therefore, this is a perpetrator whose guilt is excluded because he could not have known that what he was doing was a criminal

[1] In criminal doctrine, the acceptance of a mistake of law is justified by the expansion of punishments for the purpose of introducing completely new incriminations. In addition, the acceptance of the normative-psychological understanding of guilt contributes to this treatment of mistake of law in criminal law (Lazarević, 2011, pp. 153-154).

act. Given that guilt is a legal element of a criminal act, its absence, by the actions of the perpetrator, negates the nature of the criminal act. In this sense, our legislator states that *an act shall not be considered a criminal offense if it was done out of a compelling mistake of law* (Article 29, paragraph 1 of the Criminal Code). This legal solution is classified as a modern comparative legal solution.[2] For the existence of a compelling legal mistake it is necessary to establish in a specific legal case that the perpetrator was not obliged and could not have known that this act was prohibited. Otherwise, there is *rebuttable* legal presumption that the perpetrator was aware of the illegality of the criminal act.[3]

An avoidable mistake of law exists in the case of a perpetrator who was unaware that an act was prohibited, but should and could have known (Article 29, paragraph 3 of the Criminal Code). In the case of an avoidable mistake of law the guilt of the perpetrator is not excluded, nor the possible awareness of the illegality of the criminal act. Therefore, an avoidable mistake of law does not lead to exculpation of a criminal offense, but may be punished leniently (Article 29, paragraph 3 of the Criminal Code).

The issue of mistake of law in international criminal law is regulated in a completely different way. Namely, the Rome Statute of the International Criminal Court understands legal error in the light of psychological theories of guilt (Act on Ratification of the Rome Statute of the International Criminal Court, 2001). According to the provisions of Article 32, paragraph 2 of the Rome Statute, ignorance of the illegality of the act, provided in the provisions of a certain legal document, as a criminal offense under the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. However, in specific cases, the possibility is foreseen that a mistake of law can exclude the criminal responsibility of the perpetrator if, in the specific case, the mental

[2] It is interesting to note that in Italy, the Constitutional Court, despite valid legal regulations, accepted the modern point of view that a compelling mistake of law excludes guilt (Vrhovšek, 2007, p. 20).

[3] The Decission of the Higher (District) Court in Subotica adopted the following position in regards to compulsive mistake of law: Bearing in mind that the defendant represented himself in the proceedings and that he was neither aware nor obliged and could have been aware of the prohibition of the criminal act in question, which consitutes a compulsive mistake of law, the first-instance court had the obligation to check the defense of the defendant in detail and to determine in a safe and reliable way whether it is founded or unfounded. This is due to the reason that a compulstive mistake of law from Article 29, para. 1 and 2 of the CC is one of the bases for the exclusion of guilt as one of the constitutive elements of the general concept of a criminal offense, and thus also the criminal offense the defendant is charged with (Decision of the District Court in Subotica, Kž. 458/07 of November 2007).

element of the criminal offense is excluded. Therefore, in exceptional cases, a mistake of law can be a ground for excluding the criminal responsibility of the perpetrator. Such are the cases where a subordinate person (Article 33, paragraph 1, point b. and c. of the Rome Statute):

- did not know that the order was unlawful and
- the order was not manifestly unlawful.

The provision of paragraph 2 stipulates that any order to commit the crime or genocide or a crime against humanity is considered manifestly unlawful. Therefore, the Rome Statue classifies genocide and crimes against humanity in the group of generally known criminal acts (mala in se), which excludes the possibility of the perpetrator's ignorance, and therefore the existence of legal error.[4]

4. Conclusion

The existence of wrong, unrealistic or imagined false understanding in a person leads to various external reactions. They can range from milder forms of unlawful behavior to the most serious crimes. Since mistake is a psychological and legal term, its meaning must be determined in a broader sense. This practically means that mistake is an institute that goes beyond the framework of legal norms as it is a pert of everyday interaction and communication between people. Hence, mistake has a different legal treatment in comparative criminal law.

In our country, the normative-psychological theory of guilt was adopted, which radically departs from its earlier, purely psychological treatment. This produced repercussions in the field of mistake as a basis for exculpation. A solution was adopted according to which an compelling mistake of fact and of law excludes the existence of a criminal offense, while an avoidable mistake can be the basis for leniency. Such a solution to the issue of mistake is a positive step forward, which brings our criminal legislature on the same level as modern European legislatures.

[4] The International Criminal Tribunal for the former Yugoslavia dealt witht he issue of mistake of law in Lubanga case. Reference to mistake of law should be added to this, in the case of contempt of fourt, by Florence Hartmann (Banović & Bejatović, 2011,p. 147).

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ZABLUDA U KRIVIČNOM PRAVU REPUBLIKE SRBIJE

REZIME: U radu je predstavljen institut zablude (error) u našem krivičnom pravu. Polazišnu osnovu čini zakonsko uređenje zablude kao jednog od osnova isključenja krivice. Uvažena je činjenica da zabluda predstavlja psihološko-pravni pojam čije značenje obuhvata više supstancijalnih elemenata. Pravna relevantnost zablude doprinosi njenom različitom tretmanu u zakonodavstvu. S obzirom da krivično pravo predstavlja granu zakonodavstva kojom se najdublje zadire u prava čoveka zabluda predstavlja važan institut kojim se može isključiti krivica učinioca krivičnog dela. U zavisnosti od vrste zablude, pravnih i situacionih okolnosti u kojima se razmatraju, moguće je izdvojiti: stvarnu zabludu (error facti) i pravnu zabludu (error iuris). Njihovo dejstvo je neophodno ceniti u kontekstu određenog krivičnog slučaja. Sledstveno tome, autor će u radu ukazati na opšti pojam i vrste zablude uključujući njeno dejstvo na krivicu učinioca krivičnog dela.

Ključne reči: *krivično pravo, stvarna zabluda, pravna zabluda, krivica.*

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THE IMPACT OF ARTIFICIAL INTELLIGENCE (AI) ON EDUCATION – BALANCING ADVANCEMENTS AND ETHICAL CONSIDERATIONS ON HUMAN RIGHTS

ABSTRACT: The primacy of artificial intelligence (AI) in education has become increasingly relevant in recent times, aiming to facilitate the easier acquisition of material. There is a growing emphasis on the implementation of AI and the search for ways to incorporate it into everyday work. However, this story brings into play ethical, copyright, and many other rights. The text discusses the growing role of artificial intelligence (AI) in education, emphasizing its potential benefits and ethical challenges. It explores the use of models like Generative Pre-trained Transformer (GPT) to enhance learning processes, yet highlights concerns related to transparency and ethics.

Keywords*: Artificial intelligence, Generative Pre-trained Transformer (GPT), Education, Ethical Considerations, Human rights.*

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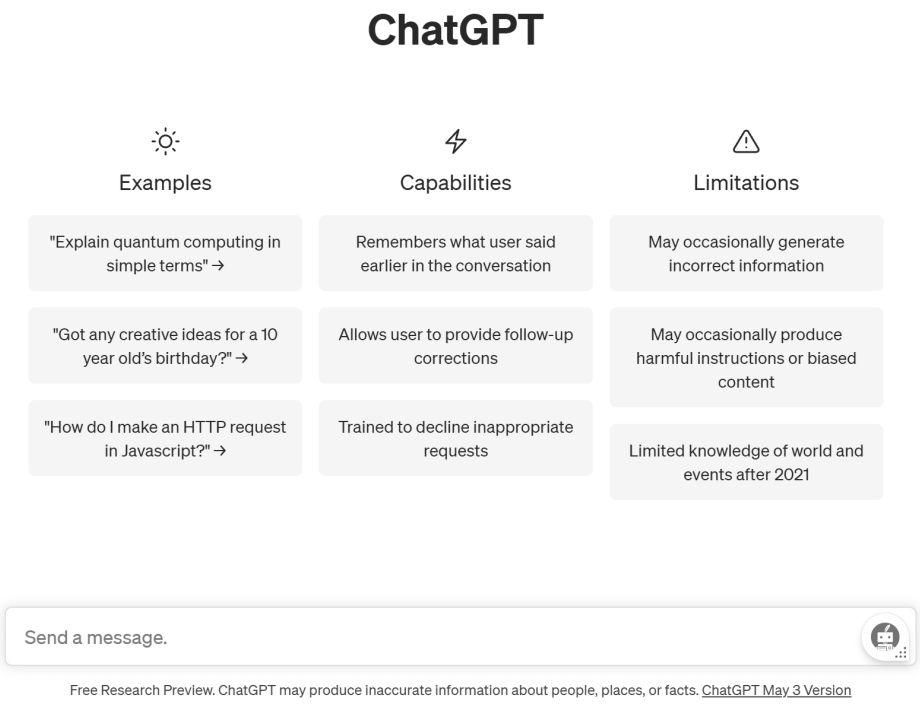
1. Introduction

Dependency on technology is increasingly prevalent in the current era. We are witnessing a time when children are spending more and more time with computers or mobile devices. The capabilities provided by GPT can lead to a dependence on their usage. The need and dependence for the use of Internet technology and the advantages it provides is increasingly being created. Internet addiction disorder should certainly be considered a general disorder under which there are other disorders that are directly related to the Internet (Bjelajac, Filipović & Stošić, 2022).

By employing artificial intelligence, students can access solutions or pre-written text more quickly and effortlessly. However, these outcomes might not genuinely reflect their own knowledge, thereby raising concerns about the level of understanding students attain through the utilization of artificial intelligence. Instead of arriving at final solutions through their individual effort and comprehension, students could resort to acquiring ready-made solutions and texts, thereby abbreviating the time they would spend in reading and comprehending the subject matter. This is especially pertinent in the context of initial programming education. The prevalent use of AI, particularly the adoption of ChatGPT, is conspicuous across all spheres of life.

ChatGPT (GPT: Generative Pretrained Transformer, https://chat.openai.com/chat), is a natural language processing model developed by OpenAI. OpenAI ChatGPT, which was created especially for conversational and chat-based applications, can understand user requests and produce text that simulates human speech. This makes it practical for systems like conversational AI systems, virtual assistants, and chatbots. Through natural language processing, ChatGPT generates human-like responses based on user input. It is designed to comprehend natural language and produce intelligent and relevant answers to user queries. Within just two months of its launch in November, ChatGPT became the fastest-growing consumer application in history with over 100 million active users. Since its release on November 30, 2022, ChatGPT has accumulated data up until 2021 and does not possess knowledge of events occurring after that date. (Source: ChatGPT Sets Record for Fastest-Growing User Base—Analyst Note).

Graph 1. Display of the ChatGPT Interface



According to the authors, "an emerging existential threat to the teaching and learning of introductory programming" (Finnie-Ansley et al., 2022). Zhu et al. (2021) describe the application of GPT-3 in various adaptive learning contexts and examine its effectiveness compared to traditional methods. Wu et al. (2021) explore the use of GPT-3 in promoting natural language learning and investigate how GPT-3 can assist students in developing language skills.

According to Lo's study in 2023, the performance of ChatGPT varied across different subject domains, ranging from exceptional (e.g., economics) and satisfactory (e.g., programming) to unsatisfactory (e.g., mathematics).

2. What are the advantages of using ChatGPT in education?

The utilization of ChatGPT in education can be beneficial in various ways. ChatGPT aids in personalized learning, student support, enhancing the efficiency of the teaching process, increasing educational accessibility, and monitoring student progress. Like any other innovation, ChatGPT also comes with its application advantages and limitations in education. Numerous

research studies highlight the advantages of employing GPT in education. The findings of one study (Liu et al., 2021) indicate that users perceived the conversational agent as helpful and that the tool effectively supported English language learning. In another study, Arora, Yadav, & Goyal (2021) explore the application of GPT-2 for assessing writing skills in English language students. The results suggest that GPT-2 can be used for evaluating writing skills and that its assessment closely aligns with evaluations from human raters.

In order to reduce time and boost writing quality, ChatGPT can be a useful tool in higher education for enhancing writing. It can generate texts, summarize data, and create outlines. Additionally, it can spot grammar and style mistakes, which improves the readability of written content (Atlas, 2023).

When discussing the application of ChatGPT in education, we can enumerate several characteristic advantages:

- Providing support to students,
- Enhancing the efficiency of the teaching process,
- Monitoring student progress,
- More efficient communication,
- Personalized learning.

Providing support to students involves ChatGPT offering pre-formulated solutions or guiding the process of arriving at a solution. In cases where difficulties persist, ChatGPT can, step by step, define and illustrate the approach to solving each task, even the problem itself. Additionally, by furnishing students with access to pertinent information and resources, proposing previously unexplored perspectives, and introducing novel areas of research, ChatGPT can facilitate the cultivation of research skills among students (Kasneci et al., 2023). This equips students with improved abilities to comprehend and evaluate the subject matter at hand.

Enhancing the efficiency of the teaching process is evident in assisting educators in automating various tasks, such as test assessment, test question generation, and assignment grading. For instance, in scenarios involving advanced or struggling students, ChatGPT can subsequently prepare specific tests or provide instructions on how to work with them. This means that the system can be tailored to different categories of students within the same cohort.

Several advantages of ChatGPT were highlighted by Rudolph et al. (2023), encompassing its ability to generate human-like dialogues, its rapidity and efficacy, and its cost-effectiveness due to the elimination of human labor.

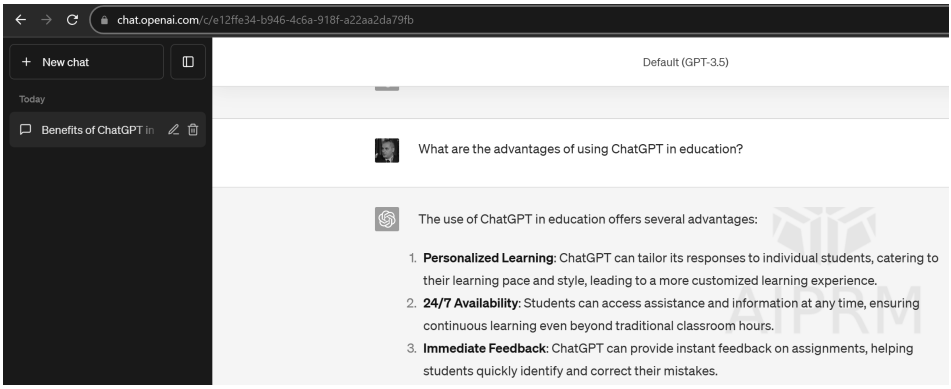
When discussing personalized learning, ChatGPT can be adapted to an individualized learning curriculum based on students' interests. Chokshi

& Thakkar (2021) suggest that GPT-3 is powerful enough to develop chatbots that can comprehend and tailor themselves to individual student needs. ChatGPT can be prompted to customize content for specific age groups, offering lesson plans, texts, links, and tests according to designated schedules. This allows educational materials to be tailored to each age group. The advantage is further amplified as ChatGPT provides the preparation of both open-ended and multiple-choice test questions with provided answers and explanations, facilitating faster and easier assimilation of the material. Further insights into personalized learning and the utilization of GPT can be found in the work of Hamad, Hammad & Zainuddin (2022). Increasing the accessibility of education is exemplified by ChatGPT's ability to enable students to access various materials and information more easily and swiftly. While using Google search yields millions of results, ChatGPT offers a specific and accurate response to precisely defined questions or problems. Attaining a more precise solution hinges on a correctly formulated prompt.

Monitoring student progress entails that educators can observe students' advancement through specific tests and, with the assistance of ChatGPT, tailor the curriculum to each age group and cohort, primarily offering individualized support to students.

Enhanced communication is evidenced by students' ability to pose questions at any time and receive answers promptly. However, the validity of the responses is brought into question, especially when questions are not precisely formulated. An illustration of potential responses to the stated question is demonstrated in the practical example below.

Figure 2. ChatGPT output on question: What are the advantages of using ChatGPT in education?



Source: Authors, using ChatGPT 3,5.

3. What are the disadvantages of using ChatGPT in education?

In addition to its positive aspects, ChatGPT also exhibits certain drawbacks. Some of the negative aspects include:

- Incomplete accuracy of responses,
- Lack of creativity,
- Absence of human reaction,
- Limited understanding capability,
- Potential for misuse,
- Dependency on technology,
- Inability/weakness in plagiarism detection.

When discussing the lack of human interaction, we primarily refer to the potential for reduced socialization among students and teachers. The teacher undoubtedly serves as a pivotal component in the education process, guiding the student's journey. Interaction with the teacher can make the student feel valued, engaged, and motivated for continued effort and knowledge acquisition.

Without supervision and result validation, not every response is guaranteed to be entirely accurate. Rigorous monitoring of responses can lead to misunderstandings and misconceptions. Therefore, the oversight, validation, and monitoring by teachers during its application are crucial.

Regarding creativity, the provision of ready-made specific solutions can inhibit students' creative thinking. Creativity itself is contingent on cognitive abilities, and the application of ChatGPT without student-teacher interaction might curtail the development of creativity, impeding the fostering of autonomy and critical thinking in students.

The limited understanding capability implies that without a properly and clearly defined prompt, ChatGPT will not provide a clear answer, thus questioning only the understanding of the issue. ChatGPT provides answers based on a clearly defined question, and logical reasoning alone does not lead to obtaining logical solutions. This change, these logical solutions, can be identified and addressed only by the teacher. Concerns have been raised about students using ChatGPT to copy and paste texts without critically evaluating what has been highlighted or selected from a source, without attributing the original sources, and without being aware of the possibility of plagiarism (García-Peñalvo, 2023).

When considering the potential for misuse, it primarily pertains to the utilization of pre-existing materials, texts, or the paraphrasing of published content. Detecting generated text is notably challenging, especially using

anti-plagiarism software. However, versions have emerged in the market that recognize writing styles produced by artificial intelligence, thereby alerting us or categorizing the text as AI-generated. Illustrative cases include instances where certain authors have begun publishing works with ChatGPT listed as the primary author or cite text provided by ChatGPT. Any form of employing ChatGPT devoid of logical reasoning and independent conclusion-drawing jeopardizes the integrity of the educational process.

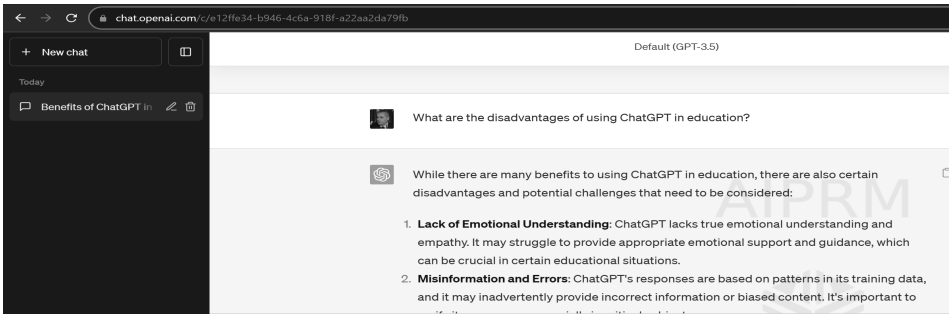
In his research, Mhlanga discovered that educators are concerned about the use of ChatGPT in education. In conducted studies, teachers expressed apprehension that students might submit work generated by ChatGPT due to its rapid ability to produce acceptable texts (Mhlanga, 2023). Another study revealed that the usage of ChatGPT in education presented various issues in studies, ranging from plagiarism to inaccurate answers and citations (Sallam, 2023).

Inadequate or weak plagiarism detection is a prominent concern when utilizing AI, particularly ChatGPT. In an experiment examining essays generated with ChatGPT, Khalil and Er (2023) discovered that 40 out of the 50 essays examined had a similarity score of 20% or less, indicating a high level of originality. ChatGPT produces high-quality outputs that are likely to evade plagiarism detection software. One potential solution for working with students has been the restriction of ChatGPT during instructional sessions.

While ChatGPT can assist in generating ideas for a specific subject, familiarizing oneself with its concepts and issues, or even generating potential application program code, the produced texts should not be regarded as final products (Halaweh, 2023).

An example of obtaining potential responses to the stated question is demonstrated in the practical example below.

Figure 3. ChatGPT output on question: What are the disadvantages of using ChatGPT in education?



Source: Authors, using ChatGPT 3,5.

4. The impact of artificial intelligence on human rights

It can be said that among other events, the year 2023 was marked by debates on the topic of artificial intelligence (AI), its use for societal advancement, and the risks it brings. For this reason, Colinson's Dictionary declared artificial intelligence (AI) as the word of the year in 2023. (Collins Dictionaries, 2023). What can be observed as a common result of all debates on the use of artificial intelligence is the consensus that, on the one hand, it can be a driver of societal development, but on the other hand, it can pose a risk to the security of citizens and be an instrument for violating basic human rights. Concerns about potential misuse of artificial intelligence are also expressed through increasingly frequent international congresses on the topic of AI and the risks it brings. One such conference was held on November 1st and 2nd, 2023, by the United Kingdom government under the theme "AI Safety Summit." (Government of the United Kingdom, 2023). The goal of international conferences is to achieve consensus on a global level regarding the measures that need to be taken to ensure global security in light of the increasing use of artificial intelligence.

We can only talk about the positive side of using artificial intelligence (AI) if it does not pose a danger to humans, and this can be achieved only by ensuring the security of both input and output data. In this era of growing AI usage and efforts to mitigate the risks it brings, it is necessary to have appropriate legal regulations at both the international and national levels. One good example of legal regulation for the use of artificial intelligence is the European Union, which has adopted a series of declarations and resolutions aimed at ensuring safety and protecting human rights from violations through the use of AI (Prlja, Gasmi & Korać, 2021, p. 9).

In the process of aligning legal regulations with the expansion of the use of artificial intelligence, the Republic of Serbia has adopted a series of documents to regulate its use and align with international documents that govern the application of artificial intelligence. One of the more important documents in this field is the Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020-2025. (2019). In addition to measures aimed at promoting the development and application of artificial intelligence in various areas of society to enhance economic development and improve services, the strategy also includes measures necessary to ensure its safe use. This involves preventing its misuse and protecting citizens. Based on the analysis of documents that regulate the application of artificial intelligence, both at the international and national levels, we can conclude that the common

characteristic of all these documents is the emphasis on the need to strike a balance between the development of artificial intelligence and its safe use. "While there are potential benefits in terms of economic development and improved efficiency, the development of artificial intelligence also brings certain challenges. These include data protection, the risk of inheriting biases and discriminatory factors from data, and other ethical concerns"(The Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020-2025, 2019, 1.2, paragraf 6).

By aligning its regulations with those of the European Union, the Republic of Serbia aims to achieve a common goal, which is to ensure that technological advancement and the increasing use of artificial intelligence do not jeopardize human safety. Serbia has adopted Ethical Guidelines for the development, implementation, and use of reliable and responsible artificial intelligence (2023). Explainability and verifiability are among the fundamental ethical principles of artificial intelligence usage, ensuring transparency and the ability to verify and test a particular system and its impact on humans. Adherence to this principle is achieved by requiring an explanation of the purpose and manner of using artificial intelligence systems, especially those that are the product of AI and provide automated recommendations or make decisions on specific issues for humans (Milošević Grbić, 2023), furthermore, by not providing explanations for such decisions, transparency is called into question. Providing rationales for decisions made using artificial intelligence is aimed at preventing misuse and discrimination (Avramović & Jovanov, 2023, p. 171). The right to dignity is one of the fundamental human rights, and its protection is guaranteed by the Constitution of the Republic of Serbia (The National Assembly of the Republic of Serbia, 2006, Article 23). The risks of violating human dignity through the use of artificial intelligence include the spread of unchecked news and disinformation, which directly jeopardize human dignity (Konstantinos & Lambrou, 2023, p. 14), as well as errors in facial recognition due to the use of artificial intelligence programs for facial recognition in public places, which have exposed many individuals to discomfort and violations of their dignity by law enforcement in the previous period (Gasmi & Prlja, 2021, p. 328). The principles of fairness and protection against discrimination in the decision-making process using artificial intelligence systems can only be achieved if there is transparency and explanations for decisions made using AI systems. Artificial intelligence, as a system, relies on data input by humans, which may inadvertently contain their own biases (Avramović & Jovanov, 2023). There is a high risk associated with the use of artificial intelligence concerning the right to personal data protection of individuals.

The Republic of Serbia adopted the Law on Personal Data Protection in 2018 (National Assembly of the Republic of Serbia, 2018), which guarantees the protection of personal data during collection and processing. In the previous period, competent authorities observed different interpretations of the Data Protection Law (The Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020-2025, 2019), leading to legal uncertainty.

According to the Ethical Guidelines for the development, implementation, and use of reliable and responsible artificial intelligence, the use of artificial intelligence in the field of education is considered high-risk (2023). When it comes to the use of artificial intelligence tools like ChatGPT in education, there seems to be divided opinions. On one hand, some argue that ChatGPT, if used intelligently, can serve as a tool to reduce the workload of teachers and enhance the quality of education. On the other hand, others believe that it provides students with the means to cheat and plagiarize their work (Connolly & Watson, 2023). Many universities have banned the use of ChatGPT (such as Cambridge, Imperial College of London, Sciences Po in Paris, India, and many others), as have certain countries (Italy, China, Iran, North Korea) (Gordon, 2023). On the other hand, we have examples like South Australia, which has approved the use of ChatGPT in its educational institutions (Gordon, 2023). Opponents of using ChatGPT in education argue that it hinders future academics from thinking independently and critically, fostering a habit of accepting others' ideas and opinions, thereby denying them the right to their own thoughts. They also argue that it enables plagiarism. Advocates of allowing the use of ChatGPT, but in a controlled and permissible manner, point out that even today, students can plagiarize and buy papers, but there are checks through various plagiarism detection software programs. They believe that educational institutions should adapt to the digital age and use AI tools responsibly to enhance the learning experience institutions should approach and consider the use of ChatGPT in the same manner (Connolly & Watson, 2023).

5. Conclusion

Despite the existence of negative aspects, the advantages of utilization far outweigh the drawbacks when it comes to the application of GPT in education. The use of GPT in education undeniably yields positive effects, albeit contingent upon proper implementation. Foundational training and knowledge about its usage are imperative. The negative impacts themselves

can be mitigated through thoughtful question design, training educators and students for effective technology use, and the seamless integration of ChatGPT into the educational curriculum. Educating students about the rules of ChatGPT use and monitoring its application are pivotal factors in safeguarding the integrity of the educational process.

The implementation of GPT in education holds the potential for significantly enhancing efficiency and personalization in education. However, concurrently, we must remain cognizant of the potential negative consequences. Therefore, further research and the development of appropriate regulations can aid in ensuring responsible adoption of this technology within an educational context. While the application of ChatGPT demonstrates positive outcomes, a more comprehensive assessment is required to gain a deeper understanding of its potential benefits and threats to education.

At the end, the incorporation of artificial intelligence in education holds immense potential to transform the educational process, providing advantages like enhanced productivity and tailored instruction. But one must carefully weigh potential downsides, transparency challenges, and ethical considerations. The more general conversations about the dangers and effects of AI on society highlight the necessity of international cooperation as well as laws to guarantee the responsible application of AI. Finding a balance between advancement and protecting human rights is still a critical concern as the AI landscape changes.

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UTICAJ VEŠTAČKE INTELIGENCIJE (VI) NA OBRAZOVANJE – BALANSIRANJE NAPRETKA I ETIČKIH RAZMATRANJA LJUDSKIH PRAVA

REZIME: Primat veštačke inteligencije (VI) u obrazovanju postao je sve relevantniji u poslednje vreme, sa ciljem olakšavanja lakšeg usvajanja materijala. Postoji sve veći naglasak na implementaciji VI i potraga za načinima kako je uključiti u svakodnevni rad. Međutim, ova priča uvodi etička, autorska i mnoga druga prava. Tekst razmatra rastuću ulogu veštačke inteligencije (VI) u obrazovanju, ističući njene potencijalne prednosti i etičke izazove. Istražuje korišćenje modela kao što je Generativno Predtrenirani Transformator (GPT) u svrhu unapređenja procesa učenja, ali istovremeno ističe zabrinutosti u vezi sa transparentnošću i etikom.

Ključne reči: *veštačka inteligencija, Generativno predtrenirani tdransformator (GPT), obrazovanje, etička razmatranja, ljudska prava.*

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REVIEW OF THE DEFINITION OF CRIMES AGAINST HUMANITY IN CASE-LAW OF THE *AD HOC* TRIBUNALS

ABSTRACT: Crime against humanity is one of the oldest international crimes, sanctioned by the international community since the early twentieth century. Throughout the twentieth century, the concept of this international crime has evolved, and its definition and scope have undergone changes from the Nuremberg Tribunal, through ad hoc international tribunals for the former Yugoslavia and Rwanda, up to the Statute of the International Criminal Court. However, ever since the first codification of this international crime, there has been a challenge in fully determining it. This is evident from continuous efforts at the United Nations to adopt a comprehensive special convention that will codify all rules related to crimes against humanity. This paper will demonstrate the development of the definition of crimes against humanity through statutory prescriptions in the statutes and jurisprudence of ad hoc tribunals and the International Criminal Court, which have significantly influenced the definition of crimes against humanity.

Keywords: *crime against humanity; ad hoc tribunals; Rome Statute.*

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1. Introduction

Crime against humanity is one of the oldest international crimes. The prohibition of the commission of this crime, and the obligation of states to prevent and punish the perpetrators of this crime, is part of both international customary law and many international legal instruments. These obligations, what's more, have been elevated to rank *ius cogens* norms, that is, they represent international legal norms of a peremptory character (Draft articles on Prevention and Punishment of Crimes Against Humanity (hereinafter: Draft), 2019, Preamble). As part of *ius cogens* norm, prohibition has *erga omnes* effect, and derogation or deviation from this obligation is not allowed (Wald, 2007, p. 621). This rule is considered inherent to civilized society. No country, therefore, must depart from the prohibition of crimes against humanity (Galland, 2019, p. 33), because compensation for these crimes is in the interest of the community (Orakhelashvili, 2008, p. 288).

Although it appeared sporadically even before the 20th century, the very term *crime against humanity* was used for the first time, in the modern sense, on the occasion of the massacre of the Armenians by the Ottoman Empire in 1915 (Shabas, 2007, p. 98). Namely, the term was officially used in the joint Declaration of the Allied governments, that is, the governments of France, Great Britain and Russia, as allied powers in the First World War (Shabas, 2007, p. 34). To denote the massacre of the Armenians, the term "crime against Christianity and civilization" was initially proposed, but later the term "Christianity" was changed to the term "humanity" (Cassese, 2008, p. 101).

The circumstances of the case that resulted in the appearance of the concept of a crime against humanity – the massacre of the Armenians – could be presented through a couple of important elements: 1) the crime was committed during the war, 2) it began against the civilian population, 3) it was characterized by a large number of victims and 4) was carried out in an organized manner by engaging the state apparatus (similarly to Šurlan, 2011, p. 89). Two positions expressed in the aforementioned Declaration of the Allied Governments, from the aspect of establishing the concept of crimes against humanity, stand out in particular: 1) the understanding and position is expressed that the Turkish state carried out the massacre and 2) the understanding and position is expressed that all members of the Turkish government will be considered personally responsible. Attitudes expressed in this way are still considered fundamental elements of crimes against humanity (Dadrian, 1996, p. 213). Therefore, the Declaration defines and incriminates that behavior which is evidently such that only the state can implement it with

its coercive apparatus, and in addition to the responsibility borne by the state, it is also a personal responsibility – of all those who represent the state and participate in conducting such a policy. By the Peace Treaty of Sèvres from 1920, it was foreseen that the Ottoman Empire would hand over to the Allied Powers those persons who were wanted as responsible for the massacres that took place on the territory of the Ottoman Empire (Cassese, 2008, p. 102). However, the Treaty of Sèvres never entered into force, and a new one was adopted – the Treaty of Lausanne – which amnestied all Turkish crimes. The crime of aggression will not be discussed in more detail on the international stage until the end of the Second World War (Shabas, 2007, p. 99).

The return to the international scene, and the further development of the definition of the term "crime against humanity" is realized through the definitions of crimes against humanity in the statutes of the International Military Tribunal in Nuremberg and the International Military Tribunal in Tokyo, and the definitions of crimes against humanity in the statutes of the *ad hoc* tribunal for the former Yugoslavia and Rwanda (Bassioun, 2010, pp. 575-593). Today, the most relevant and complete definition of a crime against humanity is the one contained in Article 7 of the Rome Statute of the International Criminal Court (similarly to Đorđević, 2014, p. 139). This definition, along with the practice of the International Criminal Court (see extensively: Stanojević, Pavlović & Prelević, 2010), will serve as a starting point for regulating this issue at the level of public international law.

This, however, does not mean that the international community has ceased to be interested in and strives to further, on a rounded level, regulate the issue of crimes against humanity and responsibility for the violation of the ban on the commission of this crime, both at the level of individual criminal responsibility and at the level of state responsibility for violations of this *jus cogens* norms. To this end, the adoption, within the UN, of a special convention on preventing and punishing crimes against humanity has been discussed for several years, and the International Law Commission prepared a draft and published it in 2019.

2. Crimes against humanity before the Nuremberg and Tokyo tribunals – first definitions

The crime against humanity, understood in the modern context, was for the first time incriminated and prosecuted before the International Military Tribunal in Nuremberg (hereinafter: the Nuremberg Tribunal) and the International Military Tribunal in Tokyo (hereinafter: the Tokyo Tribunal).

After the end of the Second World War, the London Conference, which began on June 26, 1945, gave birth to the Agreement on the Prosecution and Punishment of the Main War Criminals of the European Axis, which, in August 1945, was signed by the four Allied Powers. The Statute (Charter) of the Nuremberg Tribunal was an annex to this agreement (Shabas, 2000, p. 37).

The definition of crimes against humanity contained in the Statute of the Nuremberg Tribunal undoubtedly represents, in its essence, the initial and most characteristic phase of the development of this crime as an international criminal offense (Shurlan, 2011, p. 200; Lopičić, 1998, p. 59). Thus, Bassiouni (1994), points, "out that this definition served as a model and legal basis for the latter definitions, but also as a confirmation of the status of the international custom of crimes against humanity in the work of the *ad hoc* Tribunal for the former Yugoslavia" (p. 457). Namely, as a result of the negotiations between the representatives of the four allied powers in London, an agreement was reached regarding the definition of what will become a crime against humanity, as it reads in Article 6(c) of the Charter of the International Military Tribunal in Nuremberg:

> *"c) crimes against humanity: that is, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during war, or persecution on political, racial, or religious grounds in the commission of or in connection with of any crime within the jurisdiction of the Court, regardless of whether or not it violates the laws of the country where the crimes were committed."*

However, the very definition of crime against humanity in Article 6(c) is meager, since it does not refer to a wider context, does not contain a general concept, i.e. *chapeau*, viewed in isolation, does not reflect the specifics of this work (Šurlan, 2011, p. 204). It is obvious that the authors were not inclined to prescribe this act as an independent crime. This, Schabas (2007) "points out, was because the Allies were uneasy about the consequences that wider, fuller and more independent regulation might have in terms of the treatment of minorities in their countries (and especially colonies)" (p. 99). Therefore, the Allies insisted that crimes against humanity could only be committed if they were connected to one of the other crimes within the jurisdiction of the Tribunal, namely war crimes or crimes against peace. By prescribing this and binding it to another crime, the Allies, as an obligation, predicted the existence of a nexus between crimes against peace or labor crimes, on the one hand, and crimes against humanity, on the other. Therefore, a crime against

humanity, *ipso facto*, was not and could not be an independent crime. It also points to the fact that, at the time of the writing of the Nuremberg Charter, crime against humanity did not yet exist as an independent crime as part of customary international law.

However, viewed in a wider context, i.e. primarily in the context of the entire Article 6, the incrimination of crimes against humanity acquires sufficient characteristics when paragraph 1 of Article 6 of the Charter is taken as a *chapeau* , i.e. a contextual element of crimes against humanity, by which the narrowly and insufficiently defined paragraph (c) acquires other unifying elements.

Thus, paragraph 1 of Article 6 of the Charter primarily determines that the Court is established *"as a court for the trial and punishment of the main war criminals of the European Axis countries."* The individual responsibility implied by this expression is further emphasized below, where it is determined that *"the court is competent to judge and punishes persons who, either as individuals or as members of an organization"* have committed any of the aforementioned crimes. The circumstance that these are not just an individuals, although already emphasized by the designation "major war criminals", is additionally accentuated by the requirement that the activities undertaken by the individuals were in the "interest of the countries of the European Axis . We believe that the linguistically logical formulation *"interest of countries"* has the function of a contextual element which in the modern redaction of crimes against humanity is determined as a plan or policy, i.e. an element which should show the crime against humanity not as an isolated, sporadic act of an "ordinary" individual, but as an organized action of the state against individuals (Bassiouni, 2008, pp. 448-450). Therefore, Schabas (2008) "argues that it is probably for this reason that the requirement for the existence of an element of state or organizational policy was omitted from the definition of crimes against humanity in the Nuremberg Tribunal Charter" (p. 953). The correctness of this understanding is additionally reflected in the last paragraph of Article 6.27, which states that *"leaders, organizers, instigators or accomplices, who participated in the creation or execution of a joint plan or conspiracy for the execution of a joint plan or conspiracy for the execution of any of the mentioned crimes, are responsible for all acts committed in the execution of such a plan by any person."* Like Schabas, we believe that from these mentioned *"secondary"* elements a clear conclusion can be drawn that even the Charter of the Nuremberg Tribunal required the existence of a state or organizational policy, i.e. undertaking a specific action as part of this policy,

as a necessary precondition for the existence of crimes against humanity and its prosecution.

The acts of committing crimes against humanity listed in the Nuremberg Charter represent the first list of concrete or relatively specific acts of commission enumerated for this crime. Although the list of acts of execution only expanded over time, those enumerated in the Nuremberg Charter were retained in modern incriminations of this crime. The specificity of the solution of the Nuremberg Statute regarding enforcement actions is reflected in the fact that enforcement actions are grouped into two categories, of which the first group of actions includes actions aimed at the existence and physical integrity of a person. However, with the words "other inhumane acts", the enumeration of this group of acts is left open for the introduction of other acts that are characterized by brutality, inhumanity, monstrosity and which, due to such characteristics, may represent the act of committing a crime against humanity. This open ended provision, in its essence, is contained in the provision of Article 7(k) of the Rome Statute. The second group of acts of execution – persecution, by definition does not have to contain elements of physical abuse of people, but it is enough for the persons to leave the country, scared of the evil fate that could overtake them if they stay, so that in that case they are considered exiled (Šurlan, 2011, p. 208), where in the case of persecution, as a manifestation of the act of committing a crime against humanity, differences appear in terms of the motives of expulsion, which could be political, racial and religious.

The definition of crimes against humanity in the Nuremberg Charter as one of the constitutive elements of this crime includes the primacy of international law. This means that the circumstance of whether the acts of execution violated the law of the country where the crimes were committed has no influence on the existence of the crime against humanity and the prosecution and responsibility of its perpetrators. The reason for such a prescription is a direct consequence of the then valid legislation of Nazi Germany, which actually represented the basis for the commission of crimes against humanity. Since, in the pre-war period, Germany passed a considerable number of laws that enabled *lege artis* discrimination against Jews, their complete disenfranchisement, confiscation of property, expulsion, killing, it was necessary in the definition of crimes against humanity to directly eliminate the effect of those laws, that is, to determine that their existence, as well as (dis)compliance with national regulations is not important.

The Nuremberg Charter laid the foundations and provided for almost all the elements of crimes against humanity, as known by modern international criminal law.

The decision on the judicial prosecution of the main war criminals was applied in parallel to the events that took place in the Far East. The Tokyo Tribunal was formed on the model of the Nuremberg Tribunal, with the aim of prosecuting the main persons responsible for mass crimes by applying the concept of individual criminal responsibility, while most of the participants in the crimes were left to be processed by domestic courts, whereby the Japanese Emperor Hirohito was exempted from prosecution and individual criminal responsibility for crimes within the jurisdiction of the Tokyo Tribunal.

The international crimes for which the Tokyo Tribunal had jurisdiction are defined in Article 5 of the Tokyo Charter. In prescribing the crimes that will fall under the jurisdiction of the Tokyo Tribunal, basically, the same legal and nomotechnical methodology was applied as in Article 6 of the Nuremberg Charter, prescribing a single *chapeau*, and then grouping them into three categories of crimes: crimes against peace, classic war crimes and crimes against humanity. Thus, it is foreseen that the Tribunal will be competent for the trial and punishment of war criminals of the Far East who were either as individuals or as members of an organization suspected of having committed acts as part of crimes against peace. Responsibility is conceived as individual and subjective. A crime against humanity is defined as "*murder, extermination, enslavement, deportation and other inhumane acts committed before or during war, or persecution on political or racial grounds in the execution of or in connection with other crimes within the jurisdiction of the Tribunal, regardless of whether they constitute violation of the internal laws of the state in which they were committed"* and *"Leaders, organizers, inspirers and accomplices who participated in the design or implementation of a joint plan or conspiracy for the execution of any of the aforementioned acts are responsible for the acts performed by any person in terms of the implementation of the plan.*"

Although the statutes of both *ad hoc* tribunals were created in an almost identical period, the inevitability of their comparison shows us that the approach to defining crimes against humanity was nevertheless different. While in the Nuremberg Statute all the main general elements are expressed in *a chapeau* common to all three categories of acts, in the Tokyo Charter, the wording is done differently. Namely, common elements establish in principle individual responsibility, both individually and as a member of a group, and the commission of a crime in the connotation of a crime against peace, thus

establishing a connection with war (Bassiouni, 1994, pp. 468-469). The category of crimes against humanity is further determined by the elements of the plan or policy either in terms of formulation or implementation. With the introduction of this element, the crime against humanity received its rounded, complete physiognomy, by means of which it is fundamentally different and independent from the other two categories of crime. The element of differentiation also appears in the criterion of discriminatory behavior. Namely, while in the variant of the Nuremberg Charter persecution is related to the criteria of political orientation, race or religion, in the version of the Tokyo Charter discrimination is directed towards groups of different political orientation and racial affiliation. Unlike the war in Europe, religion did not appear as an important factor in warfare in the Far East (Kittichaisaree, 2001, p. 119). The element of crime against humanity that is specifically stated in both the Nuremberg and Tokyo Charters is the existence of responsibility for the crime independent of the solution of internal legislation, while in later definitions of crimes against humanity this element is no longer explicitly stated. However, we believe that this is due to the simple fact that with the later development of international law, it was crystallized as a general rule of international law that no one can invoke their internal law to justify the violation of an international legal obligation or prohibition. These first steps in establishing and defining crimes against humanity, although a great step forward, were nevertheless limited. As the biggest limitation, we consider the non-independence of this crime, that is, the condition of prosecuting this crime only with some other crimes that fell under the jurisdiction of the Nuremberg and Tokyo Tribunals. Dissatisfaction with such a restriction emerged within weeks of the Nuremberg verdict. Namely, the General Assembly of the United Nations quickly decided to, on a universal level, determine and define the most serious form of crime against humanity – genocide – as a separate and independent crime that could be committed both in peace and in wartime (Schabas, 2007, p. 100). In the period from 1945 to 1948, there were several variants of proposals according to which the definition of crimes against humanity does not require the existence of war. This has led many to take the view that, from a common law perspective, the definition has evolved to definitively cover crimes committed in peacetime (Schabas, 2007, p. 101). However, the UN Security Council introduced a dose of uncertainty into the definition when, in 1993, it established the International Criminal Tribunal for the former Yugoslavia, whose Statute, in Article 5, required that a crime against humanity must be committed within the framework of an armed conflict, whether international or internal character. Nevertheless, the same

UN Security Council, just one year later, however, when establishing the International Criminal Court for Rwanda, did not insist on the existence of an armed conflict. Although there would be little doubt about the status of crimes against humanity as part of customary international law and its constituent elements at the time of the establishment of these *ad hoc* international tribunals, these inconsistencies in the actions of the international community, and especially the UN Security Council, called into question the common law content of crimes – what exactly does the common law prohibition of committing crimes against humanity mean?

3. Crime against humanity in the Statute and practice of the ad hoc International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (hereinafter: the Tribunal or ICTY) was established by United Nations Security Council Resolution no. 827 of May 25, 1993 as *ad hoc* criminal tribunal. Many contested the legality of this tribunal, that is, the right of the UN Security Council to establish a judicial body in order to preserve world peace and stability, acting on the basis of Chapter VII of the UN Charter. Agreeing with the claim that the UN Security Council should not have established the Tribunal in this way, denying it legitimacy and giving it the attribute of a political court, and obliging all member states to cooperate with it, in terms of legality, we nevertheless take a different position. Without going into the complex matter of international public law and rules related to the United Nations system, we nevertheless point out that the UN Security Council is essentially unlimited when it takes measures based on Chapter VII of the UN Charter, with the aim of establishing and protecting world peace and stability.

In any case, one of the crimes for which this Tribunal was competent to prosecute is a crime against humanity. Namely, the actual jurisdiction of the Tribunal is determined by Article 5 of the ICTY Statute. The definition of crimes against humanity of the ICTY Statute is the first modern and positive legal definition adopted after the end of the Second World War.

As we pointed out, the crime against humanity is defined in Article 5 of the Statute as follows: "*The International Court is competent to prosecute persons responsible for the following criminal acts when they were committed in an armed conflict, either of an international or internal nature and directed against the civilian population: a) murder; b) extermination; c) enslavement; d) deportation; e) closure; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts*" This definition of

crime called *crime against humanity*, however, does not correspond to the definition and does not include elements that, at that time, could be considered customary law. Bassiouni (1994), "gives the definition contained in the ICTY Statute so incomprehensibly modest and unusable that it inevitably encourages consideration of the reasons that led to it" (p. 459). Namely, the deviation from the customary law definition of the act, as well as the elements of this crime established since Nuremberg, is striking to such an extent that it raises doubts regarding the nature of the deviation – whether this definition is contrary to the general concept of crimes against humanity in the international customary law that was present at the time, or are deviations of such a character that they do not violate the essence of the of this crime (Šurlan, 2011, p. 221). We'll see, the Tribunal, through its practice, will change this definition a lot.

As we pointed out, at the time of the adoption of the ICTY Statute, as a part of customary international law, it undoubtedly included certain basic elements of this part, namely: 1) a crime against humanity can be committed both in times of war and in times of peace, 2) the crime is directed against the civilian population, 3) the crime must be committed systematically and widely and 4) the crime must be committed as part of a plan or (organizational) policy. Of the aforementioned four basic elements of crimes against humanity, and as defined in Nuremberg and Tokyo (which will later appear in the Rome Statute), in the statutory solution of the Statute of the *ad hoc* Tribunal for the former Yugoslavia, only one appears – the element of the civilian population

The element of committing an act whether in war or in peace is narrowed down and the act is related to armed conflicts, either international or internal. Namely, it was still decided in Nuremberg that the crime against humanity refers to acts committed "*before or during the war.*" The possibility of peacetime execution of this crime, according to customary international law, was therefore not disputed. Although the Tribunal's mandate was to try crimes committed on the territory of the former Yugoslavia, which were predominantly involved in armed conflicts, this, we believe, cannot be a sufficient and justified reason for the UN Security Council to deviate from the definition of this crime under international customary law, thereby introducing uncertainty into the international legal order.

The element of distribution and organization is completely omitted, as well as the element of having a policy or an organizational plan. A simple linguistic interpretation would lead to the conclusion that, for example, every single case of murder committed during an armed conflict automatically constituted a crime against humanity. Such an approach is absurd and contrary to both the existing general concept of crimes against humanity according to

customary law, as well as the logic and purpose of international criminal law and justice.

The definition of crime against humanity in the Statute of the Tribunal stands out all the more strikingly from the general flow and development of the concept of this crime and even more directly highlights the one-time nature of its purpose, bearing in mind the fact that it was not conceived in the codification and nomotechnical way of defining the act according to the model "a crime against humanity is..." but it was already done according to the model of authorizing the Court to prosecute for certain actions (Bassiouni, 1994). Namely, the basic logic that was applied in the cases of the *ad hoc* tribunals in Nuremberg and Tokyo was reduced to adaptation to the situation and the directly committed crimes, and was also applied in the case of the ICTY. Certainly, to a certain extent, it was justified and, at first glance, rational. However, since the jurisdiction of the ICTY was not limited in time, and as the crimes took place even after the drafting of the Statute, it turned out that the logic of binding to the created and factually clear situation is irregular and that the determination of this part is unnecessarily restrictive (Šurlan, 2011, p. 222).

Nevertheless, the Tribunal, through its rich practice, did not stop or limit itself to the definition set by the Statute, but the Tribunal interpreted the crime against humanity in the categories of customary law definition, referring to the Nuremberg Charter, draft codes, and theoretical works, thus supporting its arguments for expanding the definition of crimes against humanity. In this way, in the practice of the Tribunal, the unnecessary narrowing of the concept of crime against humanity was primarily corrected, and its essential legal essence was confirmed. On the other hand, by referring to customary law, the Tribunal tried to prevent possible objections of violation of the principle of legality (Šurlan, 2011, p. 231).

As a consequence of insufficiently appropriate statutory regulations, as well as the creative role of judicial panels, in considering the basic elements of crimes against humanity in the context of the *ad hoc* Tribunal for the former Yugoslavia, two categories are distinguished: crimes against humanity as defined in Article 5 of the Statute and crimes against humanity as is shaped in the practice of the Tribunal.

Thus, from the perspective of the Tribunal's judicial practice, unlike the elements of crimes against humanity defined in Article 5 of the Statute: 1) that the act can and must be committed within the framework of an armed conflict and 2) that it is directed against the civilian population, the Tribunal, through its practice, as elements of crimes against humanity decided: 1) that the crime

can be committed during an armed conflict, whereby the armed conflict extends to the territories of states where there is neither a factual conflict nor a formal relationship between the warring parties, if it can be established that there is a connection between of a primary armed conflict with that territory – which, viewed essentially, introduces the element of peace in a hidden form; 2) the crime is directed against civilians; 3) the act must be part of an attack; 4) the work is an integral part of a widespread and systematic action; 5) the act must be committed with the awareness of participation in the widespread and systematic implementation of the plan and 6) the act is characterized by distinct inhumanity and brutality that shake the conscience of humanity (Schabas, 2006, p. 187 et seq.; Šurlan, 2011, p. 231).

From the point of view of the modern definition of crime, but also from the point of view of the definition of crime from the time of Nuremberg, an essential characteristic of this crime appears to be that it can be committed both in times of war and in times of peace. As the concept existed even at the time of Nuremberg, the reason for the restrictive definition of this element of crimes against humanity in the ICTY Statute is unclear. From the point of view of the implications of the restrictive definition of crimes against humanity in the Statute, the Tribunal itself has repeatedly dealt with the issue of the possibility of existence and prosecution of crimes against humanity exclusively in times of armed conflict.

The element of systematic and widespread attacks is completely omitted in the definition of the crime referred to in Article 5 of the Statute. Without this element, a crime against humanity conceived in this way could rather be understood as a simple sum of individual criminal acts connected by the circumstances that they were committed against civilians during the war, rather than pointing to a specific and unique international crime, undoubtedly different in relation to other criminal acts. or international crimes (Šurlan, 2011, p. 225).

Although the element of knowledge or awareness of participation in the wider aspect of the commission of crimes against humanity does not appear in the text of Article 5 of the Statute, the Tribunal, through its practice, quite rightly highlights it. Namely, in addition to the mandatory existence of imagination as the only acceptable category of *mens rea* for all international crimes[1], in the case of crimes against humanity, in addition to the conscious

[1] Ignoring, of course, the absurd and widely criticized approaches of the Tribunal regarding the definition of individual criminal responsibility according to the model of joint criminal enterprise.

and willing undertaking of actions, another element is essential – that the perpetrator of the crime had knowledge and awareness that his action belongs to a wider context of events, i.e. that he undertook his action with the intention of participating, executing or achieving a certain policy, plan or goal, thereby *mens rea* for a crime against humanity is raised another level higher in the requirements of the psychological attitude towards the act.[2]

Through it is practice, the tribunal also modified the definition of the civilian population element. Namely, at first glance, the wording used in Article 5 of the Statute "*any civilian population*" indicates the broadest concept of that term, which includes all categories of the civilian population, including its own citizens. However, the scope of this understanding is automatically limited by linking the existence of crimes to armed conflicts. However, the Tribunal, through its case-law, interprets this wording – "*any civilian population*" – extensively so that it also extends to the civilian population of its own citizens (Ivanišević, Ilić, Višnjić & Janjić, 2008, pp. 86-87). The emphasis is therefore placed on the phrase "any" and then explained to refer to all people who are not combatants regardless of their nationality – and therefore *any* civilian population. Subsuming the concept of civilians was additionally expanded at the expense of the concept of *combatants*, so that *civilians,* for the purposes of prosecution for crimes against humanity in ICTY practice, can be considered both members of the armed forces and resistance forces who are *hors de combat*, as well as prisoners (Cassese, 2008, p. 102).

In the ICTY Statute, discrimination does not appear as an element of the general concept of crimes against humanity, but appears only in the context of persecution and essentially affects the assessment of the actions that are perpetrated by persecution. However, despite the undoubted omission of the element of discrimination from Article 5 of the Statute, this element, also through the case-law of the Tribunal, was introduced into the category of constitutive elements of crimes against humanity. However, unlike the other elements of crimes against humanity that have been modified through the practice of the Tribunal in accordance with customary law, this element is proving to be the most controversial.

[2] In terms of the psychological attitude of the perpetrator towards the act, this level of awareness and will, that is, intention, is not as high as in the case of genocide. It is generally accepted that genocide requires a special intent to destroy a group or part of a group. That degree of intent, awareness and will is not required in crimes against humanity; for the existence of this crime, it is sufficient (and necessary) for the perpetrator to be aware that he is undertaking his actions in the context of a systematic or widespread attack as part of state or organizational policy.

Bearing in mind the rather meager definition of crimes against humanity contained in Article 5 of the ICTY Statute, and especially bearing in mind that the definition contained in Article 5 of the Statute deviates so much from the customary law definition of crimes against humanity (Scharf, 2019, p. 67) starting from the Nuremberg Trials, the creative role of the Tribunal was undoubtedly not only useful, but also necessary in the construction and crystallization of crimes against humanity. However, not a single court, especially not an international criminal tribunal, should be a legislator, to create law and implement a normative function. It is a general legal principle that criminal law is *lex stricta*, so the creative role of the court can only be extremely justified and only when it is in favor of the defendant. Such a creative approach as demonstrated by the Tribunal, as well as the inconsistency and complete arbitrariness in the freedom to choose the direction of reasoning from case to case cannot be considered acceptable in international justice. Although certain creative interventions by chambers in the definition of crime (such as insisting on the existence of a widespread or systematic attack) were correct and acceptable, such changes in rationale, and frequent adaptation and correction of the definition of crime by the chambers, violate not only the principle of legality (*nullum crimen sine lege*), but also many rights of the defense because the defense did not know or could reasonably expect which direction and which definition of crime the acting panel would choose.

The ICTY Statute did not even have to offer a definition of crimes against humanity. It would not be impossible if the text of Article 5 stated – a crime against humanity as defined in customary law, so the court panels would not have to resort to legal and logical gymnastics in order to determine the definition of this crime. However, the existence of the definition of crime against humanity in the Statute and its second-class treatment are disapproving both for the creators of the Statute and for the entire work of the Tribunal (Šurlan, 2011, pp. 232-233). We admit that the Tribunal found itself in a serious dilemma: whether to remain faithful and apply an absolutely unusable, inappropriate and incomplete definition of crimes against humanity (which is also inconsistent with the common law definition) that would hinder, if not absolutely prevent, the achievement of the goal of establishing the court and prosecuting the crime, or to, through creative interventions, correct and adapt the statutory definition, relying on the definition of crimes against humanity under international customary law, in order to conduct criminal proceedings for acts that are subject to the jurisdiction of the Tribunal. However, despite the fact that certain creative (and legislative) interventions of the Tribunal were justified, we still believe that the answer to the dilemma should have

been: it is neither the purpose nor the mandate of the Tribunal to correct an imperfect legislator (the UN Security Council).

4. Crime against humanity in the Statute and practice of the ad hoc International Criminal Tribunal for Rwanda

The Statute of the International Criminal Tribunal for Rwanda (hereinafter: the Tribunal for Rwanda or ICTR) was adopted by Resolution 955 of the UN Security Council of November 8, 1994 with the aim of prosecuting individuals responsible for serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan citizens responsible for such violations committed on the territories of neighboring countries, in the period from January 1, 1994 to December 31, 1994.

In the Statute of the Rwanda Tribunal, crimes against humanity are defined in Article 3: "*The International Tribunal for Rwanda shall have jurisdiction to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack directed against any civilian population on the national, political , on a racial or religious basis: a) murder; b) extermination; c) enslavement; d) deportation; e) closure; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts.*" This definition differs significantly from the definition from the ICTY Statute, and represented a somewhat modified and corrected definition from the ICTY Statute. Most notably, it includes as a mandatory element the existence of a widespread or systematic attack. If one takes into account the fact that the definitions of the two *ad hoc* tribunals were created almost at the same time, the question inevitably arises as to why the Security Council, which established the tribunals, decided on different approaches. Since the Statute of this Tribunal was drawn up only after the events took place, it was based on and adapted to suit the existing facts and the needs of the proceedings (Bassiouni, 1994). Therefore, this provision deviates from the customary law definition of crimes against humanity to the extent that it was expedient in relation to the specific events in Rwanda (Cassese, 2008). Despite this, the definition of the Tribunal for Rwanda is still much closer to the general concept of crimes against humanity, since it contains all the essential elements of this crime, including the element of a widespread and systematic attack (in contrast to the definition from the ICTY Statute). In addition, the definition of crimes against humanity by the Rwanda Tribunal adds another element that does not exist in the customary law definition – the element of discrimination (Schabas, 2007). On the other hand, like the ICTY

Statute's definition of crimes against humanity, the ICTR Statute's definition does not contain an element of plan or policy of a state or other organization. This element will only appear in the Rome Statute, for the first time after the Nuremberg and Tokyo trials.

Article 3 of the ICTR Statute expressly contains an element of discrimination based on distinction on national, political, ethnic, racial or religious grounds. However, discrimination, regardless of what basis, as a constitutive element is a typical feature of the crime of genocide, not a crime against humanity (Schabas, 2007, p. 90 et seq.). The crime against humanity at its core should not be linked to discrimination, because this act does not have to be directed towards a single group (Ntoubandi, 2007, pp. 58-64). Certainly, the element of discrimination is inevitably present in the subtext, in the logic, in the reasons that determine widespread or systematic behavior towards some people, but that element does not need to be formalized, because a formalized element would introduce an additional misconception into the distinction between genocide and crimes against humanity, and could represent and additional burden during processing (Šurlan, 2011, p. 238). In its work, however, the Tribunal relativized the element of discrimination, adopting the position that although the discriminatory element is explicitly stated, it is possible to commit a crime against humanity against an individual who does not belong to any of the listed groups if the perpetrator consciously wanted to commit a crime against humanity. This position is directly opposed to the statutory definition of crime, which, among other things, requires that the act was undertaken with regard to one of the listed personal characteristics. This court had the opposite problem and approach from the ICTY. As we have seen, the ICTY, partly under the influence of the provisions of the ICTR Statute, wanted to introduce these elements into the definition contained in the ICTY Statute, while, on the other hand, the ICTR sought to remove this element from the definition of the crime it is prosecuting. Although the ICTR was correct in terms of defining a definition that would be consistent with the customary law definition of crimes against humanity, it must be criticized the same as the ICTY: it is not the tribunal's mandate to correct an imperfect legislator (the UN Security Council). It is particularly absurd that the ICTY referred to the practice of the ICTR to support its position on the discriminatory element as an essential feature, while the ICTR referred to the practice of the ICTY to support its position that the element of discrimination is not an essential element and feature of the crime.

5. Concluding remarks

What is certain is that crimes against humanity is a relatively broad concept that includes most forms of crimes committed against innocent civilians, including war crimes in the classical sense. However, what seemed also certain – the general and customary law definition of crimes against humanity – became uncertain, mainly due to the inconsistent Security Council, but also the wanderings of ICTY and ICTR jurisprudence in the extremely arbitrary and inconsistent definition of the essential elements of this crime. Criticism from the legal society and scholars of the statutes of *ad hoc* tribunals and their case-law, as well as the turbulent waters of international criminal law, created through the legislative actions of the Security Council, will result in the fact that the UN Security Council will never again unilaterally create an *ad hoc* tribunal, and will result in the international community approaching the definition of this crime in a unique way at the universal level – by creating a (permanent) International Criminal Court and adopting its Statute (Rome Statute), which in Article 7 contains, from the aspect of international criminal law, the final definition of this crime which contains a precisely defined contextual element (paragraph 1): "*for the purposes of this Statute,* "*crime against humanity*" *means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*" whereby, removing any doubt about the definition of the term attack, paragraph 2 of the same article defines that "*attack directed against any civilian population*" *means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*" Hereby, the contextual element of this crime, based on the Nuremberg Charter and the judgments of that tribunal, also respecting the criticism directed at the account of *ad hoc* statutory solutions of the *ad* hoc tribunals and their jurisprudence, finally defined in the clearest and most precise way that can be done. This definition was adopted by the International Law Commission in its drafts of the international public law convention on crimes against humanity. It can therefore be said that the definition of the contextual element of this crime from the aspect of customary international law is, finally, a settled issue.

In defining crimes against humanity, it was a long road from Nuremberg to Rome, with a lot of wandering, both in the legislative interventions by the UN Security Council and in the case law of the tribunals, which, instead of consolidating the usual rule of crimes against humanity, only introduced

additional legal uncertainty and called into question the common law status of this crime, which was by no means acceptable. Organized efforts of the entire international community, embodied in the framework of the Rome Conference, will be needed to definitively define this crime on a universal level. Regardless of the answer to the question whether this definition of crimes against humanity in the Rome Statute was only a codification of the existing customary law or a completely new rule of international criminal law, in the light of statutory solutions and the case law of the *ad hoc* tribunals referred to in this paper, twenty-four years later there is no dispute that this definition reflects customary law on the definition of crimes against humanity as it stands today.

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OSVRT NA DEFINISANJE ZLOČINA PROTIV ČOVEČNOSTI U PRAKSI *AD HOC* TRIBUNALA

REZIME: Zločin protiv čovečnosti jedno je od najstarijih međunarodnih krivičnih dela, odnosno krivičnih dela sankcionisanih od strane međunarodne zajednice, počev od ranog dvadesetog veka. Kroz dvadeseti vek, koncept ovog međunarodnog krivičnog dela je evoluirao, pa je i definicija i obim ovog zločina pretrpela izmene od Nirnberškog suda, preko ad hoc međunarodnih tribunala za bivšu Jugoslaviju i Ruandu, sve do Statuta Međunarodnog krivičnog suda. Međutim, još od prvog kodifikovanja ovog međunarodnog zločina, javlja se problem sa potpunim određivanjem radnji izvršenja ovog krivičnog dela, koji nije u celosti otklonjen ni u poslednjem

aktu međunarodnog krivičnog zakonodavstva – Rimskog statuta. Tome svedoče kontinuirani napori na nivou Ujedinjenih nacija da se donese i sveobuhvatna specijalna konvencija koja će kodifikovati sva pravila koja se odnose na zločin protiv čovečnosti. Ovaj rad će prikazati razvoj definicije zločina protiv čovečnosti kroz statutarna propisivanja zločina u statutima i sudskoj praksi ad hoc tribunala i Međunarodnog krivičnog suda, a koja su uticala na definisanje zločina protiv čovečnosti.

***Ključne reči*:** *zločin protiv čovečnosti, ad hoc tribunali, Rimski statut.*

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ETHICAL AND LEGAL ASPECTS OF PUBLIC RELATIONS

ABSTRACT: Public Relations (PR), a significant component of the media industry, also represents a management function that helps establish and maintain beneficial connections between the organization and various stakeholders. The evolution of the public relations profession is commonly perceived as a qualitative shift from the unethical practices that dominated several decades since the 1920s to strategically and ethically conducted campaigns in contemporary business. However, when considering the practice of PR in the first decades of the 21st century, numerous concerns arise regarding ethical dilemmas, conflicts, and, consequently, the ethical decision-making process. The main objective of this paper is to offer an overview of ethics and its development in PR. The application of ethical principles based on utilitarian, deontological, situational and virtue approaches is discussed. This study also analyzes the most frequently encountered ethical problems in contemporary PR practice. Finally, the paper delves into some models of the ethical decision-making process and discusses the legal consequences of PR.

Keywords: *Public relations, ethical codes, ethical principles, court processes.*

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1. Introduction

Ethics and morality denote very complex and multidimensional social and spiritual phenomena. In everyday speech these terms are used as synonyms, although they are different. Morality can be defined as a form of social consciousness, but also as a form of social behaviour, that is, as a historical and practical manifestation of human practice. Morality is made of rules and human norms of behaviour in a society. At the same time, morality is a set of principles that arose spontaneously and voluntarily, as well as norms of behaviour that regulate the relationship between individuals and the social community (as well as the social community towards them). Ethics, on the other hand, is a philosophical discipline that studies morality. Ethics refers to a system of values that is the basis for deciding what is right or wrong, good or bad. Or, more precisely: ethics is called "a set of criteria by which decisions are made about what is wrong" (Gower, 2003, p. 1). The decision-making process has to take into account all the pieces of the "mosaic" which includes truthfulness, keeping promises, loyalty and commitment.

Unlike ethics, which belongs to philosophical disciplines, business ethics describes and explains the practice of business-ethical behaviour. *Black* points out that the issue of business ethics is the most important issue in the work of all professionals dealing with public relations. "The ethics of an organization is determined by everything the company does, not everything it says. It is necessary that it operates in a way that serves, and is clearly seen to serve, the common good. Ethical and moral values are not absolute concepts and their articulation in any organization must be related to the culture of that organization, not to its strategic or tactical policy" (Black, 2003, p. 195). As Lewis Alvin Day observes, lawyers and judges are not right when they talk about the laws of the foundation of democracy; namely, "legal obligations are based on moral ones" (2004, p. 53).

In order to establish the necessary level of moral values and determine more precisely what is good and what is bad, we need to define the general standards of behaviour in the public relations area – the code (Dašić, 2014). The Code represents a formalized system of rules that is valid within the professional public relations circles. The ethical sensitivity of public relations is primarily caused by the discrepancy between the viewpoints of communicators and receivers (Meiden, 1991).

The ethical code is defined for different levels – it is possible to talk about public relations codes at the level of individual organizations, at the level of government institutions, as well as at the international level (Voza, Vuković, & Riznić, 2009; Dašić, Milojević & Pavićević, 2020). An example of this last

category of codes is the code of ethics of the International Public Relations Association, IPRA. The code of ethics, when it comes to organizations, defines issues such as (1) the responsibility of experts in public relations; (2) honesty and integrity; (3) rules and obligations of participants in the communication process; (4) the way of achieving relations with the internal public; (5) behaviour according to public relations practices; (6) behaviour towards employers and clients; and (7) behaviour towards colleagues (Cvetković, 2003, p. 172).

In their daily work, PR experts are faced with situations in which conflicts of different duties appear, such as: (1) duty to oneself, (2) duty to the organization or client, (3) duty to the profession and (4) duty to society. The attitude towards the mentioned duties is mainly based on the adopted system of values and norms.

The initial basis of moral behaviour is the adopted personal value system of PR experts, that is, their *individual ethics*, which includes moral principles such as integrity, honesty, reliability, openness, self-respect and respect for others, competence, etc. In this sense, Parsons observes: "Good people do not need laws to tell them to act responsibly, but bad people will always find a way around the laws" (2004, p. 67). Sometimes PR experts should refrain from some intentions of the organization, or the client, whose interests they represent, if it can harm higher interests; for example, PR profession or society. In the "Serbian Public Relations Society's Code", for example, it is clearly stated: "If undertaking any activity in the field of public relations may cause a serious violation of professional conduct or contradict the principles of this Code, the public relations expert must immediately report this to his client or employer and do everything to comply with this Code." If the organization, or the client, still persists in carrying out ethically questionable intentions, the PR expert should comply with the Code, even at the cost of losing the contract (Krstić, 2009, p. 171). In this case, *professional* and *social ethics* take precedence over *organizational ethics*.

Field of public relations, just like any other professional field, is based on certain standards and norms of behaviour. The ethical codes of various associations in the field of public relations define the norms of moral behaviour of employees of this profession. They are actually a kind of "guides for correct behaviour" (Black, 2003, p. 202). Establishing ethical standards of the public relations profession does not imply "automatic" acceptance of moral behaviour (Katlip, Senter & Brum, 2006, p. 159). The ethics of public relations, according to Milas, mainly emphasizes transparency, keeping secrets (confidentiality), truthfulness, objectivity, precision, problems and limits of political activity (lobbying) and journalism.

2. Ethical sensitivity and decision-making in public relations

Considering ethics in public relations is part of a broader issue that includes business ethics and ethical behaviour in modern business. Ethical aspects of PR are becoming more important due to the constant exposure of organizations to the public. At the same time, the interest of the general public in objective information is increasing, so the number of ethically sensitive issues is also increasing. Public relations experts face additional dilemmas since the decision must satisfy (1) the public interest, (2) the employer, (3) the ethical code of the organization and (4) the personal value system (Vilkoks, Kameron, Olt & Ejdži, 2006). At one point in 1955, Walter Lippmann clearly defined the "public interest": "Let's suppose that the public interest is exactly what people would adhere to if they looked unhindered, thought rationally, acted impartially and benevolently" (Black, 2003, p. 194).

For public relations, it is assumed that the members of this profession follow a larger set of principles in the performance of their work, which includes "truthfulness, honesty, devotion, loyalty, reliability, engagement, responsibility and respect" (Filipović & Kostić-Stanković, 2014, p. 266). These values are a prerequisite for building mutual understanding of the organization and different publics, which is primarily based on trust and respect for adopted values.

When it comes to conducting PR activities, there are minor or major deviations, which often take on the proportions of a gross violation of the PR code of ethics. It is for this reason that ethical issues have become an indispensable topic in studying the field of communication, public relations and management. Ethical issues and PR associations are becoming more important. In 1991, the International Public Relations Association (IPRA) published a monograph on "Ethical dilemmas in public relations – a pragmatic examination".

An important part of the moral decision-making process, as pointed out in the previous section, is the evaluation of a situation based on different ethical theories. Normative ethics is a part of general ethics that investigates the development of general theories, rules and principles of moral reasoning. These principles facilitate the process of making ethically based decisions. Applied ethics (for example, business ethics, public relations ethics, media relations ethics, etc.) deals with solving problems in a certain segment of social practice. Applied ethics resolves specific ethical issues in specific situations based on knowledge derived from metaphysics and general principles and rules of normative ethics.

In the practice of public relations, regarding different value orientations, absolutist, existentialist and situational ethics can be distinguished (Vikoks

et al., 2006). According to the absolutists, every decision is either "good" or "bad". The existentialists believe that they make their decisions based on current rational choice. The situationalists make their decisions based on the criteria of consequences; a good decision is one that brings the greatest benefit. This classification is close to the division of theories of normative ethics into virtue ethics, deontological ethics and teleological (consequential) ethics. The practice of public relations generally follows the principles of (1) Kant's deontology (2) Mill's ethical theory of utility (utilitarianism), (3) virtue ethics and (4) situational ethics.

Deontology

The German philosopher Immanuel Kant (1724-1804), in his Critique of the Practical Mind, starts from the concept of "good will", which is the only real moral motive that a person should be guided by when deciding on something. The moral good of an act arises only from a good intention, and it is such only if it is motivated by a sense of duty, i.e. respect for the moral law. According to deontological ethics, some actions are inherently bad, such as lying. Consequently, such actions should not acquire the status of universality and are inherently ethically unsustainable. Kant's deontology defines morality as a set of necessary, binding principles (categorical imperatives) discovered by practical reasoning itself. It is based on reason and the autonomous understanding of man.

The concept of universal duty represents what all rational people would accept as ethically correct from the perspective of each individual. The categorical imperative implies: "act only in accordance with your maxim so that it becomes a universal law!" The categorical imperative is expressed through a person's intention and respect and appreciation of other people. Intention stands for the desire which resides in the background of making a decision, that is, "good will".

Deontological theories are aimed at preventing unwanted consequences. Using a deontological approach in ethically controversial situations implies that decisions are being made based on a judgment of what is good or bad, and not based on who benefits the most from the decision made. In this type of decision-making, communication experts take into account the positions of different interest groups, consider their values and moral principles, thereby, eliminating communication barriers based on prejudices. There are two advantages of using a deontological ethical approach in public relations practice are usually pointed out:

- The organization, if decisions are made in accordance with deontological ethics, has the ability to establish a balance with the wishes of all interest groups important for the organization itself.
- This approach is open to change through an open communication model (Katlip et al., 2006).

In the "triangle" of ethical decision-making, deontology wise, there are three "pillars", that is, principles: duty, intention and respect and appreciation (Cutlip et al., 2006, p. 141). Consequently, it is necessary to find answers to three questions respectively: (1) Am i doing the right thing and not causing any harm? (2) Am i acting with morally correct goodwill? (3) Do i treat others with respect and appreciation?

Utilitarianism

According to the ethical theory of utility (utilitarianism), which was founded by Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873), as well as other forms of consequent ethics, everything that contributes to the benefit of the greatest number of people is ethical. Each act (action) should be evaluated based on the criteria of whether its final effect is greater than the effort (price) that had to be made. What is important is the consequence of an act, not its intrinsic nature. The principles of this ethics are widely present in the army (as a social institution) and are the basis of many formal procedures. Machiavelli is considered the forerunner of this type of ethics thanks to the well-known attitude that "the end justifies the means".

Mill equates utility to an individual's happiness. Bentham, on the other hand, strives for the "general good", that is, advocates the "principle of general happiness". In other words, an action can be considered acceptable if it results in "the greatest happiness for the greatest number of people" (Wood & Somerville, 2008, p. 146). The use of the principle of "the greatest good for the greatest number of people" is justified only and only when, in the decision-making process, "accurate assessments of potential outcomes can be made and when these outcomes go beyond the self-interest of those who make moral choices" (Parsons, 2008, p. 41).

Utilitarianism is the most commonly used approach in making ethically correct decisions in business. Despite this, this approach has certain disadvantages. The main objection to utilitarianism is that it neglects the interests of marginalized social groups (Kurtić, 2009; Necić, 2021).

Utilitarianism can be used to maintain a status quo where the majority is happy, but the minority is not, regardless of the fact whether this is done on purpose or not. By constantly prioritizing wishes of the majority, the organization may be prevented from implementing the necessary changes initiated by different publics and other interest groups. This approach also requires the PR experts to accurately predict what future consequences each of the alternatives will have. However, many of the consequences cannot be predicted and this creates the possibility of serious and costly miscalculations during utilitarian analysis (Katlip et al., 2006, p. 138).

Virtue ethics

In addition to deontology and utilitarianism, the ethical theory of virtue, whose founder is the ancient Greek philosopher Aristotle, has a strong tradition. This theory starts from the conception of an ideal human life, one in which a person enjoys a high degree of moral happiness (life fulfilment) – a basic moral good. In order for a person to reach such a state, he must possess a number of character traits – virtues. The main questions that a person asks himself following this ethical tradition relate to: What kind of man should i be? What is a person's uniqueness, virtue? What should I do to fulfil myself as a man? What kind of man do I want to be?

The essence of this ethical tradition is reflected in the fact that attention is paid to the person himself, rather than to his actions. “Being good” is more important than “doing good”. It is assumed that a person's character precedes a person's actions, so advocates of virtue ethics believe that the fundamental questions are not: What should I do? What moral law should I follow?

But that the real question is: What would a good person do in a given situation?

Virtue ethics seems to be particularly important for public relations practitioners. Although it is important to show loyalty to the employer, the PR manager must not allow the client or the employer to strip him of his self-respect.

Despite the fact that codes of professional ethics in the field of PR offer a multitude of principles for resolving ethical dilemmas, numerous ethical issues can also arise at the individual level (Vilkoks et al., 2006, p. 76). Shall I lie to my employer? Shall i rig the sweepstakes so that my client wins? Shall i fraudulently obtain client information from another agency? Shall i cover up a serious problem? Shall i state only half-truths in the press release? Shall i bribe a journalist or a legislator? Shall i withhold some information at the press conference? Shall i quit

my job or engage in questionable activity? Shall i deviate from my own moral beliefs? To what extent will i compromise my own beliefs?

The basic indicator of the character of a person dealing with public relations is respect for professional standards of behaviour, that is, independence in work.

Situational theory

Situational ethics, as a special form of moral philosophy, rests on the point of view that no moral law or principle can be applied universally. Moral norms are not absolute, but are subject to deviations depending on specific circumstances. Hence, moral responsibility urges decision-makers to act as the situation dictates, for the greater good. Behaviour in accordance with this theory of normative ethics mainly characterizes the work of PR professionals in the USA.

3. Ethical problems in public relations

Ethical dilemmas arise in many areas of public relations practice. A whole array of undesirable phenomena is associated with PR professionals, such as deception, scandals, manipulations, representation of personal interests instead of social goals, (in)competence, conflict of interests, etc. Relations with the media are considered the most ethically sensitive issue. The development of information and communication technologies has brought new ethical problems related to the use of social media in PR practice (Toledano & Avidar, 2016), the increasingly difficult distinction between traditional, editorial, on the one hand, and the so-called sponsored content in the media, on the other hand, influencer marketing (Borchers & Enke, 2022). On the other hand, communication strategies and information management are becoming "key points" of contemporary public relations (Jakopović, 2013, p. 20).

At first glance, some areas of PR seem to be stripped of ethical concerns, although practice shows otherwise. Regarding this, there is a certain research, as one of the specialized areas of PR. Many researchers believe that by including confidentiality, privacy and consent of the respondents when designing the questionnaire, the problem related to ethics simply does not exist. It is quite on the contrary. Ethical issues are more complex to be covered in a prepared questionnaire. It is necessary to think about the purpose and expected results (that is, the consequences) of the conducted research.

In some cases, ethical issues are easily recognized and resolved. However, many ethical problems are not easily detected. In such situations,

researchers think about these questions, analyse them, and modify the initially designed questionnaire in order to minimize ethical concerns. Disagreement about ethical issues is often present, which is to be expected. Consideration of these issues, as well as analysis of these discrepancies, is important in order to arrive at ethically sound actions.

Good ethics, for example, contribute to a better atmosphere for research. For example, the complete agreement (consent) of the respondent to participate in a certain survey increases his attention, and also reduces the frequency of questions in terms of how long it takes, who conducts it, and how the respondents will do the survey. An ethically correct approach makes respondents concentrate more on the questions from the questionnaire, and less on the possible results of the research. Obtained consent strengthens the interviewer's position, and with privacy ensured, a far greater degree of honesty can be achieved in the respondents' answers.

Ethical dilemmas cannot be avoided in most research projects. This can be illustrated with the following example. Let's suppose that a national employment institution conducts a survey in which respondents, beneficiaries of unemployment benefits, are interviewed about their previous five years' work experience. The aim of this study is to find appropriate measures based on which people would be transferred from the labour market to a state of full employment. The question arises whether the researcher should tell the participants of the study that it will take two minutes, even though the researcher knows that this activity takes half an hour. Is misleading interviewees about the length of the interview good or bad? This dilemma can be viewed from two different angles.

Competence

Public relations experts are expected, as Frank Wylie believes, to perform their duties "responsibly" in accordance with ethical principles and abilities (Black, 2003, p. 195). The minimum conditions for success rest on trust in ethical behaviour and/or acquired experience.

The competence of PR employees, at first glance unquestionable, in some situations becomes an ethically sensitive issue. Competence includes at least three elements: (1) having the necessary skills to perform a specific job; (2) continuous improvement of knowledge and skills; and (3) refraining from making promises (to the employer or client) and guaranteeing success (Gregory, 2009, p. 283). The third form of behaviour is most often recognized in the practice of public relations. Consequently, the 11th provision found its place

among the 12 articles of the Code of Ethics of the International Association for Business Communication (IABC): "Professional communicators do not guarantee results that they are unable to achieve" (Vilkoks et al., 2006, p. 69). A similar recommendation is found in the Code of Ethics of the Public Relations Society of America (PRSA): "Define precisely what can be achieved in public relations" (Cutlip et al., 2006, p. 160).

Conflicts of interest

The hard-earned trust in PR employees can disappear overnight due to conflicts of interest. The Code of Ethics of the Public Relations Society of America (PRSA) highlights a key principle: "Trust of clients, employers and the public is built by avoiding real, potential or perceived conflicts of interest (Wilcox et al., 2006, p. 63). PR employees should notify their employers (clients) in writing if such conflicts occur. PR agencies usually end up in this kind of situations when they represent two competing companies. In these situations, since it is difficult to maintain impartiality, it is best to refrain from representing one of the companies. PR experts may refrain from representing the interests of a company if such action would be contrary to their personal beliefs and moral feelings (Gregory, 2009, p. 283). However, the general recommendation is to act in the best interest of the client, even if it conflicts with personal ethics.

Public relations

Media relations are the most significant and ethically sensitive part of public relations. Both professions (public relations and journalism) should insist on accuracy of information and honesty. Although journalists and the majority of public relations employees are directed to the media, this does not mean that the same code can regulate their behaviour in different circumstances. The differences occur from the missions of the two professions. The mission of journalism is to uncover facts, report on social institutions and give fair and balanced reports (what some would call 'objectivity') on everyday issues. Ethical journalists, traditionally, should not promote anything or do anything for personal interests. Public relations employees, on the other hand, are by definition someone's representatives and are committed to achieving the goals of the organization they represent. They also provide information for public use, but usually in a way in which they can achieve the most favourable outcome for their company or client (Day, 2004, p. 124).

Harmonious relations between journalists and PR experts are based on built trust. It also persists in the situation when the spokesperson of the organization says that he has "no comment" regarding a problem or refuses to answer questions that are not directly related to the published statement (Wilcox et al., 2006, p. 78). Ethically questionable behaviours refer to paying for announcements about the organization in the media, fostering cooperation with only one media, sending journalists on tourist trips, etc.

The ethical sensitivity of public relations and journalism arises from their different goals. Media in the market sell *news*, while public relations protect the interest of the company, i.e. earnings. In the past, 40 to 50% of journalistic content in newspapers and magazines came from public relations departments; that is, about 15% when the news program was broadcast by the radio and TV station (Hunt & Grunig, 1995, p. 60). Recently, we reached the point where up to 60% of the news that is created in public relations "workshops" is published in the media, and in this sense, Dario Terzić rightly notes that a new, "invented" journalistic genre is emerging – the announcement for press (2013, p. 285). The accuracy and reliability of published data in this way is becoming more and more questionable. At a time when press releases "flood" the media space, when it is impossible to control them, a new form of "partial journalism" is being created, which is causing negative consequences in many countries (Kljajić, 2013; Terzić, 2013, p. 288). The issue of transparency of information *sources* becomes more and more complex as a result – "information is no longer a right", as noted by Vesna Laban, but a privilege, which has a negative impact not only on journalism but also on society as a whole (2005, p. 113). The relationship between public relations and journalism therefore best expresses the polarity "hot – cold" (Day, 2004, p. 124).

Spinning

Recently, another special ethical problem, related to the media, is taking on worrying proportions. It's about spinning, that is, presenting something better than it actually is. This practice is counterproductive from the point of view of achieving long-term public relations goals, as it erodes the trust and credibility gained over the years. For a long time, public relations have suffered damage due to the widespread practice of spinning, as well as propaganda in favour of the organization, which damages the reputation of the profession in the public (Ward, Luttrell & Wallace, 2020). There are authors who, due to the problems just mentioned, consider it unnecessary to talk about ethics in public relations, considering it an oxymoron (Berger & Reber, 2006).

The problem with spinning became noticeable when the share of informative media space originating from PR increased considerably. The possibilities for abuse, misuse and manipulation of information have grown to great proportions. "Spin doctors", based on their knowledge about various media and their technologies, shape favourable public perceptions of people and events, that is, social phenomena and processes. Spin doctors believe that they speed up the process of spreading certain news and information. They use numerous techniques such as defending against journalists, approving or refusing interviews, advising those who give interviews, commenting on journalists' texts or frequently highlighting a certain phrase or interpretation of events.

The main goal of spin doctors is to give the news the desired direction of interpretation, that is, to convince the public in favour of or against a certain idea, organization or person (mainly politicians). The difference between spinning and public relations is reflected in the fact that PR is predominantly based on information and facts, while a spin is based on "manipulation and tricks" (Šćekić, 2013, p. 249). There is nothing ethical about spinning, so it is not surprising that, as Brautović and Brkan point out, "everyone involved in communication claims that spinning has nothing in common with PR" (2009, p. 183).

The goal of media relations management is to secure conditions for the free flow of important information. Such an interpretation of relations with the media is characteristic only in democratic societies, which confirms the social importance of public relations. The practice of relations with the media "is not needed by non-democratic political regimes, which, moreover, often prohibit and persecute it" (Verčič, Zavrl, Rijavec, Ognjanov, & Brbaklić, 2006, p. 27). Returning to the ethical values and professional standards of the profession, which rest on the truthfulness of information, is becoming imperative for the development of the modern media industry.

4. Models of ethical decision-making

Public relations professionals strive to base their decisions on ethical principles. For that purpose, they use different decision-making procedures, that is, moral reasoning in ethically sensitive situations. In modern ethical theory, there are mainly three determinants that should be taken into consideration when deciding whether an action is moral or not: (1) the action itself, (2) motives, i.e. the purpose and (3) circumstances related to the specific action, that is, the situation (Gregory, 2009, p. 280). Consideration of the first determinant is reduced to the search for an answer to the question: *What a person does*? The analysis of motives of action refers to the question*:*

Why does he do it? Finally, determining the circumstances of action includes answers to the question: *How, where and when does he do something?*

Public relations professionals strive to base their decisions on ethical principles. They are used in different decision-making procedures, that is, moral reasoning, in ethically sensitive situations.

DAO model. An ethical situation is usually a complex relationship involving elements such as: (1) the moral subject (the one making the ethical decision); (2) performed action (verbal or non-verbal); (3) the particular context in which the action is undertaken; (4) the individual, group, or public toward whom the action is directed; and (5) the consequences (positive and negative) of the action (Day, 2004, p. 38). Day views moral reasoning as a systematic process involving three stages: (1) **d**efinition of the situation, (2) **a**nalysis of the situation (based on moral theories), and (3) **o**pinion or ethical judgment (2004: 96). Hence, the acronym "DAO" is used for the shorter name of this model. The definition of the situation consists of "description of the facts, observation of principles and values in the given case and clear presentation of the considered ethical issue" (Day, 2004, p. 96).

The analysis of the situation is a central activity in the decision-making process according to the "DAO" formula. In this phase, all information is used, as well as imagination, in order to conduct a complete analysis of the situation and evaluate ethical alternatives. The moral subject weighs all conflicting principles and values, considers the direct consequences of external factors, and, finally, analyses the moral duties towards various parties and considers the application of various ethical theories. During the last stage, a decision based on moral principles is being made. Ultimately, the moral subject makes the moral judgment.

PURE model. Luttrell and Ward propose their PURE model of ethically sensitive decision-making (2018). This four-phase process begins, first, with the decision-makers (1) identifying personal and organizational **p**rinciples, (2) then considering whether they have a foothold in **u**niversal standards, (3) then evaluating the **r**ights of clients and also shareholders, and it ends with (4) ethical confirmation of the recommended final solution (**e**nd result). This model is designed to help beginners in public relations, despite the multitude of ethical theories, to reach more easily the final decision (Luttrell & Ward, 2018, p. 59).

Blanchard-Peel model. Kenneth Blanchard and Norman Vincent Peale believe that five "principles of ethical strength", or "5P", are crucial for ethical decision-making. The mentioned authors, in their book "The power of ethical management" (1988), state as key principles for PR experts: (1)

purpose, (2) pride, (3) patience, (4) persistence and (5) perspective. The stated principles are interdependent, while the perspective represents the central ethical principle of every organization. Blanchard and Peel define the "principles of ethical strength" as follows (Black, 2003, p. 199):

1) Goal: The mission of our organization is communicated by the management. Our organization is guided by values, hope and vision that help us determine what behaviour is acceptable and what is not.
2) Pride: We are proud of ourselves and our organization. We are sure that if we feel that way, we can resist the temptation to act unethically.
3) Patience: We believe that if we stick to our ethical values for the long term, we will achieve success. This involves balancing the desire to achieve results and the manner in which they are achieved.
4) Persistence: Our determination is embodied in ethical principles. We firmly stick to our commitment. We take care that our activities are always in line with our goal.
5) Let our managers and all employees stop to think and evaluate how far we have come and where we are going, and determine how we will get there.

PR employees use different models when making decisions that involve consideration of ethical issues. No model of ethical decision-making has superiority over the others, that is, they should be used depending on the specific circumstances of the situation. The code of professional ethics as well as organizational ethical standards provide conditions for transparent decision-making that contributes to building trust and credibility of the organization in the public.

5. Public relations experts and lawyers

In their daily work, public relations practitioners, as already described, face a multitude of ethically vulnerable problems. It is therefore not surprising that numerous legal consequences arise from their work, partly due to the neglect of this aspect in the performance of various activities. Mostly it refers to the main part of their work – communication. It is difficult for many, as noted by Wilcox et al., "to imagine how exactly public relations people can break the law or cause a lawsuit, just by communicating information" (2006, p. 296). For example, the Princeton Dental Resource Centre once paid $25,000 to settle a lawsuit after the New York State Attorney General's Office accused

the organization of making false and misleading claims in its newsletter. However, even when many accusations are dismissed, for not being legally founded, the organization suffers damage, whether it gains bad publicity or incurs high defence costs.

Public relations employees must hold themselves legally accountable when they advise or tacitly support the illegal activities of their clients or employers. Special attention must be paid to issues that invade the privacy of employees – the problem is present when it comes to (1) newsletters about employees, (2) photos that are released to the public, (3) publicity and advertising, and (4) media inquiries about employees (Vilkoks et al., 2006, p. 300). PR employees cannot be expected to possess knowledge related to advocacy as a profession. Even lawyers, on the other hand, do not know well the postulates of the PR profession and, consequently, "often do not understand how important the public opinion is in determining the reputation and credibility of the organization" (Vilkoks et al., 2006, p. 321).

Fortunately, good cooperation between PR experts and lawyers can be achieved if some common mistakes are avoided in practice. PR employees should not disclose too much information; recklessly cross the lines of privileged information; oversimplify; exaggerate; and adversely affect the judicial process by their recklessness, by publishing inappropriate information (Wilcox, Cameron & Reber, 2015, pp. 330-332). The improvement of mutually beneficial cooperation between lawyers and public relations experts is imposed as an imperative in modern business, since the probability of initiating court proceedings is increasing.

6. Conclusion

Recently, the ethical issues of the public relations profession have become the focus of interest not only of the professional but also of the academic public. Various factors, the most important of which are analysed in this paper, influenced a visible departure from the traditional, legalistic approach towards the consideration of a multitude of ethical aspects in public relations. Legal norms have been the basic guidelines for public relations professionals during the history of the profession, which is almost a century long.

Different codes of ethics, which regulate relations between interested parties in public relations, were created due to the need to make a step forward in relation to the minimum defined by laws. Codes, no matter how detailed and exhaustive they are, cannot encompass all the complexity of public relations, especially in the light of recent changes in the field, primarily of information

and communication technologies. The so-called the new reality demands from experts of various profiles, not only when it comes to the profession of public relations, the possession of knowledge of basic ethical principles and the ability to perceive problems that contain an ethical dimension. These are prerequisites to overcome an ethically sensitive situation, that is, a problem, by using one of the models, briefly described in the paper, in order to facilitate the decision-making process.

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ETIČKI I PRAVNI ASPEKTI ODNOSA S JAVNOŠĆU

REZIME: Odnosi s javnošću (OSJ), značajan deo medijske industrije, predstavljaju funkciju menadžmenta koja pomaže u uspostavljanju i održavanju korisnih veza između organizacije i deoničara. Razvoj odnosa s javnošću kao profesije obično se sagledava kao otklon od neetičke prakse, koja je dominirala decenijama u periodu posle 1920-ih godina, prema strateški i etički vođenim kampanjama u savremenom poslovanju. Ipak, kada se sagledava praksa OSJ u prvim decenijama XXI veka, javljaju se brojne nedoumice u vezi sa etičkim dilemama, problemima, i, sledstveno

tome, procesom donošenja etički zasnovanih odluka. Glavni cilj ovog rada je da razmotri ulogu etike u razvoju OSJ. U radu se u tom smislu diskutuju osnovni etički principi koji počivaju na utilitarizmu, deontologiji, situacionoj etici i etici vrline. U radu se takođe analiziraju etički problemi koji se najčešće javljaju u savremenoj praksi OSJ. Naposletku, razmotreni su uticajni modeli procesa etičkog donošenja odluka a isto tako i neke legalne posledice OSJ.

Ključne reči: *odnosi s javnošću, etički kodeksi, etički principi, sudski procesi.*

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ON LOCAL SELF-GOVERNMENT AND ITS CONSTITUTIONAL POSITION IN SERBIA

ABSTRACT: Local self-government is a form of decision-making and governance in local communities established on smaller parts of state territories. It is exercised either directly by its citizens, or by their elected representatives, as well as by other local bodies. The local authority, executed by local bodies, theoretically represents the government of citizens in local communities. Local self-government can be considered as the basic organization of power, and the history of constitutionalism cannot be imagined without it. In this paper, the authors first present the basic characteristics of self-government. These include: 1) the existence of a defined scope for certain local self-government activities, executed by local government bodies without interference from the central government; 2) citizens' entitlement to choose their representatives in local communities through direct elections or to be directly involved in making decisions on important topics of interest to the local community; 3) local institutions' independence in terms of their organization and personnel; 4) local self-government having its own independent financing sources (taxes, own property); 5) local autonomy protected by the constitution and laws to ensure the unobstructed work of local self-government. In this paper, the authors analyze the elements of the constitutional position of local self-government in Serbia, including its concept, the method of decision-

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making, jurisdiction, the right to self-organization, and the protection of local self-government.

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1. On local self- government

The local self-government, in the broad meaning of the term, represents the basic form of territorial organization of government. The citizens who live on its territory exercise their self-government powers in the widest sense. In this way the local community represents a principal form of citizens' self-government within which they exercise their rights and fulfill their needs. The interests and needs of the citizens are realized more successfully at the local level since the authorities are closer to residents and are the object of their constant scrutiny. Therefore, it can be said that self-government is a democratic structure. Namely, it is rooted in the citizens' direct and broad participation in exercising public activities and in the close control of local authorities. The concept of local self-government can be interpreted in different ways given the fact there are various criteria for its definition. If we look at local self-government from the point of view of the territorial organization of powers within a state, it is then defined as the basic form of the state's territorial organization Territory is the basic principle of the government organization in any state, while the basic form which embodies this principle is local community. Local self-government can also be defined as a type of vertical division of powers between state and local communities which represents a form of restriction of central government powers. In other words, one part of affairs are executed at the central level, while the other part are realized at the local level, whereas the division of activities between central and local authorities can be based on the principle of decentralization or on the principle of deconcentration. Decentralization means that authority is dislocated and exercised from different places. "Decentralized system includes states with larger territories in terms of area. Micro states or "dwarf states" cannot have a decentralized system of powers." "When there is only municipal self-government, which is also financially constrained, the state does not cease to be centralistic. In order to have a decentralized state, it needs to have stronger, larger and more independent territorial units. There should be, as Germans would put it, *Kommunalverbände höherer Ordung,* that is the municipal links of higher order (Kostić, 2000, p. 259).

Decentralization principle presumes that a local self-government has its own, original powers. When it comes to deconcentration of powers, this means that a local-government does not have its own powers but only those delegated by the central government. Bearing in mind that local self-government can be defined as the citizens' right to participate in the execution of public activities, they can realize these activities by taking part in referendum, local initiatives or by direct election of their representatives in local government bodies. In this way the citizens can participate in governing their local community and making decisions related to the affairs under its jurisdiction. According to theoretical points of view: "Local authorities are the closest to their citizens and local self-government is the principal social and political ambient for the realization of their rights and freedoms. In exercising their rights, the citizens come into close contact with local authorities. The citizens create their attitude towards authorities based on their personal experience at the local level. The criteria for the assessment whether authorities are successful or not (good, bad, efficient, inefficient, democratic or non-democratic) are often established based on citizens' concrete experiences at the local level when dealing with local government bodies. It is at the local level that the citizens have opportunities to witness how the authorities work….. Local communities offer *the broadest and largest possibility for the direct participation of citizens in governing the public affairs* and making decisions which can influence the fulfilment of their interests" (Pajvančić, 2008, pp. 383-384).

In constitutional systems, the status of local self-government is regulated by the provisions of the national legislation that is the constitution and relevant laws. However, the position of local community in this system is also determined by the international law as it is the case with European countries where its status is regulated by the European Charter of Local Self-Government, adopted by the Council of Europe in 1985. This international act provides the basic principles of local self-government and its nature. Constitution, as the supreme national law only defines the general issues of the position of local self-government. From the nomo-technical point of view, the status of the local self-government is usually regulated in the chapter dedicated to territorial organization. It is less common that its position is defined in the general constitutional provisions. There are several principles which outline the position of the local self-government in a constitutional system in general. They are: 1) the principle of subsidiarity, 2) the principle that the right to local self-government is guaranteed by the supreme act of the state, 3) the principle of the right of local self-government to resort to legal means in order to secure free execution of its rights, 4) the principle of

respecting local self-government postulates, 5) the principle of constitutional and legal protection of local communities' autonomy. As for the subsidiarity principle, it has been said: "If we start from the broadest understanding of this principle, embodied in the phrase "closest to the citizens", then it includes not only "vertical" subsidiarity, that is, a descent of certain jurisdictions and concrete activities to lower government levels, but also "horizontal" subsidiarity which assumes the delegation of certain government affairs to non-government subjects, including the private sector" (Milenković, 2015, p. 91).

Namely, the principle of subsidiarity refers to division of jurisdictions between central and local government bodies. Moreover, it means that the jurisdiction of higher government levels is determined by the method of enumeration, while all the affairs that can be executed at the local level should be delegated to local self-governments. This consequentially means that the decisions are made at the level of authority which is closest to citizens while the decision-making at higher government levels should be restricted. How significant is the right to self- government for one state and its society is reflected in the fact that this right is guaranteed by the supreme national law. To change the position of local self-government in a constitutional system is only possible by changing the constitution and laws, and not by changing by-laws. Also, the protection of local self-government rights is rooted in two basic guarantees. The first guarantee is the existence of legal instruments available to local communities should they decide to seek the protection in court. The second form of the protection of the right to self-government assumes the existence of procedural guarantees which ensure the participation of local self-governments in making decisions related to their status and jurisdictions. The division of powers between various levels of government also represents a form of the restriction of powers, which further assumes the existence of the instruments for ensuring citizens' direct control of government powers.

2. Types of local communities

Local communities can be classified according to the nature and character of the powers they have, according to the characteristics of the status of local communities in a constitutional system and, finally, based on the levels of the organizations of authority within vertical division of powers. As for the nature of powers vested into local communities, we can speak of decentralized local communities and the local communities based on deconcentrated authority. The first type of local communities, decentralized local-self-governments,

have their own, original jurisdiction which is not subject to restriction by higher government levels. Yet, certain restrictions are possible in exceptional cases within legally prescribed procedures where the local communities are guaranteed the legal instruments they can resort to if higher government levels violate their right to local self-government. Such a form of local self-government, the decentralized local self-government, is an example of literal application of subsidiary principle. Local self-government which does not have original jurisdiction and is void of independence, that is, autonomy in exercising delegated affairs, which is the privilege of decentralized self-governments, is the manifestation of deconcentrated authority. In this case we cannot speak of actual local self-government, but rather of a territorial unit to which the central government has delegated some powers to make decisions on behalf of the central government related to the affairs which do not take place centrally, in the capital, but at other locations.

There is also a classification of local communities to monotypic and polytypic, based on their inherent characteristics. There is no difference between monotypic local communities in terms of their status in a constitutional system. The states which have polytypic local communities make distinction between them in terms of their status, jurisdiction and local-government bodies, as well as the rights they are entitled to. The systems of local self-governments can also be classified based on the number of local government levels into one-tier, two-tier and three-tier system of local self-government. "One-tier local self-government means that there is only one level of authority (Slovenia, Switzerland, Austria, Serbia). This implies that there are central and local government bodies, and even if there is a middle level of government, it does not belong to the system of local self-government, but rather to some form of a territorial autonomy. One-tier local self-government embodies all local jurisdictions, both original and delegated" (Orlović, 2018, p. 375).

One-tier type of local self-government is the simplest form of vertical organization of powers while a two-tier form of self-government implies that it functions at two levels and in two directions. The second level of self-government comprises several local self-governments of first level, that is, besides the government on the central and local levels, here we have another level of the organization of powers, in the middle of those two. This middle level of government is, by rule, organized in the form of regions and has the authority to control the decision-making and planning process at lower level of government in the form of the supervision of second instance. The countries, such as Sweden, the Netherlands, Greece and Norway are the examples of the organization of two-tier local self-governments. On the other side,

France is the example of the most complex form of territorial organization with three-tier self-government structure where the jurisdiction of the local self-government is divided into three levels of authority which mutually collaborate on hierarchical basis. Three-tier government structure was first established in the 1980s when, within the framework of a larger reform, the Law on decentralization was passed in 1982 based on which the regions were established as self-government units (Marčetić & Giljević, 2010, p. 73). "The third level of authority is the largest unit and comprises several local self-governments of the second level of authority. The first level of organization includes the units which are the closest to the citizens and which mostly take care of communal activities. The other two higher levels of local self-government perform the tasks which require broad planning activities and larger infrastructural investments, such as communication, commercial zones, comprehensive environmental projects, inspection audits and the decision-making of second instance" (Marčetić & Giljević, 2010, p. 73).

The jurisdiction of local communities may include a number of various activities which local government bodies perform in different fields of social life. They are guaranteed by the constitution, as the supreme general law of the central government, specific sectorial laws on local self-government, as well as the statues of local self-governments which represent "their own small constitutions". In addition to the activities of original jurisdiction, guaranteed by the constitution, laws and statutes, local communities can perform other activities delegated by the central government taking into account the efficiency and economical viability of delegated tasks. In any case, the distribution of competences between the state and higher levels of territorial organization of governments on one side and local communities, on the other side, is executed based on the principle of subsidiarity.

As for the type of jurisdiction of local self-governments, we have already mentioned that it can be original or delegated. The original jurisdiction is autonomous, which means that the local self-government performs the activities of original jurisdiction, mostly of communal nature, without the interference of the central government bodies. The original jurisdiction is guaranteed by the constitution since the local self-government is a constitutional category. Higher levels of authority may delegate certain competences to local authority based on sectorial laws and rarely on the basis of by-laws, and in this case we speak of delegated activities. Initially, these delegated activities were in hands of higher government levels, but sometimes they decide to transfer them to lower government levels since it seems justified in terms of efficiency and cost effectiveness. It is important to note that delegated activities could be taken

away from the local self-government in the same way as they were given to it in the first place. However, there is a difference in the supervision of the performance of original and delegated affairs. The central government bodies can control the activities under original jurisdiction only in terms of their compliance with the constitution and laws. This means that the legality of a document passed by a local self-government in relation to its original jurisdiction will be assessed by the executive branch of power that is by the Government, while its constitutionality will be reviewed by the Constitutional Court or other body tasked to perform this review. In case it has been determined that such document is unconstitutional or unlawful, it will be removed by cancelation or voidance. As for the supervision of delegated activities by the central or regional government bodies, such control is comprehensive and includes all aspects of executed tasks. A document or an action adopted under delegated jurisdiction may be canceled or made void not only because they are not in compliance with the constitution and laws, but also because the central government believes that the local government has not completed its task in an efficient or economic way. Generally speaking, the jurisdiction of local self-governments is confined to the affairs related to everyday life of their residents. The comparative analysis of different types of local self-governments suggests that their jurisdictions are very similar with the common denominator being that they all enable self – government at the local level. As already discussed, their jurisdiction includes various communal activities and services aimed as satisfying the vital needs of their residents like provision of water, public transport, housing and urban affairs, collection and removal of waste, sewage, environmental protection, local education, organization of medical and social welfare services, sports activities, communal policing aimed at maintaining public order and security, etc.

In order to implement the activities from its jurisdiction, a local self-government needs to operate within established financial framework, that is, certain financial means are required for the realization of these tasks. The European Charter of Local Self-Government points to the significance of financial resources for the operational work of local communities underlining that they are entitled, within the central government's economic policy, to adequate financial resources of their own, of which they may dispose of freely within the framework of their powers. The Charter further defines the postulates of local government financing emphasizing the principle that its financial resources should be commensurate with its responsibilities as the principal guarantee of the financial basis for the local government functioning. The resources available to local communities should be sufficient to enable them to carry out the tasks from their jurisdiction which constitutes

the minimum guarantee for the efficient realization of the right to local self-government. Then, there is a principle of distinctive and flexible system of local government financing reflecting the diversity of financial resources. Local governments financing is directly linked to the scope and content of the activities they perform and the financial resources should be sufficiently diversified to keep up with the evolution of costs of carrying out these tasks. It has been said that "this principle represents the concretization of the initial postulate that local community's financial resources must be harmonized with its competences in order to be able to execute the tasks from its jurisdiction without obstruction" (Pajvančić, 2008, pp. 392-393). The next principle is the solidarity principle. It calls for the need to equalize the differences between financially stronger and weaker local self-governments to allow weaker self-governments to complete the activities under their jurisdiction. The municipalities from rural areas do not have the same financial opportunities as those form urban areas with developed industry, production plants and financial institutions. The needs of the citizens in these municipalities cannot be satisfied in equal way. In order to reduce these differences, it is necessary to implement the measures that will correct the effects of unequal distribution of financial resources. However, these specific measures should not diminish the discretionary powers of local authorities that is the principle of solidarity should not be in conflict with the implementation of the activities under the jurisdiction of local cominities. Hence, local communities are entitled to seek and receive financial resources related to the realization of their competences. Thus, they are entitled to 1) financial resources derived from collecting local taxes and charges, 2) receive funds from the central government, 3) receive funds for financing the delegated tasks, 4) have access to national capital market. Speaking of the local self-governments' right to determine the rate and collect taxes and charges out of which they will finance the activities under their jurisdiction, they can exercise this right only within the territory of their jurisdiction. The right of local communities to determine the rate of local taxes and charges is guaranteed by the constitution and other legal acts. As already mentioned, the central government allocates one part of its financial resources for financing the activities of local self-governments, which means that local self-government are entitled to receive some financial resources form the taxes and charges collected by the state. In this way, a part of the state tax revenue is transferred to local communities' budget. In addition, local self-governments are entitled to receive funds for financing the delegated tasks, which means that along with delegating certain affairs, the central government transfers funds for the execution of these affairs.

These funds are generated by collecting taxes and charges by higher levels of government. Also, local communities are entitled to seek loans for capital investments at national capital market in cases when such investments cannot be realized with local communities' own funds.

Finally, local self-governments are entitled to an adequate participation in the decision-making process related to the distribution of funds from higher to lower government levels. This can be achieved by carrying out the consultation with the local self-government units on the methods and criteria for the distribution of these funds.

3. Organization of local government

Local self-government units are entitled to form local authority bodies and decide on their organization. Local self-government units can realize this right based on the principles of the Charter of Local Self-Government and in compliance with the constitution and law. The institutional organization of authority in local self-government is based on the right of the local self-government units to define the organizational structure of local governing bodies based on their statutes and in compliance with the constitution and law. This right also includes free choice of the method of electing the members of these bodies, their organization, working methods, responsibilities, as well as the forms of the citizens' direct participation in making decisions on the issues under local self-government jurisdiction.

4. Local self-government bodies

The casic principles of creating the government bodies at the local level, as well as the basic forms of their institutional physiognomy are defined by the Charter of Local Self-Government. The most important local community bodies are their assemblies composed of the members freely elected by secret ballot based on general and equal voting right. Thus, the constitution, law and statute guarantee the method of electing the members of local self-government assembly, their responsibilities, internal organization, working methods and decision-making procedure. They also regulate which functions are deemed incompatible with the holding of elective office at the local level. The bodies of the executive branch of government can also be formed at the local level and they report to the assembly which controls the execution of their tasks. Also, these documents foresee the creation of local administration led by a secretary or a head of administration. The constitution and law also closely

define the election of the executive bodies at the local level, as well as their responsibilities for performing the tasks from the scope of their jurisdiction. The administrative bodies and the entire administration apparatus, consisting of professional staff are formed by local self-government bodies. The recruitment of the administrative staff for the employment in local self-government is done on the basis of merit and competence, and they are entitled to adequate training opportunities, compensation and career prospects. As for the position of the head of the municipality, comparative analysis shows that it differs from country to country. The way a mayor is elected points to the difference in their status and the organization of the local authority. There are constitutional systems in which the election of mayor is entrusted to citizens who elect him/her by direct vote, while there are systems which foresee the election of mayor by the assembly. Therefore, we can speak about two possible election models – directly by citizens' vote or indirectly by local self-government assembly. Consequently, the scope of mayor's authorities depends on the method of his/her election. Thus, in the systems which foresee the election of mayors by citizens' direct vote, he/she performs the activities of the executive authority at the local level and organizes and controls the work of local administration bodies. He/she enjoys wider autonomy than the members of the local self-government assembly. Mayor, by rule, for his work reports to those who elected him – the citizens. Thus, for example, in Croatia, "direct election of the municipality counselor, mayor or prefect has opened a new chapter in the relationship inside the municipal structures so that the focus on the collective decision-making has shifted to the citizens' votes whose legitimacy to make independent political decisions has been confirmed at local elections which have become increasingly personalized" (Klarić, 2017, p. 96). In the systems which foresee the election of mayors by assembly, the mayor usually has only protocol duties. In such systems, the mayor or head of the municipality reports to assembly which may revoke his/her appointment.

5. The supervision of local-government bodies

In all constitutional systems, even in those characterized by high level of autonomy of local self-governments, the executive authority bodies maintain the right to control the implementation of the activities from the scope of the jurisdictions of local communities and their organs. The Charter of Local Self-Government defines a general framework of the control and supervision of the local authorities' activities, while the constitution and laws regulate this issue more closely taking into consideration the state's internal circumstances.

The principles which lay the foundation for the supervision of the local authorities' bodies by the central government at the same time represent a form of protecting the right to self-government. They establish the framework for the activities of the central government bodies aimed at controlling the work of local authorities. The principles based on which the central government exercises the supervision of the work of local authorities are established by the Charter of Local Self-Government. Administrative supervision of the work of local authorities must be in compliance with the constitution and applicable laws. Thus, the supreme national act and law regulate which cases require the supervision of the work of local authorities and define the procedure for its realization. The Charter of Local Self-Government foresees that the constitution and law should regulate the situations which allow the supervision by higher authorities, as well as determine the procedure according to which it may be exercised. Regulation of these issues by the constitution and law represents a guarantee that higher levels of government will not restrict or threaten the right to local self-government. Higher authorities may control the local ones, but only for the purpose of achieving the supervision goal – to ensure the compliance of the local authorities work with the law and constitutional principles. As for the supervision of delegated activities, it can also be exercised with regard to the efficiency of their performance. There is a principle which states that the intervention of the controlling authority should be in proportion to the importance of the interest that needs to be protected. This principle basically protects the right of local community to self-government that is it prevents the central government from exercising the control which is not proportional to its goals which may lead to the restriction, endangering, or violation of the right to self-government. Yet, all local self-government systems maintain a certain level of supervision of the work of local bodies. The organizational and personnel independence of local authorities' bodies depends on whether we are speaking of the decentralization or deconcentration of their activities. The supervision only of the compliance with laws is present in those systems of local self-government based on decentralization and subsidiary principle, while the control of compliance with laws as well as of the comprehensive work of the local authorities' bodies is present in the system based on the deconcentration of the activities. Under certain circumstances, the supervision of the work of local authorities may result in the authorized action of the central government bodies exercising the right to dissolve the local community assembly and appoint an authorized person who will temporarily manage the work of the local self-government body. In case of the dissolution of the local community assembly, it is necessary to organize new elections for this assembly as soon as possible.

6. Direct participation of citizens in making decisions in local community

The level of local government offers the widest opportunity for the development of democracy by direct participation of citizens in making decisions on public affairs. Thus, in a local self-government, citizens may organize meetings and assemblies, referendum, or any other form of direct participation in decision-making process. This right is guaranteed by the principles of the Charter of Local Self-Government. Local communities' statutes regulate the types and forms of the direct participation of the citizens in managing public affairs at local level, as well as the issues under the jurisdiction of local authorities. The right of citizens to participate directly in the execution of public affairs at the local level, as well as the methods of the realization of this right, are regulated by the constitution and law. Local communities' statutes define in more details the forms and procedures of citizens' direct participation in the execution of public affairs.

7. The cooperation of local self-governments

The European Charter of Local Self-Government guarantees the right of local communities to cooperate or to form associations. This cooperation can be at the national or international level, within the framework of the constitution and law. The right to cooperation and association of local self-governments at the national level is guaranteed by law. The constitution also foresees mutual cooperation and association of local self-governments for the purpose of executing the activities of mutual interest. As for the cooperation and association of local self-governments at the international level, it is realized through the cooperation of local self-governments with those from neighboring countries, or from other countries, or as the co-operation under the auspices of various international organizations or associations of local self-governments. The conditions for the realization of the international cooperation of local self-governments is regulated by law. The Charter underlines that the right of local authorities to belong to an association for the protection and promotion of their common interests or to an international association of local authorities should be recognized in each state. The right of local authorities to cooperate with international organizations and to belong to an international association is also guaranteed by the constitution.

8. On local self-government financing

In order for a local self-government to be truly independent, it needs to have certain financial means. Local self-government's finances include own-source revenue and transfer sources form the central government budget. "State is entitled to control the spending of funds it allocates to local self-governments. There is a tendency of increasing supervision of the work of local self-governments by the state which deprives them of many aspects of autonomy" (Marković, 2014, p. 409). The European Charter of Local Self-Government regulates in details the sources of local self-governments "Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their jurisdiction. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. At least one part of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law".

9. Protection of the right to local self-government

Constitutional systems foresee specific protection of the right to self-government. A number of international acts also regulate basic postulates of the protection of the right to self-government, which are then elaborated in national legislation – the constitution and laws. The protection of the right

to self-government assumes the existence of different instruments available to local self-governments to guard this right. The European Charter of Local Self-Government foresees a specific procedure which is applied when making decisions on the local community boundaries, as well as on the issues of direct interest for local communities, including the allocation of financial resources. Local community must be consulted when making decisions on its territory and boundaries. The consultation may be realized by means of direct participation of the citizens or by including the local authority bodies. The Charter of Local Self-Government prefers direct form of participation in decision-making related to local self-government boundaries, by means of referendum, if possible. The constitution regulates more closely the conditions and methods for the realization of this right. There are differences from country to country related to the process of establishing new local communities, as well as the decision-making process on changing the boundaries of the territory of a local self-government unit. Majority of constitutional systems calls for public referendum on which the local residents will decide on these changes. Some countries require obtaining the opinion or consent of the local residents before making any decision on such issues, whereas such opinion or consent has not been made binding. Some countries do not require any sort of "voting" of the local community citizens on the issues of this kind. Making-decisions on changing the boundaries of local communities, as well as the procedure for creating new ones are regulated by the of constitution and specific laws. It is necessary that the central government consults with the local authorities, in due time and in an appropriate way, in relation to planning and decision-making processes for all matters which concern them and their residents directly. As a form of the protection of the right to financial autonomy, local authorities shall be consulted on the way in which redistributed resources are to be allocated to them. This is an important guarantee of the right to self-government. Local authorities have the right of recourse to a judicial remedy in order to secure free exercise of their right to self-government. The resolving of jurisdictional matters represents a specific form of the protection of the right to local self-government. It is not a seldom case that a conflict of jurisdiction arises between higher levels of authority and local authorities. The conflict of jurisdiction is usually related to a significant issue of the position of local self-government and such conflicts are resolved at the Constitutional Court since it is the matter of constitutional character. Namely, the scope and content of local self-government jurisdiction is determined by its status in the constitutional system. The jurisdiction of the Constitutional Court to

decide on such important matter ensures the constitutional protection of local communities' authority and their status in the constitutional system.

10. Constitutional position of local self-governments in Serbia

Before we start our analysis of the current constitutional position of local self-government in Serbia, we would like to underline that in the course of the development of Socialist Federal Republic of Yugoslavia, the concept of local self-government was in its prime. The first Constitution of Federal National Republic of Yugoslavia made the state entirely centralized, but each new constitution and applicable laws increased the scope of decentralized powers. Thus, according to the Constitution of the Socialist Federal Republic of Yugoslavia of 1963, municipalities represented the basic units of local self-government, as the form of the basic social and political community. In order to achieve this, the state had to establish the communal systems at the local level in 1955, after which these competences were transferred from the state to municipal level. The communal system reached its prime with the SFRY Constitution which further elaborated the position of municipalities as social and political community with defined scope of jurisdiction. Thus, the municipality assumed all the local government powers except those that were specifically designated to cities, provinces, republic and federation (Stanković, 2015, pp. 85-100).

The Constitution of the Republic of Serbia of 1990 laid the constitutional basis for establishing modern forms of local self-government. Thus, municipalities represented the basic and unique self-government units whose organization the Constitution left to legislators and each subsequent law to regulate. During the term of this Constitution, three laws on local self-government were passed – in 1991, 1999 and 2002 and each subsequent law changed the level and scope of municipalities' self-government. "Yet, it was not even close to the level of self-government competences which existed in the period of socialist Yugoslavia. In the period from 1991 to 2007, the level of decentralization, the rights of self-governments, the methods of determining the scope of local jurisdiction, the election and responsibilities of local bodies, the supervision of the central government, the right to own the property and financial resources and, the degree of autonomy, etc. – all varied to a great extent" (Orlović, 2015, p. 1660). Following the October changes of 2000, the status of local self-government in Serbia has undergone several reform processes. This was, by rule, one of many changes which occurred in a transition country. In that context, there are some common characteristics

to all transition countries in relation to the position of local self-governments: 1) all countries in transition adopted a new, "democratic" constitution. The constitution is the supreme law which guarantees the position of local self-government and regulates its jurisdiction, the relationship with the central government, the conditions and methods for establishing new local self-government units, the change of their boundaries, the instruments of the protection of their rights, as well other issues and aspects related to their constitutional status, 2) all countries guaranteed the autonomy of local self-government units, including the independence in adopting acts and decisions related to the execution of the activities under their original jurisdiction, where the central government supervision should aim only at ensuring the compliance with law and constitutional principles – the obligation of the states under the European Charter of Local Self-Government, 3) legal position of the local self-government is precisely defined by law. They are specific sectorial laws which regulate administrative and territorial division, organization of local self-government, its jurisdiction, the method of electing local representatives in its bodies, specific social affairs under the self-government jurisdiction, such as: public revenue, property, public procurement, referendum, official use of language and alphabet, administrative procedure, labor relations, etc., 4) for the purpose of executing the activities under its original jurisdiction, local self-government units obtain own-source funding while the state provides or redistributes financial means from its own budget for the execution of transferred or delegated activities under their jurisdiction, as well as for financing some of the activities from the self-governments original jurisdiction should they fail to raise sufficient funds for that purpose, which is the common case in all transition countries, 5) the citizens elect the members of the local self-government bodies and have more opportunities to directly participate in the execution of public affairs, although these instruments are not quite adjusted to real life circumstances in local communities, established practices or citizens' needs, which corresponds with the nature of the economic relations developing in these countries" (Golić & Šoltes, 2009, pp. 69-70).

The changes of the local self-government in Serbia have been described in the following way: "New decision-makers from the political sphere of life improved the financial position of local self-governments by introducing intervention measures. Thus, the Law on local self-government was passed at the beginning of 2002 defining an appropriate, more favorable legal framework for the work of self-governments. The scopes of original and delegated jurisdiction were widened to include new competences, the organizational structure of local government bodies was improved, and new

financing system was established along with new, clearer rules governing the relationship between the central and local authorities. In addition to the possibility to elect the members of local authority bodies by direct vote, this law for the first time allowed the possibility of direct election of mayor or head of the municipality. In addition to the assembly and mayor's function, the law foresaw the presence of city council and local administration, as well as the presence of local Ombudsman ("Protector of citizens") and some other bodies whose creation was not mandatory. Serbia and Montenegro were admitted to the Council of Europe on April 3rd, 2003 which enabled the access of the representatives of local self-governments to the institutions of this organization. In September 2004, local elections were held when the members of local assemblies were elected, as well as the heads of municipalities or mayors, for the first time by direct vote.

Soon after the election, it was discovered that there were serious problems in the functioning of local self-government bodies. In more than one third of municipalities and cities, the work of their bodies was blocked due to the fact that head of the municipality or mayor belonged to one political party, while the majority of the assembly belonged to another. Thus, the idea to elect mayor by citizens' direct vote was already abandoned in 2006. The new Constitution of the Republic of Serbia stated that the head of the municipality or mayor should be elected indirectly, by the citizens' representatives. Yet, the other provisions of this Constitution laid firm foundation for further development of local self-government. Basically, the Constitution regulated the status and work of self-governments in line with the principles of the European Charter of Local Self-Government (EPLS; 1985). They also became entitled to their own property, which was more closely regulated by sectorial law. In the mid of 2006, the Law on local self-government financing was passed and in the following year the European Charter of Local Self-Government was ratified. At the end of 2007, a new set of regulations on local self-governments was adopted increasing the number of cities and widening the scope of jurisdiction of local self-government units and regulating in details the responsibilities of their bodies. Finally, after a five-year delay, the Law on public administration was passed which established which property was in the ownership of local self-government units" (Milosavljević, 2012, pp. 750-751).

In Serbia, local self-government is a constitutional category. The Constitution primarily regulates the basic aspects of the position of the local self-government in the government system. Specific laws, by-laws and the statutes of local self-government units further elaborate constitutional norms on local self-government. Local self-government can be analyzed from the

constitutional and legal point of view as the right of citizens or as a form of the organization of authorities. Thus the Constitution in its general provisions guarantees the right of citizens to local self-government. This right is defined as the right of citizens to local self-government which restricts the state powers. This means that certain public activities are not exercised by state authorities, but by local self-government. The right to local self-government is the subject of the supervision only in terms of the compliance with the law and constitutional principles. All the citizens of the Republic of Serbia are entitled to local self-government and they are all part of larger or smaller local communities. The right to local self-government, as any other human right imposes some restrictions to state authority. This means that some fields of social life which take place in the local self-government are entirely or partially exempt from the state authority. This further means that the state does not regulate these fields of social life, but leaves them to municipalities or cities, only retaining the right to supervision. Namely, the position of the local self-government, according to the Constitution, is defined by several aspects: name, territory, creation and termination of local self-government units, the participation of citizens in decision-making process, autonomy in the organization of local self-government bodies and the protection of local self-government. The Constitution regulates that in Serbia local self-government units are municipalities, cities and the city of Belgrade. Although this list of the types of local self-government units suggests that this is a polytypic form of local self-government, we can say that here we have one basic form of local self-government unit and two derived forms. The Law on local self-government and the Law on the state's capital, which define more closely the concept of municipality, city and the city of Belgrade, foresee that there is only one organizational form of local self-government units, which may have some different characteristics. The Constitution regulates that a local self-government unit has its territory and seat, while the Law on the territorial organization of the Republic of Serbia defines the boundaries of this territory and the location of the seats. This means that self-governments are not included in making decisions related to their boundaries and the location of the seats, which is done exclusively by the central government. However, the citizens are entitled to vote on the referendum on changes of the municipal or city boundaries. Yet, such form of giving opinion does not constitute decision-making process. "Direct participation through the institutions of direct democracy strengthens civic virtues, citizens' political competences, incites the feelings of solidarity and social inclusion and upholds the legitimacy of political decisions. Finally, its key significance is that it allows that the

decisions are made by those who are concerned with them most" (Radojević, 2021, p. 57).

However, the Constitution does not say whether the referendum results are advisory or mandatory, but rather defines the referendum as mandatory and preliminary. Yet, the law defines it as advisory. A referendum needs to be held before passing the final decision on "foundation, termination or the change of territory of local-government unit". This means that on referendum, the citizens (10% of the voters) practically support the initiative of the municipality assembly to establish or terminate a local-government unit or to increase or decrease the territory of a municipality, city or the city of Belgrade. The Constitution makes the difference between the foundation and termination of the units in municipality, city or the city of Belgrade. Thus, it is the law which governs the termination of municipalities. The Constitution does not foresee the termination of cities, but lists the criteria defined by law which regulate their foundation. Local self-government is entitled by the Constitution to establish one or more municipalities on the city territory. City municipalities may be founded according to the city's statute that is city municipalities are not regulated by laws, but by by-laws. Namely, the constitutional provision defines that city statute regulates which city activities will be delegated to its municipalities. The city of Belgrade is governed by a separate law, the Law on the capital, which, along with the city's statute, regulates the position of this city.

The residents of local self-government exercise their right to local self-government by direct participation or via the representatives elected by free vote. "Given the fact that the theory of popular sovereignty is nowadays generally accepted, and by population we mean all citizens, this would imply that the supreme powers of the state are exercised directly by all its citizens. They can do it in various ways, the most common one being by means of referendum. This means that it is the citizens who adopt legal acts or pass political decisions directly, without relinquishing this right to their representatives" (Marković, 2021, p. 142). Thus, the participation in the referendum at the local level represents a form of citizens' direct decision-making, although when it comes to the issue of the foundation, termination and change of the territory of local self-government, they do not make these decisions, but only give their non-binding opinion. "The basic criticism of democrats in relation to the law from 1866. was that the election of municipal bodies was conducted under police surveillance and that the central government was able to join or divide municipalities without the decision of their citizens" (Đurđev, 2007, p. 10). Today, the key place where the

citizens can make direct decisions is the voting poll at local elections where they can directly choose their representatives for municipal of city assembly. The Republic of Serbia applies, both at state and local elections, so called D'Hondt method of proportional representation, but as of 2020, the electoral threshold was decreased from 5% to 3%. Certain surveys have revealed that "the decrease of the electoral threshold did not increase overall representation, that is, the number of election lists with the candidates for local assembly was not increased, either in absolute or in effective number" (Perišić & Kaličanin, 2023, p. 189). Other forms of citizen's participation in decision-making in local community are regulated by law and local statutes. These forms of participation include citizens' initiative, citizens' meetings or assemblies and local referendum.

The Constitution prescribes the right of local self-government units to independently organize their bodies. "Further elaboration of this constitutional principle reveals that this "independent organization" practically does not exist. Independent organization of local bodies and public sectors is in compliance with the Constitution and law. This entails a logical question – what is the remaining sphere of independence (in our practice this independence is reflected in the number of assembly members within legally regulated margin, for example 19-75) (Orlović, 2015, p. 1662).

International cooperation is one of the segments from the scope of local self-government jurisdication which is particularly emphasized in the Constitution. Namely, in the Republic of Serbia, local self-government units are entitled to cooperate with the corresponding local self-government units from another country within the foreign policy of the Republic of Serbia. This right can be exercised only by respecting the territorial wholeness and legal order of the state. The Constitution states that municipal bodies are the municipal assembly and other bodies designated by statute in accordance with law. Then, there are executive bodies whose members are elected by municipal or city assembly in accordance with law and statute. As for the organization of powers, it should be mentioned that the municipal or city assembly represents the highest body of the local self-government unit. However, the Constitution does not further elaborate this form of the organization and does not describe any other form of local bodies. The law on local self-government of 2007 regulates the position of all local government bodies stating that local self-government units cannot independently organize the organs of authority at the local level. Municipal or city assembly is in the same rank with a constitutional body since it passes the supreme legal act of the self-government unit – statute. In addition to statute, it also passes a number of other general acts,

adopts the budget and annual balance sheet, development and urban plans, initiates municipal referendum and performs all other activities designated by law and statute. Municipal assembly elects municipal executive bodies, head of the municipality or mayor and municipal counsel in accordance with law and statute. It can be concluded that municipal assembly is the highest local government body by analyzing extensive constitutional provisions on the members of a local self-government assembly. The members of assembly are freely elected by secret ballot for a four-year term of office which is again regulated by law and not by local acts or statute. As for the assembly's representation, the Constitution introduces the "positive discrimination" in regards to minorities enabling their proportional representation in accordance with law.

The majority of constitutional provisions are dedicated to the municipality, city and the city of Belgrade jurisdictions. The Constitution makes the distinction between these local self-government units. Thus, a city, in addition to the activities which are delegated to a municipality, can have other delegated activities in accordance with law. The Law on the capital foresees that the city of Belgrade can have even larger number of delegated activities which leads us to conclude that this city, as a local self-government unit, has the largest scope of jurisdiction in comparison to other units. In accordance with the Constitution, municipality has a large number of activities under its jurisdiction which are performed by its bodies as defined by law. However, its scope of jurisdiction is not limited since the Constitution prescribes that municipality can perform additional activities in accordance with law. "Here, the local jurisdiction, in terms of the constitutional right to local self-government is restricted by two things. The first one is the usefulness of making decisions at the local level related to certain matter. This means that it is the best (the easiest, fastest, most economic, most adequate and of best quality) that the decisions on certain topics are made by local authority bodies or directly by citizens. The second restriction has negative connotation and refers to the respect of hierarchy in the distribution of powers, which means that this issue is not in the state jurisdiction. These competences refer to original and not to delegated activities. Delegated tasks do not have its origin in the Constitution, but represent unilateral transfer of authority from state to local self-government level (Orlović, 2015, p. 1664).

"The municipality shall, through its bodies, and in accordance with the law: 1) regulate and provide for the performing and development of municipal activities; 2) regulate and provide for the use of urban construction sites and business premises; 3) be responsible for construction, reconstruction,

maintenance and use of local network of roads and streets and other public facilities of municipal interest; regulate and provide for the local transport; 4) be responsible for meeting the needs of citizens in the field of education, culture, health care and social welfare, child welfare, sport and physical culture; 5) be responsible for development and improvement of tourism, craftsmanship, catering and commerce; 6) be responsible for environmental protection, protection against natural and other disasters; protection of cultural heritage of the municipal interest; 7) protection, improvement and use of agricultural land; 8) perform other duties specified by the law.

The municipality shall autonomously, in accordance with the law, adopt its budget and annual balance sheet, the urban development plan and municipal development programme, establish the symbols of the municipality, as well as their use. The municipality shall see to exercising, protection and improvement of human and minority rights, as well as to public informing in the municipality. The municipality shall autonomously manage the municipal assets, in accordance with law. The municipality shall, in accordance with law, prescribe offences related to violation of municipal regulations" (The Constitution of the Republic of Serbia, 2006).

The jurisdiction of local self-government and its bodies is restricted by central government bodies. The central authority keeps for itself the right to control its activities, which is not the case with the local self-government. Even the activities under the original jurisdiction of local self-government are controlled in terms of their compliance with the law. Speaking about the control and supervision, the Constitution mentions only municipalities whose supervision is in domain of the Government, which is not the case with the cities and the city of Belgrade. Thus, Article 192 of the Constitution states: "The Government shall be obliged to cancel the enforcement of the municipal general act which it considers to be in noncompliance with the Constitution or the law, and institute the proceedings of assessing its constitutionality or legality within five days. The Government may, under the terms specified by the law, dismiss the municipal assembly. Simultaneously with the dismissal of the municipal assembly, the Government shall appoint a temporary body which shall perform duties within the competences of the assembly, taking into consideration the political and national composition of the dismissed municipal assembly (The Constitution of the Republic of Serbia, 2006). As we can see, in terms of the dismissal of assembly, the Government, as a body, is above the second constitutional body – municipal assembly, although here we actually have two bodies of two different authorities, the executive authority at the state level and a local authority body.

Speaking of the protection of the right to self-government, in theory, the following has been noted: "Namely, the realization of the right to local self-government and its autonomy can be (more or less) put into risk by certain central government actions or decisions, as well as the actions or decisions of the bodies of autonomous province. Therefore, it is vital that local self-government should protect its autonomy by being entitled to resort to certain legal instruments if it is established that some of the actions or decisions of state legislative or executive authority, or provincial government, are not in compliance with the Constitution or law" (Logarušić, 2016, p. 258).

The Constitution only regulates the protection of municipalities. Thus, Article 193 states the following: "The body designated by the statute of the municipality shall have the right to file an appeal with the Constitutional Court if an individual legal act or action by a state body or body of local self-government unit obstructs performing the competences of the municipality. The body designated by the Statute of the municipality may institute the proceedings of assessing the constitutionality or legality of the law or other legal act of the Republic of Serbia or autonomous province which violates the right to local self-government" (The Constitution of the Republic of Serbia, 2006).

11. Conclusion

Local self-government in Serbia today represents a constitutional right which restricts state authority. In these modern times, local communities in many countries, including Serbia, are entitled to self-organization and execution of activities from their original jurisdiction. Having analyzed the basic elements of the constitutional position of local self-government in our country, we have come to the following conclusions. As a result of its democratic nature, reflected in the direct participation of citizens in decision-making process, local self-government represents the source of democratic values, which has not been exhausted yet. However, the right of citizens to local self-government is restricted, at one side, by the process of strengthening the state powers (with the guaranteed protection of self-government), and at the other one side, by the process of direct participation of citizens in decision-making process which, in practice, is rare and comes down to direct voting at local elections for the members of local assemblies and indirect election of the heads of municipalities or mayors.

Local self-government cannot be imagined without its original jurisdiction. The activities from the original jurisdiction are those which the state granted

to local self-government by the Constitution. Local self-government exercises these activities in compliance with law which means that the "original" character of these activities is actually restricted. The original jurisdiction of local self-government includes the right to self-organization which is also limited by legal regulation. The way the Constitution has conceptualized the right to self-organization, makes us conclude that this right, by its legal nature, is closer to delegated competences of local self-government. The municipal assembly is the constitutional body, but also an element of the right of local self-government to self-organization. The organization of other local bodies is left to legislators. The central authority has the right to supervision or control of the activities under original jurisdiction, but only in regard to their compliance with the Constitution and law. The Constitutional Court has the jurisdiction to decide on this matter.

The right of local self-government to protection is the precondition for its secured position. In the constitutional system of the Republic of Serbia, this protection refers to both general and individual acts. Again, the Constitutional Court, as an apolitical and independent organ of the central authority, has the last word on this matter and guarantees that this protection will be efficient.

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O LOKALNOJ SAMOUPRAVI I NJENOM USTAVNO-PRAVNOM POLOŽAJU U SRBIJI

REZIME: Lokalna samouprava je vid odlučivanja i upravljanja u lokalnim zajednicama oformljenim na užim delovima državne teritorije i to neposredno od strane njenih stanovnika ili putem njihovog predstavništva, koje oni neposredno biraju, kao i drugih lokalnih organa. Za lokalnu vlast, koju vrše lokalni organi, u teoriji je navedeno da je to samo vlada građana u lokalnim zajednicama. Za lokalnu samoupravu se može konstatovati da je to osnovna organizacija vlasti. Bez lokalne samouprave ne može da se zamisli istorija konstitucionalizma. U radu se prvo iznose osnovna obeležja

lokalne samouprave. Reč je o sledećim karakteristikama: 1) postojanje ustavom i zakonom utvrđenog kruga samoupravnih lokalnih poslova, koje jedinice lokalne samouprave vrše bez mešanja centralne državne vlasti; 2) građani imaju pravo da u lokalnim zajednicama, na neposrednim izborima biraju svoje predstavničko telo ili neposredno odlučuju o bitnim temama od interesa za lokalnu zajednicu; 3) lokalne institucije su organizaciono i personalno samostalne; 4) lokalna samouprava ima samostalne izvore finansiranja (od poreza i sopstvene imovine); 5) postojanje ustavom i zakonom utvrđene zaštite lokalne autonomije, bez koje nema pravilnog funkcionisanja lokalne samouprave.

U radu se, posebno, analiziraju elementi ustavno-pravnog položaja lokalne samouprave u Srbiji i to: pojam, način odlučivanja, nadležnost, pravo na samoorganizovanje i zaštita lokalne samouprave.

Ključne reči: *lokalna samouprava, ustavno-pravni položaj, obeležja, Republika Srbija.*

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FORGING PAYMENT CARDS AND CYBERCRIME

ABSTRACT: Payment card forging and high-tech crime are deeply rooted problems in today's society. These sophisticated forms of crime utilize advanced techniques and high-tech tools to illegally access financial resources and commit fraud. Payment card forgery involves the creation of fake copies of debit or credit cards with the intent of conducting illegal financial transactions. Access to card data is achieved through various methods, including skimming (illegally collecting card data), phishing (fraud through fake emails or web pages), or the physical theft of cards. Simultaneously, high-tech crime encompasses a wide range of activities aimed at the misuse of digital technologies and networks to achieve financial gain or harm to individuals, companies, or states. These crimes often include computer fraud, cyber-attacks, and digital fraud. This paper aims to highlight the importance and seriousness of payment card forgery, explore different methods and patterns of these criminal activities, and emphasize their specific connection with high-tech crime. Different methodologies were applied in the research including quantitative and

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qualitative content analysis, comparative analysis, as well as descriptive and analytical statistics. The obtained results clearly indicate the growing importance of this problem both in the legislative and in the criminological contexts, with a constant increase in the number of committed criminal acts. Additionally, the research highlights the inextricable link between payment card forgery and various forms of high-tech crime, which often intertwine and together constitute an overarching challenge to the justice system and the security of society. Finally, the paper will consider various strategies and methods that society and the state can use to counter the spread of these criminal activities. The ultimate goal is to preserve the safety and integrity of the financial system and protect the interests of individuals.

Keywords: *payment card forgery, cybercrime, financial fraud, skimming, phishing.*

1. Introduction

From the introduction of the Internet until the present day, the Internet has become an essential tool in all aspects of society and business. From the beginning, computers and Internet technology have developed and advanced, and their impact on business and commerce operations is enormous (Featherly, 2016). The expansion of the digital world and the use of the Internet as a trading platform represents a significant change in the way companies communicate with their customers and conduct their operations. This includes online payments for business and trade transactions, which has become normal in the modern business environment. The Internet has enabled companies to penetrate new markets, expand their business networks and create more efficient ways of communicating with customers. However, this kind of technological development and progress also brings new challenges in the form of information security and privacy, as well as easier connection and realization of specific cybercrime actions, through internet platforms and advanced communication technologies (Živaljević, 2022, p. 12). Overall, the development of the Internet and the digital world has a profound and far-reaching impact on the way business and commerce operations are conducted, a constantly changing and evolving field. The Internet, automation of business activities, electronic banking, ATM transactions, payment card payments, internet payments, use of POS terminals and the like, represent new scientific

and technical achievements that make banking business modern and efficient (Pantić, 2018, p. 393).

One of the indispensable technological achievements of the financial sector are payment cards, which have become the basic means of payment. A payment card is a modern cashless payment instrument that performs three functions: cashless payment means, user crediting instrument and generally accepted international and national means of payment. It is a type of identification that authorizes the owner for cashless payment (Zečević, 2009, p. 305). Payment cards are technologically advanced instruments for cashless payment and financial transactions that allow users to make payments and transactions without using cash. This type of card represents a modern way of payment, where the card user warrants to pay the amount to the card issuer, while the seller of goods or services has the right to collect that amount from the card issuer. Cards are not a substitute for money but enable practical and quick financial transactions.

Over time, payment cards have evolved and improved. In the beginning, people were skeptical due to a lack of understanding on the purpose and benefits of payment cards. However, over time the advantages of using these cards was recognized and was reflected through several things:

- *Greater security*: using payment cards provides a higher level of security compared to carrying cash. When cash is lost or stolen, the money is usually lost forever. With a payment card, users can report the loss or theft, and the financial institution can take protective measures and compensate the damage.
- *Saving time*: payment cards enable faster and more efficient payment. Users simply present a card or use contactless options to make a payment, eliminating the need to count cash and return change.
- *Ease of use*: payment cards are easy to use and practical for everyday transactions. In addition, most stores and online stores accept payment cards as a means of payment, making them widely available. One of the increasingly common forms of payment is through a mobile phone, to which a payment card is connected, so its physical presence is not necessary.

The rapid growth of e-commerce has resulted in an increasing number of online shopping. These customers depend on credit cards as a payment method or use mobile wallets to pay for their purchases. Thus, credit cards have become the main form of payment in the e-world. With billions of transactions occurring daily, this is a fertile field for criminals to generate

profit by finding different ways to attack and steal credit card information. Criminal organizations and individuals are constantly making efforts to bypass security measures, abuse payment cards, and thereby obtain material benefits for themselves. Given the ubiquitous use of cards, abuse of payment cards is a serious challenge in modern society. In order to identify unauthorized or suspicious activities and reduce the risk of misuse, it is important to take a series of preventive measures, and apply a vigilance and monitoring of transactions. In addition, financial institutions and merchants implement various security measures to protect data and prevent card misuse. The following text will list the most common forms of misuse and payment card forgery, the legal regulations that regulate this type of criminal behavior, and global measures which are implemented in domestic legislation.

Increasing technological developments such as the increased use of neural networks and the use of artificial intelligence (AI) are also affecting card issuers and banking services. AI chat tools can write malicious code very quickly, in most cases even faster than defense software can identify that code. Today, AI is paving the way in designing new methods to better manage next-generation credit card fraud detection by supporting increased approval rates, minimizing declined transactions, and enabling the proactive monitoring of credit limits (Cherif, Badhib, Ammar, Alshehri, Kalkatawi & Imine, 2023, p. 146). From all of the above, we can conclude that a person who commits the criminal offense of abuse and fraud by using a payment card is very familiar with the technique and technology of using payment cards, which tells us that this crime is mostly committed by professionals. The execution of this form of criminal offense requires technical and technological means and knowledge, which classifies it as a high-tech crime or cybercrime.

2. Methods of misuse and payment card forgery

The oldest form of criminal offense related to payment cards refers to the classic form of the criminal offense of theft. During the earliest stages of development of this payment technique, confiscation of a payment card, and its misuse, was the first form of a criminal offense related to payment cards. Only later, due to the improvement of the protection measures and security of payment cards and banking systems, other forms of criminal activities related to various forms of fraud such as fraudulent procurement, unauthorized account access, takeover or identity theft, and other forms of financial manipulations developed. Two types of credit card crime that are directly related to classic forms of crime are account takeover and *skimming*.

When taking over an account, the criminal surreptitiously gathers key information about an individual. This can be done by stealing and then returning wallets, purses, or even breaking into buildings where the victim lives (houses, apartments, hotel rooms). The next step is to contact the card issuer, where the perpetrator presents himself as the actual and legitimate card owner and requests a change to the card address. A new card is then requested and sent to the new address. Skimming is the theft of credit card information during a legitimate transaction. Often, a double keyboard is placed on the keyboard itself, which records all the necessary data to create a fake payment card, as well as the Lebanese loop – when a strip of X-ray film is placed in the mouth of the card reader to hold the card so that the transaction is prevented (Matijašević, 2013). A merchant or employee obtains a person's credit card number by looking at receipts or using an electronic scanner. Any additional identity data such as PIN numbers, postal codes, and security codes are also downloaded. Scanners can be placed over legitimate ATMs, allowing criminals to steal from bank customers.

Thus, the crime has changed from outright card theft to downloading card information. Even as the rate of outright theft has declined, as seen in crime reports compiled by the Federal Bureau of Investigation (FBI), the incidence of remote, online theft using credit cards and other personal identity information has skyrocketed (Ross, 2013, p. 107). One of the terms that is used in this area of crime, and which can be found in domestic and foreign literature, is carding. Carding has emerged as a significant form of cybercrime that encompasses various frauds associated with the misuse of payment cards. This practice involves the unauthorized use of stolen or forged credit card information for financial gain. The evolution of technology has enabled the expansion and complexity of carding, posing significant challenges to global financial security and privacy.

Carding encompasses various tactics and strategies used by cybercriminals to exploit credit card information. The process usually includes:

- *Data collection:* cybercriminals obtain credit card information through a variety of methods, including hacking into merchant databases, using malware to steal data, or launching phishing campaigns. These methods provide important information such as card numbers, expiration dates, and CVV codes.
- *Data verification:* the stolen data goes through a verification phase to ensure its accuracy and potential for misuse. This step includes verifying whether the card has been reported stolen and that there are sufficient funds for a transaction.

- *Production of forged cards*: after data is verified, criminals use the stolen data to create counterfeit physical or virtual cards that closely resemble legitimate ones.
- *Unauthorized transactions:* with counterfeit cards, criminals initiate fraudulent transactions, which may include purchasing goods and services, withdrawing cash from ATMs, or transferring funds to other accounts.

The growth of the online market and the anonymity provided by the Internet have made it possible for stolen credit card information to be distributed. Criminals buy and sell this data, which contributes to the proliferation of carding networks and makes it a global issue.

Phishing is a sophisticated fraud technique, increasingly used in the digital age, to trick users into gaining access to their personal, financial, and sensitive information. This type of attack is based on psychologically manipulating users to get them to reveal their confidential information such as passwords, credit card numbers or personal identification information. Phishing attacks have become more frequent due to the increasing number of mobile phone users who use mobile services on a daily basis, such as online banking and e-commerce that require sensitive user information (Marforio, Masti, Soriente, Kostiainen, & Capkun, 2016). One way is in the form of text messages that redirect users to illegitimate websites asking them to enter personal information that attackers can access (Shahriar, Zhang, Dunn, Bronte, Sahlan, & Tarmissi, 2019, p. 179). Another significant problem for mobile phone and Internet users is downloading prepackaged applications, when prompted by a mobile device, without knowing that it contains harmful phishing malware (Cui, Jourdan, Bochmann, Couturier, & Onut, 2017).

Thus, a phishing technique is a form of Internet fraud that is often used for the unauthorized collection of user personal information. This process usually involves the following steps:

- *Creating fake messages:* attackers start by creating fake emails, text messages or even social networks that send messages to users. These messages often look authentic and often pose as messages from well-known companies, banks, government agencies or other trusted sources.
- *Creating urgency or fear:* In order to get users to react quickly, attackers often utilize urgent or fear tactics.
- *Displaying fake links:* Phishing messages often contain links to fake or malicious websites. These pages are often designed to look identical

to the original web pages, which can trick users into entering their personal information.
- *Data collection:* when a user clicks on a fake link and enters their information, attackers collect this information and misuse it. The misuse can include identity theft, accessing bank accounts or sending malware to users' devices.
- *Social Engineering:* phishing attacks often use manipulation and social engineering to overcome user suspicion. This may include using personal information, names or other data to create the impression that the message is legitimate.

Identity theft is a special form of criminal activity that is closely related to cybercrime. Identity theft is a multifaceted cybercrime that involves the unauthorized use of personal information for the purpose of fraud. There are different definitions of this phenomenon and, considering the seriousness of the problem, it has also been addressed by international institutions and organizations. The 12th UN Congress on Crime Prevention and Criminal Justice in 2010 defined it as the misuse of personal data for the purpose of committing fraud. Similarly, the Organization for Economic Cooperation and Development (OECD) defines identity theft as the unauthorized acquisition, transfer, possession, or use of personal data for the purpose of fraud or other criminal activity (OECD Ministerial meeting on the future of the internet economy – Scoping paper on Online Identity Theft, 2007, p. 3). The process of identity theft usually begins with learning an individual's personal information without their knowledge or consent. Data is obtained through deceptive means, theft, or criminal activity. After that, the stolen information is used for various criminal activities, often involving financial gain for the perpetrators (Milošević & Urošević, 2009). Identity theft usually consists of three elements: the manner of execution of the act itself (modus operandi), the goal of the attack and the motivation of the perpetrator (Vilić, 2019, p. 45). The emerging forms of identity theft, viewed in a narrower sense and according to the location of personal information and the means and techniques used for its illegal acquisition, can be classified into three broad groups (Đukić, 2017, p. 102): identity theft using classic methods and outside ICT systems and networks; identity theft from personal computers and mobile devices in a network environment; identity theft from ICT systems and networks.

3. International legal regulations and implications for domestic legislation

The development of technology and the expansion of the use of more secure chip credit cards have brought with them increasingly sophisticated forms of fraud related to Internet banking, credit (payment) cards and identity theft. These forms of crime are often carried out without the need to show a physical card, which makes it even more difficult to detect and suppress them. This presents new challenges, for European and Serbian legislation, in order to protect the individual as well as the entire financial and banking system.

In order to improve measures aimed at preventing such abuse, there was a need to strengthen the legal framework of the European Union. One of the first steps towards that end was the Council Framework Decision 2001/413/PUP, often referred to as the Framework Decision on Cybercrime. It represents an important legal instrument adopted by the European Union (EU) to combat cybercrime, including crimes related to cashless means of payment. This Framework Decision was adopted in 2001 and represents one of the first steps in regulating this increasingly important aspect of criminal law within the context of the digital revolution. It covers a wide range of crimes, including misuse of payment cards, identity theft and other forms of fraud related to cashless payments. The decision provides the definitions for key terms and sets certain standards for prosecuting and sanctioning the perpetrators of these crimes. In addition, it promotes cooperation between member states during the investigation and prosecution of these crimes. This legal instrument represents an important step in creating a legal basis for the fight against cybercrime in the EU and improving the security of cashless means of payment. However, given rapid technological progress, the legal framework is continuously evolving in order to adequately respond to new threats and challenges in the digital world. The EU saw the need to adopt new legal instruments that will be binding on member states and improve international cooperation in this field. In this context, Directive 2019/713/EU was adopted, which represents another key legal instrument of the EU related to the fight against cybercrime and the protection of cashless payment means. It represents an innovation of the framework decision from 2001 and enacts significant obligations for member states, serving as a foundation for domestic criminal legislation, both present and future. The most important features of this legal instrument are:

- updating the existing EU legislation in the field of security and protection of cashless payment means, with a focus on preventing and combating fraud and forgery related to digital forms of payment.

- specifies a wide range of crimes and forms of fraud related to cashless payment instruments, including digital payment methods such as payment cards, mobile wallets, electronic money and cryptocurrencies, providing clear and precise definitions of associated terms.
- special emphasis is placed on international cooperation between member states in relation to the investigation, prosecution and exchange of information on crimes related to cashless means of payment,
- foresees certain penalties for natural persons who commit criminal acts related to cashless payment instruments, prescribes minimum and maximum penalties in order to allow flexibility in sanctioning.
- a special novelty refers to online applications and support for victims of these types of crimes.
- The Directive requires the EU Commission to periodically report to the European Parliament and the Council on the progress made in bringing national legislation into line with this Directive.

Serbia tried to implement some of the above into its domestic legislation following the recommendations and the assumption of international obligations. The analysis of current criminal legislation associated with forgery and misuse of cashless payment instruments makes it clear that the legislator has prescribed a special criminal offense against the economy related to the abuse of payment cards (Article 243 CC), as well as other criminal offenses that can be subsumed under criminal offenses related to fraud and forgery of cashless payment instruments from the Directive (Pavlović, 2022, p. 38). The Criminal offense of Forgery and abuse of payment cards (Article 243 of the CC RS) is the basic criminal offense that regulates this issue. The difference, in reference to the Directive, is that in domestic legislation, incriminations are found in different parts of the Criminal Code, while in the Directive they are precisely and clearly defined in one place. The specificity of the criminal acts related to the abuse of payment cards is reflected in the fact that it sublimates several forms of criminal acts. It represents a property crime, a crime related to abuses in the economy, contains elements of crimes against legal traffic (forgery). In this context, it is difficult to classify it in a certain category. In recent times, especially after the COVID-19 pandemic and the sudden increase in contactless card payments, it has also taken on elements of computer crime. Perpetrators can be individuals or organized criminal groups. It can also have a local character but also a transnational one, where the action is carried out in one country while the consequences occur in another, which requires the continuous cooperation of police and judicial

authorities at the international level. The basic provisions of the criminal offense of Forgery and abuse of payment cards from article 243 of the CC foresees several provisions and positions that regulate this field. Paragraph 1, of this criminal offense stipulates that: whoever forges a fake payment card or who alters a genuine payment card with the intention of using it as genuine or who uses such fake card as genuine shall be punished with imprisonment of six months to five years and fined. If the perpetrator obtained an illegal material benefit (paragraph 2) or if that benefit exceeds one million and five hundred thousand dinars (paragraph 3), foreseen high prison sentences which can be 12 years, including a fine. The punishment from paragraphs 2 and 3 of this article shall apply to a perpetrator who commits the act by unauthorized use of someone else's card or confidential data that uniquely governs that card in payment transactions, or a perpetrator who acquires a fake payment card with the intention of using it as a real one, or a perpetrator who obtains data with the intention of using it to create a fake payment card (paragraph 5), which perpetrator will be punished by a fine or imprisonment of up to three years. This incrimination foresees confiscation of forged and fraudulent payment cards (paragraph 6). As we can see, this article criminalizes and sanctions actions related to forgery, abuse of payment cards, production of fake cards, as well as misuse of client data. In domestic practice, we most often encounter the crime of theft in which the card is stolen and then misused by the perpetrator of the crime by withdrawing money or paying in facilities where a PIN for the card is not required.

However, more and more often these forms of crime are taking on transnational elements, whereby jurisdiction is transferred to international criminal legislation and institutions. When solving international legal matters, priority is always given to international documents, so only if some issues are not part of one of the signed international treaties, the provisions of domestic laws are applied (Merdović, Stojković Numanović & Dragojlović, 2023, p. 104). In this regard, international legal and police cooperation in combating this form of cyber and financial crime is of crucial importance.

4. How to prevent abuse and fraud with payment cards?

In the fight against criminals, IT (software) and technical (space and hardware) protection is constantly being improved with the sphere of interest increasingly becoming access to the desired data through employees, regardless of whether it is company insiders or poorly trained, inattentive and or negligent employees. The criminals' level of professional competence

and applied methods are constantly developing and improving, which makes the danger of large material and other types of damage suffered by victims of cybercrime real; therefore, the protection of data that is, or can be, the target of criminal attacks, is of great importance (Đukić, 2017, p. 100). Payment cards, as a practical payment method, provides speed, simplicity, and practicality, thus facilitating everyday transactions. However, at the same time, criminals have recognized the opportunity to exploit the vulnerabilities of these systems. To counter these challenges, financial institutions and security experts are continuously developing sophisticated fraud detection and prevention techniques. This includes analyzing transactions to identify unusual activity, using algorithms to detect anomalies, and machine learning models to recognize patterns of behavior that indicate fraud (Basnet & Doleck, 2015). In addition, visual analytics play an increasingly important role in identifying exceptions and fraudulent activities.

The introduction of new technologies and innovations brings numerous benefits while also posing new security challenges. A comprehensive approach that combines technology, user education and effective fraud countermeasures is essential to maintaining the integrity and trust in the financial system. The banking system and financial institutions strive to preserve their credibility and trust by developing specific methods to counter specific methods of abuse, forgery and fraud related to payment cards and cashless payments (Barker, D'amato & Sheridon, 2008, p. 402). In this context, there are a number of methods and techniques that financial institutions use to detect such frauds. We most often encounter, in scientific and professional literature, the following mechanisms and methods for the prevention and detection of payment card fraud:

- Transaction analysis: Tracking and analyzing transactions is a key method in fraud detection. Identifying suspicious transactions that differ from normal patterns can indicate potential fraud.
- Exceptions and anomalies: Finding exceptions and anomalies in transactions can help detect unusual activity. Using anomaly detection algorithms makes it easier to identify transactions that stand out from the norm.
- User profiling: Monitoring the usual habits of the user enables the recognition of suspicious activities. Changes in payment or purchase patterns that differ significantly from normal behavior may indicate potential fraud.

- Geo tracking: Tracking the locations of transactions and comparing them to the usual places where the user makes purchases can help identify suspicious transactions that take place in unusual places.
- Malicious patterns: Identifying malicious patterns of behavior such as rapid the succession of transactions, large sums of money, or purchases in unusual categories, can be a sign of fraud.
- Machine learning models: The use of machine learning algorithms enables automated fraud detection. Historical data is used to train models to recognize patterns that indicate fraud.
- Multi-criteria analyses: Combining different criteria and methods for analyzing transactions can increase accuracy in fraud detection.
- Comparison with reference bases: Checking transactions against a list of known scams or suspicious entities can quickly identify potential fraudsters.
- Expertise: Security and forensics experts can provide in-depth analysis of transactions and recognize suspicious activity that other methods might fail to identify.
- Visual analytics: Data visualization helps identify exceptions and patterns in an intuitive way, making fraud detection easier.

Combining multiple methods and techniques can provide the best results in detecting payment card fraud. It is important that financial institutions regularly monitor transactions, use advanced analytical tools and implement protection strategies to reduce the risk of fraud. Financial institutions pay great attention to the education of clients so that they can recognize certain forms of fraud such as skimming, phishing, carding, *etc*. Thus, in case of phishing, preventive activities are most often aimed at increasing attention and educating users about recognizing suspicious messages and links. This includes a number of activities such as: carefully checking the e-mail address or phone number of the sender, avoiding opening suspicious links to which the received message refers, messages contain errors in grammar and spelling which can often indicate that the message is not authentic, caution with messages in which a quick response is required or a reward is promised. When it comes to carding, financial institutions and merchants apply multiple layers of protection (Sullivan, 2014):

- EMV (Europay, Mastercard, Visa) technology: Chip and PIN technology was introduced to increase security by creating dynamic transaction codes, reducing the usability of stolen data. The main feature of EMV technology is the replacement of traditional magnetic strips on

cards with microchips (EMV chips). These chips generate unique codes for each transaction, making card cloning significantly more difficult. In addition, EMV cards require the entry of a PIN (personal identification number) or a signature by the user, which further increases the security of transactions.
- Multi-factor authentication: Many platforms use multi-factor authentication, requiring additional verification, beyond a simple password, to access an account.
- Transaction tracking: Financial institutions use sophisticated algorithms to detect unusual transaction patterns and behavior, flagging potential fraud for further investigation.

As we can see, international financial institutions are trying to develop special global mechanisms and techniques so as to be able to ensure the security of transactions, data and finances of companies and individual. Misuse and forgery of payment cards has a special characteristic, in terms of damage, which can be twofold – material and reputational. Material damage refers to the specific loss of funds, while reputational damage indicates the loss of clients' trust in the bank. Citizens are usually only inflicted with material damage, which is not achieved through violence or threats. An effective fight against this form of crime requires a comprehensive approach that includes the further development of the protection system related to payment cards, as well as the proactive action of banks and financial institutions in protecting their clients. Preserving confidence in the financial system and protecting against fraud are becoming a priority in order to contain damage and preserve the stability of financial markets.

5. Conclusion

In the era of digital technologies and the Internet, payment cards and cashless payment methods have become the leading method of financial transactions in the modern digital society. This form of payment brings with it many benefits, but it also opens the door to various criminal activities, abuses, and frauds. Due to these risks, the fight against these crimes requires comprehensive measures, including legal regulation, technical protection systems and the training of personnel in the banking sector, in order to recognize and prevent fraud attempts and the misuse of payment cards. Organized criminal groups and cybercriminals pose a serious threat to banking systems and financial institutions around the world. The international scientific and

professional community is increasingly focusing on the prevention of such forms of crime and the reduction of the damage they can cause to individuals and the financial system as a whole. The consequences of payment card abuse and cyber fraud can be far more serious than financial losses. They can damage the reputation of financial institutions and lose the trust of clients. Fraud and attacks on the security of banking systems are a modern challenge that must be solved at the global level. This requires the application of sophisticated technological solutions and innovative legal regulations.

Given the growing importance of digital transactions, it is essential to constantly improve security systems and constantly monitor new techniques and tactics utilized by criminal groups. Only through a comprehensive approach that includes legal, technical, and educational measures, can we effectively combat this type of crime and preserve the integrity of financial systems.

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FALSIFIKOVANJE PLATNIH KARTICA I VISOKOTEHNOLOŠKI KRIMINALITET

REZIME: Falsifikovanje platnih kartica i visokotehnološki kriminal predstavljaju duboko ukorenjene probleme u današnjem društvu. Ovi oblici kriminala primenjuju sofisticirane tehnike i visokotehnološke alatke kako bi ilegalno pristupili finansijskim resursima i izvršili prevare. Falsifikovanje platnih kartica podrazumeva proces stvaranja lažnih kopija debitnih ili kreditnih kartica sa ciljem izvođenja nezakonitih finansijskih transakcija. Pristup podacima sa kartica vrši se korišćenjem različitih

metoda, uključujući skimming (ilegalno prikupljanje podataka sa kartica), phishing (prevara putem lažnih e-mailova ili web stranica) ili fizičku krađu kartica. Paralelno, visokotehnološki kriminal obuhvata širok spektar aktivnosti usmerenih na zloupotrebu digitalnih tehnologija i mreža radi postizanja finansijske koristi ili nanošenja štete pojedincima, kompanijama ili državama. Ovi oblici kriminala često podrazumevaju računarske prevare, sajber napade i digitalne prevare. Ovaj rad ima za cilj da istakne značaj i ozbiljnost problema falsifikovanja platnih kartica, istraži različite metode i obrasce ovih kriminalnih aktivnosti i naglasi specifičnost njihove veze sa visokotehnološkim kriminalom. U istraživanju su primenjene različite metodologije, uključujući kvantitativnu i kvalitativnu analizu sadržaja, komparativnu analizu, kao i deskriptivnu i analitičku statistiku. Dobijeni rezultati jasno ukazuju na rastući značaj ovog problema kako u zakonodavnom tako i u kriminološkom kontekstu, uz konstantan porast broja izvršenih krivičnih dela. Osim toga, istraživanje ističe neraskidivu vezu između falsifikovanja platnih kartica i različitih oblika visokotehnološkog kriminala. Ovi oblici kriminala često se prepliću i zajedno čine sveopšti izazov za pravosudni sistem i bezbednost društva. Na kraju, u radu će biti razmotrene različite strategije i metode kojima se društvo i država mogu suprotstaviti širenju ovih kriminalnih aktivnosti, sa ciljem očuvanja bezbednosti i integriteta finansijskog sistema i zaštite interesa pojedinaca.

***Ključne reči**: falsifikovanje platnih kartica, cyber kriminal, finansijske prevare, skimming, phishing.*

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JUVENILE IMPRISONMENT

ABSTRACT: Juvenile delinquency is a negative social phenomenon and a socio-legal problem that has always existed in all societies of the world. In our country, the social response to juvenile crime has evolved over time. Initially, juveniles were treated as adults, and the primary purpose of punishment was repression. However, with the adoption of the Law on Juvenile Offenders and Criminal Protection of Juveniles in 2005, significant changes occurred. The new system of punishment primarily focuses on the protection, correction, and rehabilitation of juveniles. For this purpose, corrective orders are issued first. However, when the dimensions of juvenile crime surpass the possibilities offered by the application of corrective orders, criminal sanctions are imposed. Juvenile imprisonment is the only punishment recognized by our juvenile criminal legislation. It is applied as an "ultima ratio" for older juveniles, only when the legal requirements are met. The subject of the paper is precisely the analysis of the content of the sentence of juvenile imprisonment, the legal conditions for imposing it and the manner of its execution. The aim is to review the fundamental positive legal decisions in the Republic of Serbia related to the sentence of juvenile imprisonment and the criminal legal status of juveniles.

Keywords: *juvenile detention, juvenile delinquency, criminal sanctions, juveniles.*

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1. Introduction

"Youth folly" or "They're just a kid". Sentences that can be heard very often, which justify the most diverse actions of minors. However, can these and similar sentences be used in the context of a kind of justification for each of their actions? Psychological research indicates that children from an early age have a perception of the good and bad things they do, and that they often, and for the fun of it, examine the limits to which they can go unpunished. In addition, due to the general development of civilization, the pace of modern life has become accelerated, parents have less and less time available to spend with their own children, and they are increasingly "left to fend for themselves" and are rapidly maturing under the influence of the aforementioned development. Today's fifteen-year-old can hardly be compared to a minor at that age 20 or 30 years ago, so the criminal offenses that today's minors commit are nothing like those innocuous offenses that used to be committed by "wayward children" which were most often left unreported. Namely, according to the available statistics in our country, the structure of committed juvenile crime is dominated by property crime, especially criminal offenses of theft and aggravated theft, but in addition, other forms of criminal behavior are present, such as light and severe bodily injury, violent behavior and unauthorized possession of narcotics. What is particularly worrying is the execution of even the most brutal crimes such as murders and aggravated murders, which we unfortunately witnessed this year. These data are difficult to comprehend, because there are still prejudices in the public that minors commit only near negligible criminal offenses, which do not have significant consequences, and that it is enough just to warn them, not to punish them, for the commission of these offenses. However, even though the perpetrator of the crime is categorized as a minor, their crime often goes beyond what the public usually imagines that a person at that age can even think, let alone do. In such situations, the state must have criminal law mechanisms to sanction them, and this mechanism is the punishment of juvenile imprisonment as the only punishment known to our juvenile criminal legislation and which is used as an "ultima ratio" when the juvenile cannot be affected by other criminal law instruments. Also, this matter deserves special attention because juvenile delinquency is one of the most important indicators of the criminal situation in the country, and returning minors to the "right path" is the primary and responsible task of every society.

2. Development of the idea of the special position of juvenile offenders in criminal law

Special treatment of minors in the criminal justice system is not a new concept. Back in Roman law, there was the principle of "*Doli incapax*" or "inability to commit a crime" that protected children from prosecution because of the presumption of lack of ability and understanding required to be guilty of a crime (Smith, 1994, p. 427). Although in Roman law it was only about the beginnings of a different approach to minors and their status was not precisely determined, it was still pointed, as early as then, to a different level of their mental development as a reason for different criminal law treatment compared to adults. What is particularly interesting is the fact that since ancient times, socially unacceptable behavior of minors has been described in almost the same way as today. Thus, Socrates also said that: "Children now love luxury, they have bad behavior, contempt for authority, they show disrespect to elders and love chatter instead of learning. Children no longer get up when the elderly enter the room. They contradict their parents, chatter in front of people, greedily swallow treats from the table, cross their legs and tyrannize their teachers" (Stajić & Stanarević, 2011, p. 127).

If the further position of juveniles in criminal law is observed throughout history, it can be concluded that they have gone through several stages or phases of development, i.e. two general models can be distinguished in which juvenile crime was approached in a differentiated way. It is a protective model – a model of welfare and a justice model (Radovanov & Joksić, 2018, p. 158).

a) The welfare or protective model is linked to the beginning of the 20th century and is based on the assumption that juvenile delinquency is the result of social or environmental factors and that therefore a young person cannot bear individual responsibility. Thus, society is perceived as the cause of criminal behaviour of minors and accordingly, the primary objective of juvenile justice is to provide appropriate assistance or treatment for minors – not to punish them, but to protect them. This model focuses on the needs of minors, establishing and treating possible diagnoses if the minor has them, and is based on more informal procedures (Dignan, 2002, p. 3).
b) The justice model emerges in the second half of the 20th century and is created as a critique of the welfare model. In contrast, it emphasizes the responsibility of the minor, their punishment and procedural formalities. The justice model is based on the assumption that young people also have freedom of will and as such, they

> should be held criminally responsible for their actions. It follows from the above that the primary focus is on the criminal offenses of minors, and not on their welfare and needs (Dignan, 2002, p. 4).

The approach of modern legal systems in relation to juvenile delinquency is also based on the described models, which determine the status of juveniles in criminal law primarily on the basis of age. Accordingly, criminal legislations set an age limit that distinguishes between the category of adults and minors and on the basis of which the limit of criminal liability is set. The basis for this type of arrangement lies in the fact that the personality of the minor, as well as their special biopsychological unit, requires and justifies the existence of a special criminal legal status. Drakić emphasizes that the personality of minors goes through certain stages of biological, psychological and social development and that, accordingly, the process of their maturing is very complex, so it happens that the psychological life of minors cannot be accompanied by rapid biological and physical development (Drakić, 2010, p. 12). Therefore, youth is the period of life when the most intense development of cognitive, emotional and conative abilities occurs, when different knowledge is acquired and different habits, attitudes and values are adopted. During these years of life, individuals face numerous tasks that are placed before them, and one of the most important requirements is to build their own identity and personality. However, as they grow up, young people encounter various temptations, due to which they can stray from the right path, when they begin to run away from school, roam, that is, their behavior becomes deviant, and in certain cases they also begin to commit criminal offenses (Živanović, 2014, p. 9).

Thus, today, there is almost no country in which minors do not have a special criminal legal status in relation to adults. According to research, Belgium is often cited as an example of a country in which the welfare model is represented, with a high limit of the minimum age necessary for criminal liability of 18 years. A similar reputation was built by France by placing education and rehabilitation at the center of youth justice reforms back in the 1940s, but the age limit necessary for criminal liability is nevertheless lower and is 13 years (Urbas, 2000, p. 6). In contrast, the UK and US are traditionally associated with the justice model and the low age of criminal responsibility – 10 years in England and Wales, and as low as 6 years in several US states like North Carolina (Young, Greer & Church, 2017, p. 2017).

3. Criminal law position of minors in positive legislation

Historically, the criminal legislation of Serbia is characterized by two periods of punishment of minors. The first period is characterized by the treatment of minors and the imposition of criminal sanctions in the same way as for adult perpetrators of criminal offenses. Their position was significantly changed by the adoption of the Law on Amendments to the Criminal Code of 1959, which stipulated that juvenile delinquents could no longer be imposed the same penalties as adults. At the same time, with the adoption of this law, the second period of punishment of minors begins. This law established for the first time the sentence of juvenile imprisonment as a special type of criminal sanction that could only be imposed on an older juvenile (aged 16 to 18), under the conditions determined by law (Živanović, 2014, p. 39). With the adoption of this law, the idea arises in our country for the first time that juvenile crime has so many peculiarities that it deserves a special policy of combating it, special penalties adapted to juveniles and special criminal law. This idea was finally shaped many years later within the Law on Juvenile Offenders and Criminal Protection of Juveniles (LJOCPJ) in 2005.

Until the adoption of this law, the criminal legal position of minors in our country was regulated by special units within the general provisions of substantive, procedural and executive criminal legislation. LJOCPJ is a systematized matter of juvenile criminal law with the aim of making criminal law and proceedings against juveniles more humane, efficient and meaningful (Blagić, 2015, p. 35). All this in line with the tendencies of modern criminal policy present in many countries in recent decades, in which the principle of subsidiarity in the application of criminal sanctions comes to the fore in favor of other out-of-court measures of response to criminal behavior of minors. The overall approach in the new law is based on providing the necessary support to children and young people, starting from preventive activities to prevent juvenile delinquency, to employment and independence of young people, i.e. their integration into society after the termination of the measure (Kranjc & Vujošević, 2006, p. 119). Although it is undoubted that such instruments increasingly constitute a means of social reaction towards juvenile delinquents, criminal legislation nevertheless also provides for criminal sanctions that can be imposed on juveniles under special conditions. Almost all modern criminal legislation in the system of criminal law measures to respond to crime also provides for a special system of juvenile criminal sanctions, which largely relies on the standards established by international acts, adopted within and under the auspices of the UN and the regional organization of the Council

of Europe (Đukić & Jovašević, 2010). The possibility of imposing criminal sanctions on minors is conditioned by the best interest and minimum age for criminal liability, which is one of the general principles of the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). The Beijing Rules stipulate that this limit must be set to match the emotional, intellectual and mental maturity of the minor (Lukić & Samardžić, 2012, p. 352).

Taking into account the aforementioned principles contained in international legal documents, minors, as a specific age category of persons, have a special legal position in our country and are privileged in relation to adult perpetrators owing to the fact that immature persons, unaware of all the consequences of that decision, have entered into criminality, and owing to the knowledge that their return to a socially acceptable path has a better chance because education and maturing is yet to be found in the path of minors as persons of that age (Bugarski, Ristivojević & Pisarić, 2016, p. 68).

Thus, in our system of juvenile criminal law, there are different mechanisms for responding to juvenile delinquency, and the reaction of the state is conditioned by the age of the perpetrator of the criminal offense. Article 2 of the LJOCPJ provides for the exclusion of criminal sanctions against children, which implies that a person who has not reached the age of fourteen years at the time of committing an unlawful offense, as provided for by the law, cannot be imposed criminal sanctions nor can other measures be applied which are provided for by this law.

Furthermore, Article 3 of the LJOCPJ stipulates the age limits within which one person is considered a minor in the criminal law sense of the word. Thus, it is envisaged that a minor is considered to be a person who at the time of committing the criminal offense has reached the age of fourteen and has not reached the age of eighteen. Our criminal legislation further prescribes the lower and upper age limit of minors and classifies minors into two categories – younger and older. A junior juvenile is a person who, at the time of the commission of the criminal offense, has reached the age of fourteen and has not reached the age of sixteen. An older juvenile is a person who, at the time of the commission of the criminal offense, has reached the age of sixteen and has not reached the age of eighteen. The law recognizes another special category, a younger adult who turned eighteen at the time of the commission of the criminal offense, and who did not turn twenty-one at the time of the trial. At this point, it is important to note that these limits, from a bio-psychological point of view, are relative in nature, and that the onset of maturity in minors has an individual character (Bojić & Joksić, 2012, p. 44).

Juveniles may be sentenced to corrective measures, juvenile imprisonment and security measures provided for in Article 79 of the Criminal Code. Only corrective measures can be imposed on younger juveniles, while in addition to corrective measures, older juveniles can exceptionally be sentenced to juvenile imprisonment, because their level of mental development is higher and approaches the mental development of adults.

4. Juvenile imprisonment

Our criminal legislation knows only one sentence that can be applied to a juvenile offender, and that is juvenile imprisonment. As a rule, only corrective measures are applied to them, and the imposition of a sentence of juvenile imprisonment occurs only exceptionally, with the fulfillment of certain conditions and the assessment of the juvenile judge that this is necessary in order to achieve the purpose of punishment (Stojanović, 2015, p. 383).

Juvenile imprisonment may not be shorter than six months or longer than five years, and shall be imposed for full years and months. For a criminal offense punishable by imprisonment of twenty years or more, or in the case of at least two criminal offenses punishable by imprisonment of more than ten years, juvenile imprisonment may be imposed for a period of up to ten years.

According to Article 28 of the LJOCPJ, an older juvenile who has committed a criminal offense for which the law prescribes a prison sentence of more than five years, may be sentenced to juvenile imprisonment if due to the high degree of guilt, nature and severity of the criminal offense it would not be justified to impose a corrective measure. Also, in Article 40, paragraph 2 LJOCPJ stipulates that the sentence of juvenile imprisonment under the same conditions may be imposed on an adult who committed a criminal offense as a juvenile, and at the time of trial did not reach the age of twenty-one years.

Thus, the conditions that must be met in order to be able to impose a sentence of juvenile imprisonment relate to:

1) Age of the juvenile – The perpetrator of the criminal offense must be an older juvenile, i.e. a person who has reached the age of sixteen years at the time of committing the criminal offense, and has not reached the age of eighteen years. The reason for accurately determining the age limit lies in the assumption of biopsychological maturity and development of older minors, because this is one category of persons who is able to understand the importance of their actions and at the same time be responsible for them (Todorović, 2017, p. 16). Namely, minors of a certain age are considered to be

criminally responsible persons because they possess a certain degree of psychophysical maturity. In this way, their ability to reason and decide exists at the time of the commission of the crime, i.e. the juvenile is able to understand the significance of their act and can manage their actions. These circumstances certainly indicate that certain criminal sanctions can be applied to them, assuming that they are accountable, and thus criminal proceedings can be conducted against them (Blagić, 2015, p. 52). However, there are exceptions to this assumption, and these claims should be taken with reservations, because it is known that the physical development of a minor often does not follow their mental maturity. Bearing this in mind, even when there is a possibility of imposing this sentence, because the condition related to the age of the minor is met, the court must also take into account all other circumstances related to the personality of the minor and only exceptionally impose the sentence of juvenile imprisonment – when it is unequivocally convinced of the existence of psychophysical maturity and development of the minor (Blagić, 2015, p. 131). Numerous studies indicate the prevalence of certain negative personality characteristics of juvenile delinquents such as: lower level of intelligence than non-delinquents, the presence of psychopathic personality traits (self-centeredness, delusions of grandeur, lack of responsibility, emotional instability), aggressiveness and lack of motivation for work and discipline, lack of positive attitudes towards the environment in which they live, starting from parents to social institutions, but also committing criminal offenses for fun. On the other hand, in female juvenile offenders, egocentricity, lack of certain goals and plans for the future, malleability, introversion and difficult adaptation, neuroticism, pathological lying, impulsivity, etc. are most often observed (Miladinović, Konstantinović-Vilić & Đurđić, 1992, p. 108).

The second category of person to whom the sentence of juvenile imprisonment may be imposed is a younger adult, i.e. a person who was a minor at the time of the commission of the criminal offense, and at the time of the trial did not reach the age of twenty-one years. Although most legislation attains criminal legal adulthood by the age of eighteen, this does not mean that this ends the period of development and maturity of a person. Some authors emphasize that younger adults have not reached the level of mental and physical maturity found in adults, i.e. that there is an intermediate period in the

development and maturation of a person between adolescence and the age of full maturity, and this category of persons is given a special criminal status and thus treated differently compared to other adults (Lazarević, 1961, p. 555). This special criminal legal status was regulated by the legislator in Articles 40 and 41 of the LJOCPJ, which prescribe in detail the conditions under which a younger adult may be imposed appropriate criminal sanctions provided for juveniles, including juvenile imprisonment (Rakić, 2019, pp. 19-22).

2) Execution of an offense punishable by imprisonment for more than five years by law – In order to meet this condition, it is necessary for an older juvenile to commit a more serious criminal offense punishable by more than five years. The severity of the prison sentence prescribed by law shall be determined according to the maximum, and not according to the minimum penalty. Thus, the threatened minimum prison sentence is not binding on the court when assessing the overall conditions for imposing a sentence of juvenile imprisonment. In this regard, if a juvenile has committed the criminal offense of enabling the consumption of narcotic drugs by inducing the consumption of narcotic drugs, by giving narcotic drugs or by making the premises available for this purpose (Article 247, paragraph 1 of the Criminal Code), they could not be sentenced to juvenile prison because a special maximum sentence of imprisonment of up to five years is prescribed, so this criminal offense is of no relevance. But such a possibility exists if the act was committed, for example, against a minor or mentally ill person (paragraph 2 of the same Article) because a special maximum prison sentence of up to ten years is prescribed for this form (Perić, 2007, p. 72). By prescribing the conditions in this way, the legislator singles out certain criminal offenses taking into account their severity, i.e. the degree of violation or endangerment of the protective facility. Namely, there are a number of serious criminal offenses, which are determined according to the general maximum, i.e. a special maximum is taken into account for the criminal offenses for which it is prescribed (Blagić, 2015, p. 133).

Therefore, the prescribed sentence, over five years for the committed crime, is relevant. This condition is assessed by the court in each specific situation, and the fulfillment of the conditions does not oblige the court to punish the minor, but it can also impose a corrective measure, if this sanction

can achieve the purpose of its imposition, and especially if it is justified in accordance with the circumstances of the specific case that we will talk about in the next part of the paper.

3) The existence of certain circumstances that indicate that in this particular case it is not justified to impose a corrective measure – In order to fulfill this condition, it is necessary that there be a high degree of guilt of the juvenile offender and that the nature and gravity of the committed criminal offense indicate the necessity of imposing juvenile imprisonment. As for the guilt of minors, since the LJOCPJ does not provide for special rules for determining the guilt of minors, it is determined in the same way as for adults, by applying the general rules provided for in Article 22 of the CC of the Republic of Serbia. Therefore, guilt exists if the perpetrator, at the time of committing the criminal offense, was accountable, acted with intent or negligence, and was aware or was obliged and could have been aware that his act was prohibited (Vuković, 2021, p. 196). However, in order for the court to declare the sentence of juvenile imprisonment, it is necessary that there is a high degree of guilt on the part of the perpetrator, above the usual, average degree of guilt of the perpetrator, which is valued on the basis of circumstances such as brutality, cruelty, self-interest, lack of remorse, recklessness, perseverance, etc. When considering this issue, Stojanović emphasizes that the degree of guilt is required as a decisive circumstance on which the imposition of a sentence of juvenile imprisonment may depend, as opposed to the imposition of a sentence on adults where a high degree of guilt refers only to the measurement of the sentence, in terms of the existence of mitigating or aggravating circumstances (Stojanović, 2015, p. 354). On the other hand, circumstances that lead to mitigation of the sentence, such as significantly reduced sanity, indicate that there is no high degree of guilt, and there is no basis for punishing minors. There is a certain dilemma in this regard with regard to acts committed involuntarily. Negligence undoubtedly represents a milder form of guilt of the perpetrator, but even when committing an act negligently, the consequences can be severe, and they can manifest recklessness and the absence of the minimum of attention necessary for socially acceptable behavior (Vuković, 2021, p. 224).

The second group of circumstances that must exist are those related to the nature and gravity of the crime committed. The nature and gravity of

the crime are two circumstances, interrelated and cumulatively listed in the instance of the punishment of an older minor. When it comes to the nature of the criminal offense, then, first of all, it refers to more serious criminal offenses (such as sexual assault of a disabled person referred to in Art. 179 of the CC, sexual assault of a child referred to in Art. 180 of the CC, etc.), which are valued differently on different occasions, given the existence of special circumstances during execution. In many special situations, for example, when committing a criminal offense of aggravated theft at the time of floods, earthquakes, fires or taking advantage of helplessness, it is considered that the manner of committing the criminal offense at the time of these inconveniences and difficulties is all the more reason for a special consideration of the application of this penalty. When violating or endangering a protective facility when committing criminal offenses, on special occasions the manner, circumstances, motives, as well as the motives of execution should be taken into account (Radulović, 2010, p. 151).

Therefore, when the legal conditions are met, the sentence of juvenile imprisonment can be imposed, but at the same time this does not mean that the court must impose it. The court has no obligation to apply this penalty, because it is optional, and the legislator insists on the exceptionality of its pronouncement only when the aforementioned conditions are met and when the judge comes to the conclusion that corrective measures would not achieve the purpose of punishment. In practice, this penalty is rarely imposed in criminal proceedings, while corrective measures are most often imposed. Some authors point out that this is quite understandable and that the sentence of juvenile imprisonment should be imposed only when it is truly necessary, given that going to prison is a difficult experience for every person, even for the one who has already been in prison, and it can happen that an older juvenile after leaving prison becomes even more "dangerous" to society, in the sense that a criminal infection has occurred and that we have only gained another "criminal" with the imposed sentence (Ristivojević & Milić, 2016, p. 155).

Making a decision on imposing a sentence of juvenile imprisonment is a very delicate issue that requires special dedication and expertise of juvenile judges. Regarding the manner of sentencing itself, Blagić points out that there are certain problems in practice related to clarifying and presenting the reasons that are decisive for the application of this sentence. Namely, the courts do not present or state decisive facts in the verdict, which influenced the decision to impose this sentence. Most often, the general position, which is applied by judges, is not to enter into special reasoning and grading of circumstances,

so it often happens that first instance verdicts are appealed, with a call for an absolutely significant violation of the provisions of the criminal procedure of Art. 438, para. 2, item 2 of the LCP (Blagić, 2015, p. 151). In order to avoid these and similar problems in practice, it is very important to thoroughly consider all the circumstances related to the person of the minor and the committed criminal offense, and then explain them in detail in the judgment.

When it comes to the execution of juvenile imprisonment, it is regulated in our legislation by the Law on the Execution of Criminal Sanctions, but also by the general provisions of the Law on the Execution of Criminal Sanctions, which stipulate that the provisions of this Law shall be applied in the procedure of execution of criminal sanctions against juveniles, unless otherwise provided by a special law (Art. 1, para. 2). Therefore, it can be concluded that LJOCPJ is lex *specialis*, and LECS, in the part related to the regulation of the execution of imprisonment, is *lex generalis*. In addition, significant by-laws regulating the issues of institutions where juvenile perpetrators of criminal offenses are accommodated, as well as the position of juveniles in the institution and other issues, are the Decree on the Establishment of the Institute for the Enforcement of Penal Sanctions and the Rulebook on the House Rules of the Correctional Institution for Juveniles. When regulating the execution of juvenile imprisonment, a number of international standards were adopted to formulate more humane rules of treatment for juveniles who are deprived of their freedom (Živanović, 2014, p. 47).

In our country, male juveniles execute this sentence in the Valjevo Correctional Institution, and female juveniles in the special department of the Zabela Correctional Institution Požarevac. Juvenile convicts may remain in the juvenile correctional facility at most up until they reach 23 years of age, and after that they continue to serve the prison sentence as adult convicts. However, juvenile convicts may remain in the juvenile detention facility after this period, but at most until the age of 25, if this is necessary to complete the commenced education or vocational training, or if the remainder of the sentence does not exceed six months (Joksić, 2016, p. 133). One of the basic principles of the execution of criminal sanctions against minors is the principle of individualization. In this regard, LJOCPJ envisages that the execution of juvenile imprisonment is based on an individual treatment program with a juvenile that is adapted to their personality and in accordance with modern achievements of science, pedagogical and penological practice. For this purpose, a special body was formed – an expert team that supervises the implementation of the envisaged individual programs of treatment of juvenile convicts. It is very important to ensure continuous monitoring of general progress or negative

tendencies in the behavior of juvenile convicts in order to achieve the purpose of punishment, which, in addition to special and general prevention, implies that the supervision, provision of protection and assistance, as well as the provision of general and professional training affect the development and strengthening of personal responsibility of minors, in order to ensure the reintegration of minors into the social community (Kovačević, 2015, p. 111).

A juvenile is released from the institution when the sentence of juvenile imprisonment to which they were sentenced expires, and the possibility of conditional release of a juvenile is also envisaged, if they have served a third of the imposed sentence, but not before six months have elapsed and if on the basis of the achieved success of execution it can be reasonably expected that they will behave well when released and will not commit criminal offenses. In addition to conditional release, the court may also order some of the measures of enhanced supervision with the possibility of applying one or more appropriate special obligations (Art. 32. LJOCPJ).

At this point, it is important to note that the treatment of a minor does not end with leaving the institution or prison. S. Konstantinović-Vilić and M. Kostic points out that part of the treatment is post-penal assistance provided after the execution of prison measures and juvenile imprisonment. (Konstantinović-Vilić & Kostić, 2011, p. 201). The need to provide post-penal assistance arises from the fact that the minor was separated from the environment for a certain period of time, and it is necessary to provide them with assistance in order to re-accept social values and because of their successful reintegration into the community, but also to prevent the minor from committing criminal offenses. In addition, the mere stay of a minor in an institution or establishment can result in stigmatization and rejection after leaving the institution. Therefore, treatment of a minor, in and after institutional institutions, must be aimed at preventing additional stigmatization and at minimizing trauma, arising from the separation of minors from the environment (Knežević, 2010, p. 319).

The importance of providing post-penal assistance and guidance to minors after serving their sentence is also discussed in the number of studies conducted in the field of analysis of factors that contribute to the increase of juvenile delinquency. The results of the research indicate the fact that most minors are from materially unsituated families that fail to get minors interested in education – a significant number of minors have dropped out of school and have no motivation to continue the educational process nor prosocial ideas about their future. Most spend unstructured leisure time, without occupations, hobbies, sports or other activities. Also, a significant majority of minors commit crimes under the influence of the desire to assert themselves in the peer group with

which they spend that unstructured time, and the influence of "bad company" and the desire to prove themselves is one of the most common factors of juvenile delinquency (Bugarski, Ristivojević & Pisarić, 2016, p. 60).

In this regard, the legislator envisaged certain obligations of parents, adoptive parents or guardians, institutes and guardianship bodies and regulated in detail the procedure of taking numerous and diverse measures to provide post-penal assistance to a minor, after discharge from the institution or institute, with the aim of mitigating the sharp transition from life in the institution to life outside of it, because the provision of assistance is a necessary step in the reintegration of minors into the social community and contributes to the prevention of repeat criminal behavior (Živković, 2014, p. 55).

5. Conclusion

Juvenile delinquency is a special type of crime perpetrated by persons from 14 to 18 years of age and taking into account their specific characteristics, our legislation imposes special criminal sanctions under this category of delinquents. Juvenile imprisonment is the most severe criminal sanction and the only punishment that can be imposed on a juvenile, when the degree of their educational neglect is extremely high, and the severity of the committed criminal offense and other circumstances require an institutional punishment to be applied to them, provided that the juvenile is older than 16 years.

The purpose of imposing a sentence of juvenile imprisonment is reflected in special and general prevention, but the emphasis is placed on the principle of rehabilitation, the purpose of which is to re-educate and train juveniles to live in accordance with laws and social norms after the execution of the sentence and upon their release. However, one should not lose sight of the retributive character of juvenile imprisonment as a just response of society to the crime committed. There is probably no more sensitive problem in the criminal laws of all countries in the world, than the issue of not only just, but even moreso, expedient punishment of juvenile perpetrators of criminal offenses, given the fact that the imposed sentence sanctions the committed act of a juvenile perpetrator, but what is more important for the entire society is that this sentence must represent a warning to all potential juvenile perpetrators of the same, or similar criminal offenses. The Criminal Code of the Republic of Serbia is not an instruction for the upbringing of young people, but the most important task for the survival of our country is left to the institution of the family and the parents themselves, and the Criminal Code is a catalog of committed criminal offenses

and the consequences of their commission, which often stem from the wrong upbringing of parents or even neglect of children at an early age.

In addition, we are witnessing that in the times that have come, the rights of children and minors are so "elevated" that in more and more segments of social life they are equated with the rights of an adult, and even put themselves above them. This statement logically follows the question of whether it is in accordance with the scope of the given rights to correctly harmonize obligations and responsibilities, and one of them is certainly criminal liability and the obligation to accept a sentence commensurate with the committed criminal offense, as a generally accepted social rule.

After analyzing the existing legal solutions, it can be concluded that our juvenile criminal legislation ranks among the laws of more advanced countries. The provisions concerning the punishment of juvenile imprisonment are prescribed in accordance with the set international and European standards, take into account the age and the interests of juveniles. However, it could be said that a possible problem is the very mild criminal policy of the courts, i.e. the exceptionality of imposing a sentence of juvenile imprisonment in practice. This claim is supported by statistical data that show an incredibly small percentage of juvenile imprisonment sentences imposed in the total structure of imposed criminal sanctions against juveniles in our country. Namely, in the past 10 years, the total number of juvenile imprisonment sentences imposed does not exceed even 1% of the total criminal sanctions imposed on juveniles. Bearing this in mind, we come to the conclusion that our judiciary should not hesitate to use the existing modalities of punishing minors, thus protecting society as a whole and putting the interest of society before the interests of the individual, no matter how (few) years old that individual is.

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KAZNA MALOLETNIČKOG ZATVORA

REZIME: Maloletnička delinkvencija predstavlja negativnu društvenu pojavu i sociološko-pravni problem koji postoji oduvek, u svim društvima ovog sveta. U našoj zemlji, društvena reakcija na maloletnički kriminal evoluirala je tokom vremena i u početnom periodu maloletnici su kažnjavani kao odrasli, a primarna svrha kažnjavanja bila je represija. Donošenjem

Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica 2005. godine, situacija se promenila i prihvaćen je sistem kažnjavanja koji prvenstveno karakteriše zaštita, vaspitanje i rehabilitacija maloletnika, a u tu svrhu izriču se najpre vaspitni nalozi. Međutim, onda kada dimenzije maloletničkog kriminaliteta prevazilaze mogućnosti koje nudi primena vaspitnih naloga, izriču se krivične sankcije. Kazna maloletničkog zatvora je jedina kazna koju poznaje naše maloletničko krivično zakonodavstvo i izriče se kao "ultima ratio" prema starijim maloletnicima, samo kada su ispunjeni zakonom određeni uslovi. Predmet rada je upravo analiza sadržine kazne maloletničkog zatvora, zakonskih uslova za izricanje i načina njenog izvršenja u cilju sagledavanja osnovnih pozitivnopravnih rešenja u Republici Srbiji koji se odnose na kaznu maloletničkog zatvora i krivičnopravnog statusa maloletnika.

Ključne reči: *maloletnički zatvor, maloletnika delinkvencija, krivične sankcije, maloletnici.*

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FUNDAMENTAL BREACH OF CONTRACT UNDER THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

ABSTRACT: The concept of fundamental breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980 plays a pivotal role in determining the legal remedies available to the aggrieved party. It allows for contract termination only in instances where a breach is deemed fundamental. This paper delves into a comprehensive analysis of the institution of fundamental breach of contract and its characteristics, providing insight into how the Convention distinguishes between a fundamental breach and a non-fundamental breach. As a result, it assists in resolving potential uncertainties and dilemmas the aggrieved party might face concerning the choice of legal remedies. The analysis begins with an exploration of the background and drafting process of Article 25 of the Convention. The focus then shifts to an in-depth analysis of the institution of fundamental breach of contract. This covers how and why the distinction between a fundamental breach and a non-fundamental breach emerged, leading up to an intricate examination of all the conditions and features of a fundamental breach of contract, all with the aim of accurately defining this term in line with the provisions of the Convention. The study also encompasses a review of pertinent judicial

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and arbitral practices, aiding in a better understanding of the practical application and interpretation of the institution of fundamental breach of contract. Special attention is devoted to analyzing how the aggrieved party can be confident in its right to terminate the contract and how to sidestep potential hazards and consequences of an unjustified termination.

Through a detailed review of the Convention's provisions and both judicial and arbitral practices, this paper offers a succinct insight into the institution of fundamental breach of contract in the context of international sales of goods. It investigates how contracting parties can safeguard themselves and how they can act in accordance with the rights and obligations stipulated by the Convention.

Keywords: *breach, fundamental breach, contract, international sale of goods, detriment, damage, reasonable person, foreseeability.*

1. Introduction

In accordance with the United Nations Convention on Contracts for the International Sale of Goods of 1980 (hereinafter: the Vienna Convention, CISG), the seller in a contract for the international sale of goods undertakes to deliver the goods, hand over related documents, and transfer property in the goods in the manner provided in the contract and the CISG, while the buyer undertakes to pay the price and take delivery of the goods, as stipulated in the contract and CISG (Art. 30 and 53 of the United Nations Convention on Contracts for the International Sale of Goods, 1980). If one of the contracting parties fails to fulfill their obligation, or does so but not in the manner stipulated in the contract, the question arises whether this entails the possibility of contract termination. Indeed, the basis for termination of the contract can only be a non–performance of an obligation that deprives the other contracting party of the expected benefit, thereby questioning the purpose of the contract.

The Vienna Convention distinguishes between a fundamental breach of contract and a non–fundamental breach. Article 25 CISG stipulates that a breach of contract committed by one party is considered fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Specifically, in cases of a fundamental breach of contract, the party remaining loyal to the contract is authorized to declare

an immediate termination of the contract, or has the option to insist on the contract's performance. Thus, defining what constitutes a fundamental breach is crucial in determining the legal remedies available to the aggrieved party in the event of such a breach. This is especially important as the aggrieved party can only terminate the contract in the event of a fundamental breach.

The subject of this paper is the analysis of the concept of a fundamental breach of contract and its characteristics. By clearly distinguishing between fundamental and non–fundamental breaches, situations where even the aggrieved party is uncertain whether the breach is fundamental or not can be avoided. This would create ambiguity about whether they are authorized to immediately terminate the contract or whether to employ another legal remedy available to them, to avoid jeopardizing themselves due to a potential unwarranted contract termination, which would entail certain legal consequences. In the following, the concept of a fundamental breach of contract will be concisely presented in as detailed and clear a manner as possible, starting from the drafting process of Article 25 CISG, through the precise definition of terms and conditions necessary for its existence, and up to judicial and arbitral practices.

2. Drafting Process of Article 25 CISG

In the early 20th century, numerous legal scholars emphasized the need for unification of rules governing international sales of goods (Vilus, Carić, Šogorov, Đurđev & Divljak, 2012, pp. 171–172). In 1930, the International Institute for the Unification of Private Law [UNIDROIT] decided to commence the drafting of an international law, aimed at regulating contracts for the international sale of goods (Vilus et al., 2012, p. 172). The prolonged effort, during which several drafts were developed, concluded in 1964 with the adoption of the Uniform Law on the Formation of Contracts for the International Sale of Goods [ULFIS] and the Uniform Law on the International Sale of Goods [ULIS].

Due to numerous objections to the reasonable person criterion introduced in ULIS, the working group of the United Nations Commission on International Trade Law [UNCITRAL] initially did not incorporate this criterion into the definition of a fundamental breach of contract, and it is not mentioned in the Convention drafts from 1976 and 1978 (United Nations [UN], 1991; Vilus, 1980, p. 86). However, at the Vienna Conference, the representative from Egypt pointed out that the fundamental breach, as regulated in Article 23 of the Draft Convention, was excessively subjective, as the assessment for

determining the fundamental breach of contract considers only the evaluation of the party committing the breach (UN, 1991). The Egyptian representative suggested the introduction of an objective criterion of a reasonable person, based on which the burden of proof would be placed on the party committing the breach. This party would have to prove that even a reasonable person of the same characteristics in the same situation would not have foreseen such consequences (UN, 1991). As these arguments appeared convincing at the Conference, the definition of the term fundamental breach of contract ended up including the reasonable person criterion (UN, 1991).

Along with the criterion of a reasonable person, during the preparatory works within UNCITRAL for the Vienna Convention, a very crucial issue was whether the term "substantial damage" could be used to assess a fundamental breach of contract (Schlechtriem & Schwenzer, 2016). Consequently, Article 9 of the Draft Convention was formulated as follows: "A breach by one contracting party is fundamental if it results in substantial damage to the other party, and the party committing the breach foresaw or was able to foresee such a consequence" (United Nations Commission on International Trade Law [UNCITRAL], 1977; Perović, 2004; Vilus, 1980, p. 87). Ultimately, it was decided that the gravity of a breach should no longer be assessed in relation to the extent of the resulting loss but in relation to the interests of the creditor, as precisely defined and limited by the contract, i.e., the breach is fundamental if it causes such damage that substantially deprives the other party of what he was entitled to expect under the contract (Schlechtriem & Schwenzer, 2016, p. 419; Schlechtriem, 1986). Also, during the preparatory works, the matter of foreseeability was the subject of additional proposals (UN, 1991; Schlechtriem, 1986). Hence, a proposal was made to introduce an "unless" clause. Thus, the formulation adopted in Article 23 of the 1978 UNCITRAL Draft Convention read "a breach by one contracting party is fundamental if it results in substantial damage to the other party unless the party committing the breach did not foresee and was not able to foresee such a consequence" (UN, 1991; Vilus, 1980, pp. 87-88; Perović, 2004, p. 130). The justification for this formulation was that a party should not be liable for a loss he caused if he did not foresee and could not have foreseen such loss. This allowed the party committing the breach the possibility to be relieved of liability if he proves that he neither foresaw such a consequence nor had reason to foresee it (Schlechtriem & Schwenzer, 2016, pp. 419-420). Therefore, it is not sufficient for the party committing the breach to simply prove that he did not foresee such a consequence; he also must prove that he had no reason to foresee it (Vilus, 1980, p. 89).

It was highlighted that the formulation of Article 23 of the 1978 UNCITRAL Draft Convention was significantly weakened by the subjective element, namely, by the fact that the party committing the breach neither foresaw nor was able to foresee the consequences resulting from the contract breach. This is because anyone who has breached a contract, causing substantial damage to the other party, will hardly admit that he could and were able to foresee such consequences (Vilus, 1980, p. 89; Will, 1987). Discussions about the elements constituting a fundamental breach of contract continued at the Vienna conference, leading to an ongoing search for a new, more objective definition of the concept of a fundamental breach of contract (UN, 1991; Liu, 2005). Specifically, the question was raised, if the party committing the breach could not foresee the consequences of the breach, then who could? (Will, 1987) Thus, the "reasonable person" criterion was accepted, which in ULIS was used to assess whether a breach is considered fundamental or not, with the term "of the same kind" being included in the definition of fundamental breach in the CISG. Notably, the reasonable person criterion from Article 25 CISG fully corresponds to the reasonable person criterion from Article 8(2) CISG, and objections to this criterion and to the formulations of both articles were very similar (UN, 1991; Will 1987). During the formulation of Article 25 CISG, efforts were made to avoid extremes in terms of mere subjectivization, as existed in the 1978 UNCITRAL Draft Convention, on the one hand, and objectivization, which could lead to abstract situations, on the other. Hoping to reduce the extent of speculation and to bring the hypothetical reasonable person closer to the actual position of the breaching party, the definition of the provision of Article 25 CISG uses two different elements: first, "of the same kind" and second, "under the same circumstances" (Liu, 2005; Will, 1987). Specifically, Article 25 CISG requires the party committing the breach of contract and invoking unforeseeability to further prove that a reasonable person of the same nature under the same circumstances could not have foreseen the substantial damage.

After extensive discussions, the definition of the term fundamental breach of contract was finally formulated. Article 25 CISG stipulates that a breach of contract committed by one party is considered fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Therefore, for a fundamental breach of contract to exist under Article 25 CISG, two conditions must be met: the occurrence of qualified damage and the foreseeability of such damage.

Moreover, it is interesting to point out that, unlike Article 10 ULIS, the final text of Article 25 CISG does not specify the moment when the consequences of substantial damage could have been foreseen. We assume that the working group believed it was not necessary to specify this moment. Therefore, the court or arbitration will have to make a decision on this in each specific case.

The provision on fundamental breach of contract was adopted with dissenting votes and continues to be the subject of sharp criticism and discussions in the doctrine and practice of international sale of goods (UN, 1991; Perović, 2004, p. 131).

As Ćirić and Cvetković (2008) state, "in determining and defining available legal remedies to the aggrieved party, it can be concluded that the institution of fundamental breach of contract is the supporting wall of the CISG" (p. 239). The existence of a fundamental breach of contract is crucial for determining the legal remedies available to the aggrieved party, in which case they can choose whether to terminate the contract or seek its performance. Additionally, the aggrieved party can only demand the delivery of substitute goods in cases of a fundamental breach of contract. A breach of contract will be considered fundamental if three conditions are met. These are the breach of contract, qualified damage and the rule of foreseeability.

3. Concept of Breach

In the Vienna Convention, we encounter two concepts: non–performance (or failure to perform) and breach of contract. The differences primarily arise due to the disparities between the common law and civil law systems. Specifically, in the civil law system, a contract creates various rights and obligations for the contracting parties, and thus, it can be breached by the non–performance of one or more obligations. On the other hand, in the common law system, the theory of frustration pertains to the breach of the contract as a whole. Consequently, the concept of a breach of contract is inherent to the common law system, while the concept of non–performance of one or more contractual obligations pertains to the civil law system (Fišer Šobot, 2014, p. 159).

In the Vienna Convention, the concepts of non–performance and breach of contract carry the same meaning. Thus, the breach of contract is understood in the broadest sense, and according to this, the term encompasses both untimely performance and defective performance (Fišer Šobot, 2014,

pp. 159-160). Therefore, according to the Vienna Convention, the difference between these two concepts is solely of a terminological nature.

A fundamental breach of contract is a qualified form of breach of contract, and it can occur in the case of a breach of any contractual obligation. When assessing a specific breach as fundamental, the following elements should be taken into consideration:

1. The nature of the contractual obligation;
2. The circumstances under which the breach occurred;
3. The possibility or impossibility of performance;
4. The readiness or unpreparedness to fulfill;
5. The lack of reliance on the other party regarding future performance;
6. The offer to remedy the defects;
7. The possibility of repair (Koch, 1998; Vukadinović, 2012, pp. 534-537; Spaić, 2009, pp. 110-114).

When discussing the nature of contractual obligations, parties can at the time of contracting specifically point out the importance of some obligations. They can do this explicitly, by contracting the right to terminate the contract in case of non–performance of those obligations (Vukadinović, 2012, p. 535). However, other circumstances can also indicate the importance of certain obligations, such as the nature of goods, customs, and business practices established between contractual parties. For example, when contractual parties designate the delivery time of goods as an essential element of the contract, specifically as a fixed date, the breach of that obligation will most often be qualified as a fundamental breach. Therefore, the delivery of goods at a precisely determined time can arise from the fact that contractual parties have designated the delivery date as an essential element of the contract, or as a fixed date, but it can also arise from the nature of the goods, if, for example, such goods have a market price or if they are seasonal (Vukadinović, 2012, p. 535). Additionally, the delivery of goods at a precisely determined time can also stem from the circumstances of payment and the time when the delivery is taken (Vukadinović, 2012, pp. 535-536).

As an example of non–performance of the obligation to deliver on time, the decision of the Swiss Bundesgericht can be cited. Specifically, in the case of FCF S.A. v. Adriafil Commerciale S.r.l., a seller from Italy and a buyer from Switzerland concluded a contract for the sale of Egyptian cotton in March 1994. The contract stipulated that the cotton would be delivered by June 5th in four shipments. After a month, the parties concluded another sales contract for an additional quantity of cotton. Given that the Egyptian authorities increased

the price of cotton, the seller requested the buyer to accept a price increase of 6 percent, which the buyer did. Since the seller did not timely inform the buyer that the delivery period from the first contract would not be respected, he requested the seller to fulfill his delivery obligation and then, in the absence of any response, had to purchase cotton from other suppliers, but at a higher price. The Swiss Bundesgericht referred to Article 25 CISG and held that the ultimate delivery date was of essential importance to the buyer. Thus, the court concluded that the seller committed a fundamental breach of the contract by not performing his delivery obligation, and that the buyer validly terminated the contract and was not obliged to set an additional time period for the seller to fulfill the obligation, in accordance with Article 47(1) CISG.[1]

Koch, citing other authors, emphasizes that a breach of contract will be qualified as fundamental if the contractual parties expressly stipulate the quality of goods, for example, when the buyer insists that the goods be fit for a particular purpose and when he has unequivocally expressed his special interest in the goods being suitable for that purpose (Spaić, 2009, p. 101; Koch, 1998; Schlechtriem & Schwenzer, 2016, pp. 425-426).

When discussing the types of obligations, a fundamental breach can occur due to the violation of an obligation stipulated in the contract, as well as due to the violation of an obligation foreseen by the Vienna Convention. Also, by dividing obligations into principal and secondary, a fundamental breach will occur due to the violation of a principal obligation when the economic objective of the contract can no longer be achieved, or when the injured party no longer has an interest in the contract being performed (Perović, 2004, pp. 133-134). A breach of a secondary obligation most often will not be qualified as fundamental, although in some cases it may be, as precisely that obligation might be of essential importance to the other party. This may be the case with the breach of duties of information and consultation, maintenance of trade secrets, respect for industrial property rights, adherence to the terms of exclusive distribution between the contractual parties, etc. (Schlechtriem & Schwenzer, 2016, pp. 424-428).

In one case between a buyer from Germany and a seller, or manufacturer from Italy, the seller agreed to produce 130 pairs of shoes in accordance with the buyer's specification. The contract stipulated that the buyer had the exclusive right to sell the seller's goods (shoes). However, the seller displayed shoes at a fair, which were produced according to the buyer's specification and were

[1] Details, Switzerland, 15 September 2000, Bundesgerich. Downloaded 2021, April 27 from http://cisgw3.law.pace.edu/cases/000915s2.html

marked with the buyer's trademark. When the seller refused to remove the shoes, the buyer informed him the next day via telex that he was terminating the contract and would not pay for the given sample of shoes, which were no longer of any value to him. The German Oberlandesgericht Frankfurt determined that the buyer had timely and validly declared the termination of the contract and held that the breach of the exclusivity obligation actually constitutes a fundamental breach of the contract because it endangered the purpose and essence of the contract to such a degree that the buyer no longer had any interest in the execution of the contract.[2]

The non–performance of one of the obligations does not necessarily constitute a fundamental breach of the contract. However, if one party breaches multiple obligations, these multiple breaches together can represent a fundamental breach, assuming that the conditions provided by the provision of Article 25 CISG are met, namely, the existence of qualified damage and the foreseeability of the consequences of that damage.

Also, it is possible that a breach of the contract occurs even before its maturity. Specifically, if the situation changes during the performance of the contract, and one party assesses that the other will not be able to fulfill his obligations, the question arises whether, in such a case, the party faithful to the contract should wait (e.g., for the other party to become insolvent), or whether he could himself cease performance and seek additional guarantees from the other party and, if not received, terminate the contract (Vilus et al., 2012, p. 212). Article 71 CISG stipulates that one contracting party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

1. a serious deficiency in his ability to perform or in his credit–worthiness; or
2. his conduct in preparing to perform or in performing the contract.

In connection with the interpretation of this part of the provision of Article 71 CISG, the literature emphasizes that a practical problem will be determining the "serious deficiency in ability to perform", as well as conduct regarding "preparations to perform or the performance of the contract" that provide grounds for the other party to suspend performance (Vilus et al., 2012, pp. 212-213).

[2] Decision of the German Oberlandesgericht Frankfurt of 17 September 1991. Downloaded 2021, April 19 from http://cisgw3.law.pace.edu/cases/910917g1.html#ua

Further, Article 71 CISG stipulates that if the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them.

Article 72 CISG stipulates that if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamentalbreach of contract, the other party may declare the contract avoided. Examples justifying avoidance in such instances include the words or behavior of one contractual party or objective facts, such as the destruction of the seller's factory by fire (Vilus et al., 2012, p. 213). It is essential to emphasize that the contract party, wishing to avoid the contract before its due date, is obliged to inform the other party about it (Art. 71 and 72 of the UN Convention on Contracts for the International Sale of Goods, 1980).

In the case of Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd et al., it was established that the buyer's insolvency and subsequent appointment of an administrator constitutes a fundamental breach of contract. A German company sold a tent hall to an Australian firm, which organizes large events like the Australian Grand Prix and other major festivals. The buyer agreed to pay for the goods according to a specific schedule but was late with payments and due to financial difficulties the company was placed under temporary administration. The seller requested the administrator to return the goods based on the retention clause provided in the sales contract, which stipulated that ownership cannot be transferred to the buyer until the price is fully paid. The administrator denied the existence of such a clause and refused to return the goods. The court held that the company's insolvency caused such damage to the seller, essentially depriving him of what he reasonably expected from the contract. Also, the administrator's denial of the retention clause was considered a fundamental breach of contract under Article 25 CISG.[3]

Finally, Article 73 CISG regulates fundamental breaches of contract in relation to future deliveries. It provides that in the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment. Further, if one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will

[3] Decision of the Federal Court of Australia, South Australian District, Adelaide dated 28 April 1995. Downloaded 2021, May 10 from http://cisgw3.law.pace.edu/cases/950428a2.html#ua

occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. Lastly, a buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract. From all the above, it can be observed that, with contracts involving successive deliveries, a breach of contract may occur concerning one delivery, future deliveries, and both past and future deliveries.

In a dispute before the Swiss Handelsgericht Zürich, a seller from France and a buyer from Germany, who concluded a contract for the sale of sunflower oil, were involved. The contract provided for the delivery of oil to Romania, ranging from 2 to 4 million liters, at a specified price. The buyer timely executed the payment for the first delivery, while the seller did not deliver the goods to Romania. The buyer declared the contract avoided and sued the seller for the refund of the paid amount and compensation for damages. The court held that the buyer, due to the non–performance of the first delivery obligation by the seller, could reasonably conclude that the seller would commit a fundamental breach concerning future deliveries, and he had the right to avoid the contract. Hence, the seller had to refund the paid amount and compensate for the lost profits, as the buyer proved he could resell the first delivery of sunflower oil at a higher price.[4]

4. Qualified Damages

To assess a breach of contract as fundamental, it must result in damages whose consequences possess a certain nature and gravity. This means that the party suffering the breach has incurred damages essentially depriving it of what he had reasonably expected from the contract. Thus, such a breach must either nullify or substantially impair what the aggrieved party anticipated (UNCITRAL, 2012). The severity of the damages is evaluated based on the circumstances of each specific case, taking into account the value of the concluded contract, the amount of material damage caused by the breach, and the degree to which the legitimate expectations of the aggrieved contractual party are frustrated (Đorđević, 2012, p. 69).

[4] Decision of the Swiss Handelsgericht Zürich dated February 5, 1997. Downloaded 2021, April 27 from http://cisgw3.law.pace.edu/cases/970205s1.html#ua

The Vienna Convention does not contain a definition for the term "detriment", nor does it provide examples thereof. Indeed, the term "detriment" is new in the context of this subject matter and is not customary in either international legal documents or the common law system (Bianca & Bonell, 1987, p. 210; Perović, 2004, p. 132). Due to the absence of a precise definition, it appears that the term "detriment" should be interpreted in light of the legislative history of CISG, as well as its intended application (Jafarzadeh, 2001; Ćirić & Cvetković, 2008, p. 242). The legislative history of Article 25 CISG reveals that, during its process, a debate developed regarding the weaknesses of the ULIS criteria for defining the doctrine of a fundamental breach. The history of the term "detriment" in CISG is brief. The term was conceived in the UNCITRAL working group at the beginning of 1975 and was retained as such in the Draft Convention of 1978 (UN, 1991; Jafarzadeh, 2001; Will, 1987). The nature and concept of this term were not considered either during the UNCITRAL working group sessions or at the Vienna Conference in 1980. The only mention in relation to the term "detriment" is a quoted report from the UNCITRAL working group, emphasizing that "detriment" should be interpreted objectively and in a broader sense (UN, 1991; Jafarzadeh, 2001). Also, according to the preparatory documents preceding the Vienna Convention, "detriment" is not merely causing damage, nor is it equivalent to damage (Ćirić & Cvetković, 2008, p. 242; Jafarzadeh, 2001; Graffi, 2003). "Detriment" is a broader term than actual damage or similar loss, and thus commentators on CISG caution that, when translating it into other languages, it should not be tied to restrictive concepts of the domestic legal system (Perović, 2004, p. 132). Moreover, "detriment" does not necessarily have a material character. It primarily concerns "legal detriment", which is distinct from "factual", material detriment (Ćirić & Cvetković, 2008, p. 242). Detriment can also occur when no material damage has been inflicted (Ćirić & Cvetković, 2008, p. 242). For instance, if a seller fails to fulfill his obligation to package and insure the goods, but they are nevertheless safely delivered to the buyer, it would be considered that "detriment" exists if the buyer, as a result, could not resell the goods (Perović, 2004, pp. 132- 133). The term "detriment" can further be clarified considering its purpose. Its objective is simply to enable the aggrieved party to terminate the contract and seek other goods in exchange. Accordingly, considering the legislative history and the purpose of the term "detriment", it is concluded that it must be interpreted in a broader sense and any narrower interpretation of this term must be excluded (Jafarzadeh, 2001). Therefore, it is considered that "detriment" exists if the realization of the contract's purpose is prevented and if the aggrieved party no longer has an

interest in its performance but rather has an interest in terminating the contract as a consequence. However, in business relations, material damage is most commonly used as the criterion whether the contractual obligations, i.e., the contract, have been performed or not, while in Article 25 CISG, damage is not the key criterion (Enderlein & Maskow, 1992; Ćirić & Cvetković, 2008, p. 243). On the contrary, if damages are an adequate legal remedy for mitigating the consequences of non–performance, this means that the conditions for the existence of a fundamental breach according to Article 25 CISG are not met, nor according to the corresponding provisions of UPC and PECL (Enderlein & Maskow, 1992; Ćirić & Cvetković, 2008, p. 243).

The criterion of detriment is complex and does not allow for static interpretation (Ćirić & Cvetković, 2008, p. 243). Namely, Article 25 CISG requires the detriment to be fundamental, as can be unequivocally concluded from the linguistic interpretation of the said article. For instance, in contracts with a stipulated fixed delivery deadline, fundamental detriment occurs if this deadline is not respected, thus causing the buyer to suffer damage due to delivery delay (Perović, 2004, p. 133; Đorđević, 2012, p. 71). Naturally, regarding the notion of "fundamental detriment", a new question arises. This is how to ascertain the justified expectations of the aggrieved party. Theoretically, the conditions of Article 25 CISG are determined by the so–called "Contractual Expectations Test". This test has two focal points. The first is that the source of legitimate contractual expectations must be the contract itself, not merely the subjective feeling of the aggrieved party. Secondly, not only explicit conditions from the contract but also established practice between parties, customs, and other provisions of the Vienna Convention (or UPC and PECL, in case they are the lex contractus for the contract), can be considered a source for determining the content of legitimate expectations (Ćirić & Cvetković, 2008, pp. 243-244).

In other words, which expectations will be considered justified depend on each specific case, namely, on the specific contract and risk allocation envisaged by contract provisions, established practice between parties, customs, and provisions of CISG. For instance, buyers usually cannot expect that the delivered goods will comply with the regulations and official standards in their country. For example, in a case before the German Bundesgerichtshof, the delivery of shellfish with an excessive level of cadmium, i.e., a level above the recommended in the buyer's country, was not assessed as a fundamental breach of the contract (or as a breach at all) because the buyer could not expect the seller to meet those standards and because consuming such small quantities of this shellfish did not endanger the consumer's health (UNCITRAL, 2012).

Given that business people mostly conclude contracts for purely economic reasons and that, due to any loss arising from a breach, they can be fully compensated, some authors argue that it can be considered that a contractual party is fundamentally deprived of his justified expectations only when he cannot be fully indemnified (Koch, 1998). Thus, fundamental deprivation of justified expectations must be rooted in the essence of the contract, i.e., in what the aggrieved party intended when concluding the contract and what he committed to by the contract, and as a result, he no longer has an interest in the contract being performed, as due to the consequences that have occurred, such performance has lost its value to him.

5. The Rule of Foreseeability

Article 25 CISG further stipulates that a breach of contract is fundamental only if the party in breach could foresee such consequences, or if a reasonable person of the same attributes in the same circumstances could have foreseen them. In other words, if it is determined that the party, who by breaching the contract has inflicted damage on the other party, essentially depriving it of what it justifiably expected from the contract, had not foreseen this damage and its consequences, and that a reasonable person of the same kind in the same circumstances would not have foreseen them, then a fundamental breach of contract does not exist. Therefore, foreseeability is the final condition necessary for the occurrence of a fundamental breach of contract.

This solution has been criticized in literature (Perović, 2004, pp. 153-154). Some authors regard it as a "kind of limitation", comparing it to that provided in Article 74 CISG (Schlechtriem & Schwenzer, 2016, p. 431). The mentioned article states that compensation for damage in case of a breach of contract committed by one party is equivalent to the suffered loss and lost profit incurred by the other party due to the breach, and that this compensation cannot exceed the loss that the party in breach foresaw or should have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract, considering the facts known or should have known to her (Enderlein & Maskow, 1992). On the other hand, some authors regard the criterion of foreseeability as a "filter" (Liu, 2005), the lack of which serves as a ground for justification and, if proven, it will prevent the aggrieved party from terminating the contract. This essentially means that if the fundamental deprivation of what the aggrieved party justifiably expected from the contract comes as a surprise, whether the breach is committed by the buyer or the seller, the party committing the breach can avoid the consequences arising

in the case of a fundamental breach of contract if he proves that he could not foresee this negative outcome, nor could a reasonable person of the same kind in the same circumstances have foreseen it (Liu, 2005). There have always been opponents of such a solution, for fear that it would encourage the party committing the breach to plead ignorance and effectively "tie the hands" of the other party, thus avoiding the termination of the contract, as the most serious consequence in case of a fundamental breach (Will, 2005; Perović, 2004, pp. 153-154). Indeed, some authors argue that this solution only serves to enable the tortfeasor to escape the legal consequences of a fundamental breach and that it does not contribute to qualifying the breach as fundamental. Hence, foreseeability is merely a conditional element, which must be proven to prevent the aggrieved party from terminating the contract, and detriment or serious damage as a consequence of such detriment, and justified expectations of the other contractual party remain the key elements for determining a fundamental breach (Liu, 2005).

However, if some damage occurs, the injured party is obligated to prove that he has suffered such damage, which detriments him of what he justifiably expected from the contract. When such damage, a result of detriment, is established, the burden of proof shifts to the party who committed the breach. For the tortfeasor to successfully invoke unforeseeability, he must prove two things: first, that he could not have foreseen such damage, and second, that a reasonable person of the same kind in the same circumstances would not have been able to foresee it either. If he succeeds in this, then a fundamental breach does not exist. Thus, in the "Shoes case"[5], or in the case where a manufacturer/seller from Italy agreed to produce 130 pairs of shoes in accordance with the specifications of a buyer from Germany, with the accompanying obligation of exclusivity, it was determined that the breach of the obligation of exclusivity actually constitutes a fundamental breach of the contract and that it jeopardized the purpose and sense of the contract to such a degree, which was foreseeable for the manufacturer, that the buyer no longer had any interest in the contract being fulfilled.

Namely, the most optimal situation occurs when the parties explicitly determine the significance of a certain obligation within the contract itself, as a condition without whose fulfillment one party would not have agreed to conclude the contract at all, thereby reducing the possibility for various interpretations. In this case, the requirement of foreseeability becomes irrelevant, as it can be easily proven that the significance of a certain obligation

[5] See, Decision of the German OLG Frankfurt, dated September 17, 1991. Downloaded 2021, April 27 from http://cisgw3.law.pace.edu/cases/910917g1.html

was known to the other contractual party (Perović, 2004, pp. 156-157). The foreseeability requirement only gains relevance when the parties have not explicitly established the importance of a certain obligation by the contract, nor does it stem from the nature of the transaction or negotiations between the parties, opening then the need for interpretation (Perović, 2004, pp. 157-158). In assessing the significance of a certain obligation, the Vienna Convention has given two criteria to the condition of foreseeability. These are subjective and objective (Perović, 2004, pp. 157-158; Ćirić & Cvetković, 2008, p. 246).

The subjective criterion reflects the fact that the party who breached the contract must prove that he did not foresee the damage, which resulted as a consequence of fundamentally depriving the faithful contractual party. It is realistically expected that the party who committed the breach of the contract will utilize the opportunity to invoke the unforeseeability of the consequences of detriment, which it caused to the other party with its breach. As reliance on a subjective test of foreseeability is not feasible, it was necessary to introduce an objective test. During the Conference in Vienna, the question was raised: if the party, which committed the breach, could not foresee the consequences of that breach, then who could? (Will, 1987). Thus, an objective criterion, based on the standard of a reasonable person of the same kind in the same circumstances, was introduced into the definition of Article 25 CISG. In this manner, the personal attributes of the party that committed the breach do not have a decisive role in establishing the condition of foreseeability, and thus the existence of a fundamental breach of the contract, as this determination must also include objective criteria (Will, 1987; Ćirić & Cvetković, 2008, p. 246; Enderlein & Maskow, 1992).

The objective criterion is examined through the standard of a reasonable person of the same kind in the same circumstances. Therefore, the party that has breached the contract must concurrently demonstrate that the consequences of the inflicted damage would also not have been foreseen by a reasonable person of the same kind in the same circumstances. In accordance with Article 8(2) CISG, the standard of a reasonable person is used for interpreting statements and other behaviors of contractual parties, if the rule from Article 8(1) CISG cannot be applied, where statements and other behaviors of one party are interpreted in accordance with its intention when the other party knew or could not have been unaware of that intention. Article 8(3) CISG stipulates that in determining the intent of a partyor the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The standard of a reasonable person was incorporated as early as in ULIS, serving as a concession to common law system countries. Consequently, an adequate standard of behavior is unknown in civil law system countries (Vilus, 1980, p. 25). However, Professor Goldštajn believed that the standard of a reasonable person is close to what was understood in Yugoslavian law as the concept of a good businessman (Vilus, 1980, p. 25). The standard of a reasonable person in Article 25 CISG is supplemented with two elements. The first element "of the same kind" implies a merchant from the same trade sector, fulfilling the same function. And not only must business practices be considered, but also the overall socio–economic circumstances, including religion, language, average professional standard, etc. The second element "in the same circumstances" considering the always varying situations, refers to the conditions present in global and regional markets, to legislation, policy, and climate, as well as to previous contacts and transactions, i.e., practice, and to all other relevant factors (Lorenz, 1998; Babiak, 1992; Will, 1987). In short, the entire spectrum of facts and events at a given moment (Will, 1987). As provided by Article 8(3) CISG, in determining the intention of one party or the understanding a reasonable person would have had, all relevant circumstances of the case should be taken into consideration (Will, 1987).

Thus, it is evaluated not only whether a reasonable person of the same kind could have foreseen the event but also whether business people, or merchants, from the same trade sector would have anticipated this event. Here, it is essential to limit oneself to the analysis of a specific trade sector, as standards may vary between different sectors. By proving that even a reasonable person of the same kind in the same circumstances would not have foreseen the detrimental outcome of the breach, the party committing the breach eliminates any possible doubt in its foreseeing (Liu, 2005; Will, 1987). Therefore, by posing the question of whether the party committing the breach anticipated that this breach would result in substantially depriving the other party of what he justifiably expected from the contract, and whether a reasonable person of the same kind in the same circumstances would have foreseen such an outcome, the court will, in each specific case, be required to view the contract from the subjective perspective of the breaching party, as well as from the objective perspective of a reasonable person of the same kind in the same circumstances (Liu, 2005).

Subjective and objective criteria for the conditions of foreseeability are set cumulatively. This means that a contract breach, even when it has led to substantial deprivation of the other contracting party of what was justifiably expected, will not be qualified as fundamental unless it is demonstrated that

this deprivation was unforeseeable applying both subjective and objective criteria (Ćirić & Cvetković, 2008, p. 246).

The significance of damage foreseeability for the existence of a fundamental breach of contract can be illustrated through the case SARL Ego Fruits v. Sté La Verja Begasti (Đorđević, 2012, pp. 71-72). A seller from Spain and a buyer from France concluded a contract for the sale of fresh orange juice, with several successive deliveries scheduled from May to December. In exchange for an appropriate reduction in price, the parties agreed that the delivery set for September would occur at the end of August. The buyer then proposed to delay the delivery for about ten more days, after which the seller had to preserve the juice. This caused the juice to lose quality, and the seller was unable to deliver fresh orange juice to the buyer after August and declared a contract termination. A dispute arose between the contracting parties as the buyer refused to pay the price for the goods delivered before August, arguing that from September to December, he had to purchase fresh orange juice at a higher price. The French Cour d'appel Grenoble held that there was no fundamental breach of contract, as the buyer could not have foreseen that his delay in taking delivery would cause such damage to the seller, substantially depriving him of what he justifiably expected from the contract, especially since the seller did not inform the buyer that fresh orange juice is perishable and must be preserved after August. Additionally, the court considered the fact that the buyer managed to purchase fresh orange juice from the same season elsewhere in December, indicating the absence of both subjective and objective reasons for foreseeing the damage. Based on all the aforementioned, the court concluded that the seller's termination was unwarranted.[6]

One of the controversial questions is the moment that is relevant for the existence of knowledge by the party who has committed a breach, regarding the consequences of that breach. Specifically, Article 25 CISG omits the time that would be significant for assessing the foreseeability of the consequences of qualified damage, which many considered to be a serious flaw in the definition of a fundamental breach of contract in Article 25 CISG (Vilus, 1980, pp. 13-14). The relevant moment of foreseeability remains contentious both in theory and in practice. Certainly, in the case of a dispute, this decision must be made by a court or arbitration, based on the specifics of each case. In theory, there is no consensus on which moment is pertinent for the application of the foreseeability rule. According to the prevailing view, advocated by

[6] Decision of the French Cour d'appel Grenoble of 4 February 1999. Downloaded 2021, May 10 from http://cisgw3.law.pace.edu/cases/990204f1.html

Schlechtriem, foreseeability, as a factor in interpreting contracts, clearly demonstrates that the decisive moment can only be the moment of contract conclusion (Schlechtriem & Schwenzer, 2016, pp. 434-435). Ziegel interprets the foreseeability condition in Article 25 CISG by referring to the analogous application of Article 74 CISG, which employs this condition to define the amount of damage compensation. Such a position has been confirmed by case law. By the decision of the German Oberlandesgericht Düsseldorf in a case between a shoe seller from Italy and a buyer from Germany, the moment pertinent for the application of the foreseeability rule was explicitly determined to be the moment of contract conclusion (UNCITRAL, 2012). Conversely, some authors believe that the moment pertinent for the application of the foreseeability rule should be determined in relation to the breach of contract, or in relation to the circumstances that existed after the conclusion of the contract. Thus, Koch argues that the use of the present tense in the definition of the term fundamental breach of contract (the English text of the CISG reads "A breach of contract committed ... is fundamental if it results" in depriving the other party "of what he is entitled to expect under the contract") actually leads to the conclusion that the judge should consider the moment when the breach of contract occurred as the decisive moment for applying the foreseeability rule. However, Koch also notes that the French, Spanish, and Russian texts of the CISG suggest a completely different conclusion, namely, that the moment of contract conclusion is significant for applying the rule of foreseeability (Koch, 1998). When choosing arguments supporting one view or the other, it seems most beneficial to analyze this issue in light of the legislative history of CISG. For reference, Article 10 ULIS determined the moment of contract conclusion as the moment pertinent for applying the foreseeability rule. Also, in some cases, it is desirable to consider subsequent information, at least to the extent that the party committing the breach was aware of it. Thus, Honnold believes that, in addition to the moment of contract conclusion, some subsequent moments can also be significant, but only up until the contract performance or until the moment when the contract should have been performed. He cited a hypothetical case as an example, where the contractual parties concluded a contract for the sale of 100 bags of rice. The buyer's order specified that it was necessary for the rice to be packed in new bags. The seller, preparing the shipment, had used bags, which he believed were of the same quality as the new ones and would be acceptable to the buyer at the corresponding price. He packed the rice in them, even after receiving notice from the buyer that packing in new bags was of utmost importance to him. The buyer refused to receive the shipment due to the

risk of inability to resell, and he declared contract termination. Given that subsequent information, in the form of notice about the importance of packing rice in new bags, represents substantial significance to the buyer due to the possibility of resale, violating that requirement can rightly be considered a fundamental breach of contract (Honnold, 1999). The author opines that the moment relevant for assessing foreseeability can extend from the moment of contract conclusion to the commencement of its execution. This is because the author believes that contractual parties, even after concluding the contract, can reach an agreement on some terms that are of substantial importance to them, which they were unaware of, for some reason, at the moment of contract conclusion. In any case, regardless of advocating the first or second stance, all circumstances of the specific case must always be considered, and the principle of good faith and the principle of conscientiousness and fairness should be adhered to, which is certainly in the spirit of the Convention.

The aggrieved party is obliged to demonstrate that it has suffered damage, fundamentally depriving it of what it legitimately expected from the contract, and only once such damage resulting from substantial deprivation is established, the burden of proof will shift to the party who committed the breach. The theory from Article 25 CISG has indicated this, and jurisprudential and arbitral practice has accepted that the burden of proof lies with the party who breached the contract, in accordance with the Latin maxim "Onus probandi incumbit ei qui dicit" (Liu, 2005; Graffi, 2003). According to the prevailing viewpoint, the inclusion of the word "unless" ("... unless such a consequence was not foreseen by the party committing the breach...") in the formulation of a fundamental breach of contract, points to the fact that the burden of proof is on the party who committed the breach (Perović, 2004, p. 162; Will, 1987; Liu, 2005, Graffi, 2003; Babiak, 1992; Lorenz, 1998). Therefore, the party who breached the contract must prove that he did not foresee the damage that occurred as a consequence of fundamentally depriving the other contractual party of what he legitimately expected from the contract. In addition, he must prove that a reasonable person of the same kind would not have foreseen the same in the circumstances.

6. Conclusion

Without a doubt, we conclude that the institution of fundamental breach of contract is of exceptional importance for understanding the rules regarding contract termination due to non–performance. Identifying the difference between breaches that are fundamental and those that are not, that is the process

that leads to the final qualification of a breach as fundamental is crucial in determining the legal remedies available to the aggrieved party in the event of a fundamental breach. Specifically, if a breach is qualified as fundamental, the aggrieved party has the authority to immediately terminate the contract. Since a contract is primarily a concordance of the wills of the contracting parties, it is also acceptable that if one contractual party no longer has an interest in its execution due to the damage inflicted by the other contractual party, which resulted in substantial deprivation of what was legitimately expected from the contract, the aggrieved party may, on his own initiative and through contract termination, exit the contractual relationship when the purpose for entering into that relationship ceases to exist for him. Although the Vienna Convention protects the interests of the aggrieved party in cases where a breach of contract occurs and when the loss of the aggrieved party cannot be fully covered by damages, termination of the contract by the creditor, without giving additional time to the debtor, always requires the existence of a fundamental breach of contract. Given that the provision of Article 25 CISG was adopted with dissenting votes and has been the subject of sharp criticisms and discussions from then until today, both in doctrine and in practice, it is not surprising that we now have disparate judicial and arbitral practice on this issue. However, to overcome this problem and to achieve uniformity in interpreting and applying Article 25 CISG, it is first necessary to fully understand the institution of a fundamental breach of contract, all its characteristics and the conditions necessary for such a breach to exist.

Moreover, considering that at the international level, in terms of applying Article 25 CISG, determining the existence of a fundamental breach largely depends on the perspective of the judge or arbitrator on the specific case, it is impossible not to wonder whether this leads to some uncertainty. It is inevitable that the institution of fundamental breach of contract will continue to develop consistently both through jurisprudence and doctrine, and it can undoubtedly be expected that this will achieve a uniform method in its interpretation and application, overcoming the difficulties encountered in today's practice. Certainly, the most important thing is for the contracting parties to adhere to the principle of good faith and the principle of conscientiousness and honesty when concluding and applying contracts. Also, it is crucial that the parties, when concluding a contract, strive to express their will clearly and precisely, by accurately defining their contractual obligations and the consequences of their non–performance, to avoid the need for contract interpretation, and thereby motivating them to honor their obligations and fulfill the purpose of the concluded contract.

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BITNA POVREDA UGOVORA PREMA KONVENCIJI UN O UGOVORIMA O MEĐUNARODNOJ PRODAJI ROBE

REZIME: Institut bitne povrede ugovora prema Konvenciji Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe iz 1980. godine igra ključnu ulogu u odabiru pravnih sredstava koja su dostupna oštećenoj strani, te se tako pruža mogućnost raskida ugovora samo u slučajevima u kojima se smatra da je došlo do bitne povrede. U ovom radu se podrobnije analizira institut bitne povrede ugovora i sve njegove karakteristike, pritom pružajući uvid u način na koji Konvencija pravi razliku između bitne povrede i one povrede koja nije bitna, te stoga pomaže u razrešenju potencijalnih neizvesnosti i dilema koje oštećena strana ima u pogledu izbora pravnih sredstava. Počev od istraživanja pozadine i toka izrade odredbe člana 25 Konvencije, fokus je stavljen na duboku analizu instituta bitne povrede ugovora, od toga kako i zašto je došlo do razlike između bitne povrede i povrede koja nije bitna, pa sve do detaljne analize svih uslova i karakteristika bitne povrede ugovora, sve sa ciljem preciznog definisanja ovog pojma u skladu sa odredbama Konvencije. Rad takođe obuhvata proučavanje relevantne sudske i arbitražne prakse, što pomaže u boljem razumevanju praktične primene i interpretacije instituta bitne povrede ugovora. Posebna pažnja posvećena je analizi kako oštećena strana može da bude sigurna u svoje pravo da raskine ugovor i kako da izbegne eventualne opasnosti i posledice neosnovanog raskida. Kroz detaljnu analizu odredaba Konvencije, sudske i arbitražne prakse, ovaj rad pruža jezgrovit uvid u institut bitne povrede ugovora u kontekstu međunarodne prodaje robe, istražujući pritom kako ugovorne strane mogu da se zaštite i kako mogu da deluju u skladu sa pravima i obavezama koje Konvencija propisuje.

Ključne reči: *povreda, bitna povreda, ugovor, međunarodna prodaja robe, lišavanje, šteta, razumno lice, predvidljivost.*

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LESSONS WE CAN LEARN ABOUT HUMAN RIGHTS AFTER THE COVID-19 VIRUS PANDEMIC IN THE REPUBLIC OF SERBIA

ABSTRACT: The spread and danger of the Covid-19 virus in 2020 demonstrated how unprepared states were for such threats. Each state took measures it believed to be adequate at the time to protect its population. In the Republic of Serbia, numerous measures were implemented after a state of emergency was declared in March, to prevent the spread of the virus. Many of these measures led to derogations of various human rights. However, even in extreme situations like a state of emergency, derogating human rights should meet the requirements of necessity, and proportionality. This paper examines the state of certain human rights, namely the right to information and freedom of peaceful assembly during the state of emergency in the Republic of Serbia. The analysis aims to determine whether there was a derogation of these rights or rather their gross violation. In this way, the paper seeks to provide specific lessons about human rights that every citizen can draw after the Covid-19 virus pandemic in the Republic of Serbia.

***Keywords*:** *Covid-19, Republic of Serbia, right to information, freedom of movement, freedom of peaceful assembly.*

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1. Introduction

At the end of 2019, a new virus called Covid-19 emerged in China. By the beginning of the following year, this issue became a global concern, and the first infected individuals were registered in most countries. The rapid spread of the virus and fear of the unknown posed a challenge for many nations. Each of them attempted to devise the most adequate response in the given situation. In the Republic of Serbia, the first infected people were registered in early March 2020, leading to the declaration of a state of emergency in the country on March 15. The introduction of the state of emergency as a measure against the spread of the Covid-19 virus resulted in the derogation and violation of numerous rights of citizens, guaranteed both by the constitutional and legal framework existing in the Republic of Serbia, and certain international legal instruments. Although the state can limit the enjoyment of certain rights in specific situations regulated in accordance with the constitutional and legal framework, it is essential for such limitations to be in line with the principles of legality, necessity, and proportionality. In many aspects of this "new" situation, the actions of authorities in Serbia contributed to strengthening the existing distrust among citizens, culminating on July 7, 2020. The July protests and police brutality are just some of the challenges that further distance Serbia from the model of democracy. The state of emergency resulted in a strengthening of the executive branch of power and numerous cases of human rights violations. Freedom of movement, freedom of expression, freedom of association, freedom of participation in social and political life, as well as many other freedoms and rights of citizens, were jeopardized during the state of emergency. Although the events in the Republic of Serbia may currently seem like a distant memory, it is necessary to draw lessons from the time of the Covid-19 virus pandemic to ensure that every citizen, in any new and unknown situation, is aware of the existence of circumstances in which their human rights are endangered or violated. This paper analyzes the right to information, as well as the freedom of peaceful assembly, as the rights of citizens that were endangered during the state of emergency in the Republic of Serbia. In each section, the existing normative framework in Serbia will primarily be presented, as well as certain international instruments guaranteeing these rights. Then, the practice of state authorities, which endangered citizens' rights and in numerous cases led to their violation, will be addressed.

2. Right to information

Under the freedom of expression and opinion, the right to information is also implied. This right is guaranteed by Article 51 of the Constitution of the Republic of Serbia, which states: "Everyone has the right to be informed truthfully, completely, and in a timely manner about matters of public importance, and the media are duty-bound to respect this right. Everyone has the right of access to data kept by state bodies and organizations exercising public authority, in accordance with the law" (Constitution of the Republic of Serbia, 2006). Freedom of expression is also guaranteed by the European Convention on Human Rights and Fundamental Freedoms, as well as the International Covenant on Civil and Political Rights. Both the Constitution of the Republic of Serbia and these international documents allow for the possibility of limiting freedom of expression in certain cases, meaning that freedom of expression does not have the status of an absolute right that cannot be denied to an individual in any situation. According to the Constitution: "Freedom of expression may be limited by law if it is necessary to protect the rights and reputation of others, to preserve the authority and impartiality of the courts, and to protect public health, morality, democratic society, and the national security of the Republic of Serbia" (Constitution of the Republic of Serbia, 2006). The state's obligation to protect its citizens from an epidemic and to restrict certain rights for this purpose is not a problem; however, it needs to be examined whether these limitations are legal, necessary, and proportionate (Belgrade Center for Human Rights, 2021, p. 132).

The state of emergency in the Republic of Serbia was declared on March 15, 2020. However, it should be noted that "the state of emergency was declared before the epidemic was declared an epidemic of major epidemiological significance and without the participation of the National Assembly as the body competent to declare a state of emergency" (Dimitrijević & Panić, 2022, p. 6). After the introduction of the state of emergency on March 15, Serbia began to create a narrative that it was at war with the virus (Hercigonja & Pejić Nikić, 2021, p. 4). This presentation of the situation by the authorities contributed to strengthening the existing fear among citizens. The creation of this "war" atmosphere eventually proved to be fertile ground for the violation of numerous human rights in Serbia during the pandemic (Hercigonja & Pejić Nikić, 2021, p. 4). In response to the spread of the virus, numerous new measures were implemented, including the establishment of the Crisis Staff, border closures, restrictions on freedom of movement and assembly, the imposition of curfews, and more. Daily information was provided by

the Crisis Staff, a body formed during the pandemic, whose exact scope of authority was not clearly defined. Moreover, the members of this body, whose composition was also questioned, often had conflicting statements about the current measures, further confusing citizens. At one point, there was an attempt to centralize public information about the pandemic as the government issued a decree banning the publication of information from any source other than the official one represented by the Crisis Staff and its members (Government of the Republic of Serbia Conclusion, 2020).

Data related to medical equipment and the number of respirators was not known to the public (Belgrade Center for Human Rights, 2021, p. 137). The number of sick and deceased from Covid-19 was often questioned, both by citizens and numerous non-governmental organizations. After an article published by the Balkan Investigative Reporting Network Serbia (BIRN), which pointed out discrepancies in the data and alleged that authorities were downplaying the number of Covid-19 deaths, dissatisfaction among citizens increased even further (Belgrade Center for Human Rights, 2021, p. 135). This information represented data of public importance to which every citizen has the right. From the very beginning of the state of emergency, there were suspicions of concealing information and presenting false numbers, which were further fueled after the publication of the mentioned article. It is important to note that the right to information is closely related to the issue of information of public importance. In the normative framework of the Republic of Serbia, information of public importance is defined as "information held by a public authority, created in the work or in connection with the work of a public authority, contained in a specific document, and which relates to everything that the public has a legitimate interest to know" (Law on Free Access to Information of Public Importance, 2004). The question of transparency in the work of state authorities, although problematic in the Republic of Serbia, was particularly criticized during the pandemic, especially concerning human lives, which should not be treated as mere figures that can be manipulated based on current interests.

3. Freedom of movement

Freedom of movement represents one of the fundamental rights of every person. This right is guaranteed by the Constitution of the Republic of Serbia. Article 39 of the Constitution states, "Everyone has the right to move freely and choose their place of residence within the Republic of Serbia, to leave it, and to return to it" (Constitution of the Republic of Serbia, 2006). According

to the following paragraph of the same article, "Freedom of movement and residence and the right to leave the Republic of Serbia may be restricted by the law if necessary for the conduct of criminal proceedings, the protection of public order and peace, the prevention of the spread of infectious diseases, or the defense of the Republic of Serbia." In addition to the Constitution of the Republic of Serbia, freedom of movement is also guaranteed by certain international legal instruments, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. After the introduction of the state of emergency in the Republic of Serbia, measures were implemented to restrict the movement of the population to prevent the spread of the Covid-19 virus. Citizens arriving from abroad during March received brochures about Covid-19 upon entry into the country, but they were not provided with detailed instructions regarding self-isolation, which led to numerous arrests (Belgrade Center for Human Rights, 2020, p. 66). Among the many measures adopted by the executive authorities, "one of the most drastic and even humiliating measures that particularly affected Serbian citizens over the age of 65 was the restriction that allowed them to shop for groceries only once a week, between 4 and 7 in the morning, in stores that opened in those early morning hours, although there was no logical explanation for this measure, and it could not be justified by health reasons" (Belgrade Center for Human Rights, 2020, p. 81).

During the state of emergency in the Republic of Serbia, the practice was to introduce a "multi-day complete ban on the movement of the entire population, i.e., the so-called 'lock-down'" (Bataljević, 2021, p. 70). Additionally, arrests, judicial proceedings, and fines were not uncommon for citizens who violated the curfew during the state of emergency. Due to the rapid issuance of new measures, people often weren't sure which ones were currently in effect, resulting in numerous fines. Citizens were obligated to follow daily press conferences of state officials; otherwise, they wouldn't be informed about the current movement restrictions. During the curfew, the movement ban did not apply to "1) healthcare workers with valid licenses, 2) members of the Ministry of Interior, Ministry of Defense, Serbian Armed Forces, and security services, as well as 3) individuals with movement permits issued by the Ministry of Interior" (Committee of Lawyers for Human Rights, 2020, p. 20). However, due to unclear instructions regarding the issuance of movement permits, the procedures and processes were extremely confusing for citizens. The situation in which different information came from different sources regarding the curfew and the permit issuance needed to be regulated in a way "that enables each individual to know what is prohibited and what

is not. If a citizen can exercise a certain right, then that should only be possible if there is a prescribed procedure" (Milić, 2020, p. 756). Estimates suggest that by the end of the state of emergency, there were nearly eight thousand violations committed by citizens during the curfew (Đorđević, 2020). During the state of emergency, the selective application of measures was noticeable, as evidenced by the fact that torches were lit on the rooftops of buildings in certain cities during the curfew in response to expressions of dissatisfaction by critical-minded citizens. The Belgrade Center for Human Rights, analyzing the measures introduced by European countries regarding movement restrictions, concluded "that the measures restricting and banning the movement of Serbian citizens are certainly among the most drastic in Europe" (Belgrade Center for Human Rights, 2020, p. 82).

4. Freedom of peaceful assembly

Freedom of peaceful assembly is one of the essential rights that allow people to participate in the social and political life of their community, and as such, it has a certain political dimension (Dimitrijević, Popović, Papić & Petrović, 2007, p. 249). This freedom is guaranteed by the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Constitution of the Republic of Serbia. Article 54 of the Constitution guarantees citizens the freedom of peaceful assembly, and it distinguishes between indoor gatherings that do not require approval and notification and outdoor gatherings that must be reported to the state authority in accordance with the law. The same article states that the freedom of assembly may only be restricted by law if necessary to protect public health, morals, the rights of others, and the security of the Republic of Serbia (Constitution of the Republic of Serbia, 2006). Further regulation in this area is left to the Law on Public Assembly, which was adopted in 2016. A significant drawback of this mentioned law is the lack of the requirement of proportionality in its provisions, which is a legal standard prescribed by the European Convention (Belgrade Center for Human Rights, 2021, p. 142).

During the state of emergency, the freedom of assembly was gradually restricted. This restriction evidently did not apply to state representatives who were present during the distribution of respirators in certain major cities in Serbia. This serves as another proof that the implementation of measures introduced to curb the spread of the Covid-19 virus was selective. The declaration of the state of emergency itself, which bypassed the National Assembly of the Republic of Serbia, was carried out differently because the

authorities claimed that the parliament could not convene due to restrictions on the freedom of assembly. All measures aimed at preventing the spread of the virus ceased to be in effect on May 6, 2020, when the decision to lift the state of emergency was made. At that time, there were frequent statements in the media about having defeated the virus (Hercigonja & Pejić Nikić, 2021, p. 8). The decision to lift the state of emergency was based on the declining number of cases and deaths from the virus at the end of April. It can be concluded that politics "was the main driving force (especially after the end of the state of emergency) that directed institutions and decision-makers in the process of managing the pandemic, while expertise (from the field of epidemiology and medicine in general) was sidelined" (Hercigonja & Prebić, 2023, p. 4). When making decisions to lift all measures, attention should be paid to concerns about the truthfulness of the data presented to the public and citizens since the beginning of the state of emergency. By May 7, citizens' lives returned to normal overnight, and it seemed as if the Covid-19 pandemic never existed. Already at the beginning of June, a football match between Red Star and Partizan was held with a large number of people in attendance. While drastic measures were taken at the beginning of the state of emergency to prevent the spread of Covid-19, with the lifting of the state of emergency, it seemed as if those measures were a distant past.

After the parliamentary, provincial, and local elections were held, and the election victory was celebrated, it was announced that stricter measures and a new curfew would be introduced. This decision contributed to massive dissatisfaction among citizens, who expressed their disagreement by taking to the streets of Belgrade and other major cities in Serbia. Although the protests began peacefully, with citizens sitting on the streets, the situation soon took a different turn. A certain group of demonstrators threw rocks, to which the police responded with brutal force and a large amount of tear gas due to delayed and poor judgment (Đorđević, 2020a).

Police officers did not distinguish between violent groups and individuals who wanted to express their disagreement peacefully, considering everyone on the streets as potentially dangerous, which led to an escalation of violence (Đorđević, 2020b, pp. 6-7). Images and videos of police brutality spread on social media, causing an increase in the feeling of insecurity among citizens who might have joined the protests in a peaceful manner to express their disagreement with the newly announced measures. In this way, their right to peaceful assembly was hindered, despite being guaranteed by the Constitution and important international instruments.

The police officers who used excessive force, deviating from their powers granted by the law and acting inhumanely, have not been sanctioned. It is concerning that the Internal Control Department reacted only in one case when a police officer used force against a child with developmental disabilities (Published in Danas, 2020). This contributes to the perception that institutions using force do not have to be held accountable for their actions. Additionally, such actions by police officers are not in line with the Law on Police, which was adopted in 2016 and emphasizes the principle of proportionality in the use of force. Article 105 of the Law, in addition to defining means of coercion, also defines when a police officer can use them. According to this article, means of coercion are used only if the task cannot be accomplished in any other way, and they must be used with restraint and proportionate to the danger, while the officer is obligated to preserve human life and cause as little harm as possible (Law on Police, 2016). Furthermore, by employing excessive force, the police officer directly endangers the life and psychological and physical integrity of the person toward whom the force is used, and these values are protected by the Constitution of the Republic of Serbia (Nikač & Leštanin, 2017, p. 197).

Thanks to the media, during the protests, people became aware of the extent of police brutality. The use of physical force against individuals peacefully sitting on a bench in Pionirski Park, kicking people who were already lying on the ground and unable to resist, and the inadequate use of force by police officers were certainly not in line with the existing normative framework in the country or international standards. The institutions responsible for police oversight clearly did not have an adequate reaction to the behavior of officers during the protests and the individuals who acted in an inhumane manner were not sanctioned. On the other hand, numerous civil society organizations reacted sharply and directed criticism and demands not only to state institutions but also to certain actors outside the country to respond to police brutality and the excessive use of force.

4. Conclusion

During 2020, many countries faced serious challenges posed by a previously unknown virus to the world. In that unforeseen and new situation, each country tried to devise an adequate response, calling for solidarity and patience among its population. In the Republic of Serbia, during the state of emergency, there was a narrative that the state declared war on an invisible enemy. For that reason, drastic measures were taken that did not meet the conditions of the proportionality test, which is important when it comes

to derogating human rights. The state of emergency in Serbia contributed to strengthening the executive branch, which does not pay much attention to human rights. The right of citizens to be informed, guaranteed by the Constitution of the Republic of Serbia itself, was not respected. In the situation of a state of emergency and the danger of the virus threatening the entire population, citizens were left with conflicting information, living in constant fear. The result of this was a state in which citizens did not know which measures were in force, leading to numerous arrests and fines. The number of sick and deceased from Covid-19 was a matter of public interest. Doubts about the reported data throughout the state of emergency led to the strengthening of the existing distrust of citizens toward institutions in the country. The lifting of the state of emergency and the holding of elections in 2020, followed by the announcement of new measures and a curfew, were one of the main motives that brought citizens to the streets in July 2020. These "July" protests will be remembered for the amount of police brutality. The disproportionate use of force by the police, as well as equating all participants in the protests as potentially dangerous, led to a serious violation of the freedom of peaceful assembly. The lack of sanctions against police officers by the appropriate institutions in the country resulted in an atmosphere in which citizens do not feel safe to express their disagreement with the current policies in the country. Even before 2020, the Republic of Serbia was far from being classified as a democratic country, but the behavior of the authorities during the state of emergency certainly further distanced the country from the model of democracy and the rule of law. According to a public opinion survey conducted by the Belgrade Centre for Security Policy in late 2020, "one-third of Serbian citizens believe that the pandemic has affected the quality of democracy in Serbia, and of that number, 29.3% believe that there has been an erosion of democracy, 28.9% believe that decisions by competent institutions have threatened democracy, while 24.1% believe that all power is in the hands of one person" (Belgrade Centre for Security Policy, 2020, p. 7). Although 2020 now seems distant, every citizen should draw certain lessons from the time of the state of emergency in the Republic of Serbia regarding the state of their human rights during the Covid-19 pandemic.

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LEKCIJE O LJUDSKIM PRAVIMA KOJE MOŽEMO NAUČITI NAKON PANDEMIJE VIRUSA COVID-19 U REPUBLICI SRBIJI

REZIME: Širenje i opasnost od virusa Covid-19 tokom 2020. godine pokazalo je koliko su države nespremne na ovakve vrste pretnji. Svaka država je preduzela mere za koje je verovala da su adekvatne u datom trenutku kako bi zaštitila sopstveno stanovništvo. U Republici Srbiji su nakon uvođenja vanrednog stanja tokom marta preduzete brojne mere kako bi se sprečilo širenje virusa. Mnoge od njih su dovele do derogacije brojnih ljudskih prava. Međutim, čak i u ekstremnim situacijama kakvo je vanredno stanje, derogacija ljudskih prava treba da ispuni uslove neophodnosti, srazmernosti i proporcionalnosti. U radu se ispituje stanje pojedinih ljudskih prava i to prava na obaveštenost i slobode mirnog okupljanja tokom trajanja vanrednog stanja u Republici Srbiji. Analiza ima za cilj da utvrdi da li se radilo o situaciji u kojoj je postojala derogacija pomenutih prava ili se zapravo radilo o njihovom grubom kršenju. Na taj način, rad teži da pruži određene lekcije o ljudskim pravima koje svaki građanin može izvući nakon pandemije virusa Covid-19 u Republici Srbiji.

Ključne reči: *Covid-19, Republika Srbija, pravo na obaveštenost, sloboda kretanja, sloboda mirnog okupljanja.*

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THE INSTRUCTION TO THE AUTHORS
FOR WRITING AND PREPARING MANUSCRIPTS

The Editorial board of the "Law – theory and practice" journal asks the authors to write their manuscripts to be published according to the following instruction.

In the journal there are being published the pieces of work referring to legal, economic and social disciplines. Namely, in the journal there are published: scientific articles, surveys, reviews, the analyses of regulations, the comments on the court decisions, students' papers and other additional texts. The manuscripts are to be sent in English through OJS online platform.(http://casopis.pravni-fakultet.edu.rs/index.php/ltp/about/submissions)

All manuscripts must submit to review. Each scientific paper must be reviewed by at least two reviewers according to the choice of the editorial board.

The editorial board has the right to adjust the manuscript to the editorial rules of the journal.

General information about writing the manuscript:

The manuscript should be written in the Microsoft Word text processor, Times New Roman font of the value of 12 pt, in Latin letters, with a spacing of 1,5. One is supposed to use the value of 25 mm for all margins. The scope of the manuscript can be of 12 pages at most in an A4 format including a text, tables, pictures, graphs, literature and other additional material.

The title-page of the paper should contain the title of the paper work in English, and below it there should be written the same thing in Serbian of the font size of 14 pt, Bold. After that, there is a spacing and, then, there should be stated the author's name and surname, his/her title, affiliation (the work place **with obligatory stating the name of the country too)**, an e-mail address and contact phone, the font size of 12 pt. If the author has his/her ORCID number, it should be stated immediately after his/her name and surname. For more information about ORCID iD, please visit https://orcid.org and after the registration insert your ORCID iD number.

Then, there is a spacing, and after that there should be written an abstract of the length to 250 words in English, and in Serbian below it of

the font size of 12 pt. An abstract represents a brief informative contents review of the article enabling the reader's quick and precise judgment of its relevance. The authors have to explain the goal of their research or to state the reason why they decided to write the article. Then, it is needed the methods being used in a research to be described including a short description of the results being reached in a research.

Key words are stated after one line of a spacing below the abstract written in English, and, also, in Serbian below it. There should maximally be five of them, of the font size of 12 pt, Italic. Then comes a two-line spacing and the text of the paper work.

Manuscript should be written concisely and intelligibly in a logical order which, according to the rule, includes the following: an introduction, the working out of the topic and a conclusion. The letters of the basic text should be of the font size of 12 pt. Titles and subtitles in the text are supposed to be of the font size of 12 pt, Bold.

The name and number of illustrations (diagrams, photographs, graphs) should be represented in the middle of the line above the illustration, the font size of 12 pt. The name and number of a table should also be represented in the middle of the line above the table, the font size of 12 pt. Below the illustration or table, it is obligatory the source to be stated ("Source:…"), the font size of 10 pt. If the results of the author's research are represented in the form of a graph or table, there should be stated as a source below the illustration or table: Author's research.

If the author of the text writes a thank-you note or states the project references within which the text has been written and the like, he/she does it in a special section – Acknowledgments, which, according to the ordinal number, comes after the Conclusion, and before the author's affiliation and the summery of the text written in Serbian.

Use APA style to write references (The hand book for publishing, the American Psychological Association) as an international standard for writing references. Remarks, namely footnotes, may contain additional explanations or comments referring to the text. Footnotes are written in a font size of 10 pt.

Within the APA style, the used source is stated **inside the text,** in the way the elements (the author, the year of publication, the page number where the quoted part is) are indicated in parentheses immediately before the full stop and separated by a comma.

Citing rules inside the manuscript

If the cited source has been written by one author:

When a sentence contains the author's name and his/her cited words, then, after the author's name, there is stated the year of publication of the cited text in the brackets. At the end of the sentence, it is necessary the page number on which there is a sentence from the cited text to be indicated:

There is an example:

As Besermenji (2007) points out, "it is especially present the problem of the air pollution, which is explicitly a consequence of an extremely low level of ecological awareness as well as the lack of professional education in the field of environment" (p. 496).

In the case when the author is not mentioned in the sentence, his/her surname, the year of publication of the paper work and the page number in the paper should be put in brackets and at the end of the sentence.

There is an example:

Also, "rural tourism is expected to act as one of the tools for sustainable rural development" (Ivolga, 2014, p. 331).

A note: If a citation has been made by paraphrasing or resuming, then it is not necessary the page number to be stated.

There is an example:

The environment represents everything that surrounds us, namely everything with which a human's living and producing activity is either directly or indirectly connected (Hamidović, 2012).

If the cited source has been written by two authors:

There should be put "and" or "&" between the authors' surnames depending on the fact whether the authors are mentioned in the sentence or not.

There are some examples:

Chaudhry and Gupta (2010) state that as many as 75% of the world's poor live in the rural areas and more than one-third of rural areas are in arid and semiarid regions.

Hence, "rural development is considered as a complex mesh of networks in which resources are mobilized and in which the control of the process consists of interplay between local and external forces" (Papić & Bogdanov, 2015, p. 1080).

If the cited source has been written by three to five authors:

When such a source is cited for the first time, all the authors should be stated:

There is an example:

(Cvijanović, Matijašević Obradović & Škorić, 2017)

When this source is later cited again, there should be stated only the first author's surname and added "et al.".

There is an example:

(Cvijanović et al., 2017)

If the cited source has been written by six and more authors:

By the first and all further citations, the first author's surname should be stated and added "et al.".

There is an example:

(Savić et al., 2010)

If the author of the cited text is an organization:

In the case when the author of the cited text is an organization, then its name should be put in brackets as an author of the text. If the organization has a known abbreviated name, then one has to write this abbreviated name in a square bracket, after the full name, in the first citation, while any further citation should be marked by this abbreviated name.

There is an example:

the first citation: (Serbian Academy of Sciences and Arts [SASA], 2014)

further citations: (SASA, 2014)

If the authors of the cited text have the same surname:

In the case of the authors having the same surname, there should be used the initials of their names in order to avoid the confusion.

There is an example:

The attitude made by D. Savić (2017) is presented...

If there are cited several references of the same author from the same year:

If there are two or more references cited from the same author and from the same year, then, after the fact of the year, there have to be added the marks "a", "b", etc.

There is an example:
(Dragojlović, 2018a)
(Dragojlović, 2018b)

If there exist two or more texts in one citation:

When one cites two or more texts in one citation, then, in brackets, there are stated the surnames of the authors of original texts in the order of publication and they are separated by a semicolon.

There is an example:

Obviously, living and working in rural areas has always been connected with specific material and symbolical relations to nature (Milbourne, 2003; Castree & Braun, 2006).

If there is cited the newspaper article with the stated author:

There is an example:

In *NS uživo* there was published (Dragojlović, 2021) that...

In the list of the used references, this reference should be written in the following way: Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.

If there is cited the newspaper article without the author being stated:

There is an example:

Published in *Politika* (2012)

In the list of the used references, this reference should be written in the following way: *Politika*. (2012). Straževica gotova za dva meseca [Straževica finished in two months]. February 1.

If the personal correspondence is cited:

The example: According to Nikolić's claims (2020),

In the list of the used references, this reference should be written in the following way: Nikolić, A. (2020). Pismo autoru [Letter to the author], 21. novembar.

If it is cited the text in press, at the end of the reference, and before the full stop, it is obligatory to add "in press".

If the court decisions, the praxis of the European court for human rights, and other sources from both national and international court praxis are cited, a reference should contain as much precise facts as it is possible: the type and number of the decision, the date when it was made, the publication where it was published.

The example in the text: (The Decision of the Superior court in Belgrade – A special department K.Po1 no. 276/10 from 26th January 2012)

The example in the text: (Borodin v Russia, par. 166.)

A note:

The sources from the court praxis **are not stated** in the list of the used literature. A full reference from the court praxis **is stated** in a footnote. While citing the European court for human rights praxis there should be indicated the number of the submitted petition.

There is an example of a reference in a footnote:

As it is stated in the Decision of the Superior court in Belgrade – A special department K.Po1 no. 276/10 from 26th January 2012 Intermex (2012). Bilten Višeg suda u Beogradu [Bulletin of the High Court in Belgrade], 87, p. 47.

Borodin v Russia, the petition no. 41867/04, the sentence ECHR, 6. 2. 2013, par. 166.

If the laws and other regulations are cited:

When citing a legal text or other regulation, in the text there should be stated a full name of law or other regulation including the year when the law or regulation was enforced.

There is an example:

(The Code of criminal procedure, 2011)

(The Book of rules on the content of the decision on conducting the procedure of public procurement made by several consignees, 2015)

This rule is also applied to laws and other regulations not being in force any longer.

There is an example:

(The Criminal law act of Republic of Serbia, 1977)

When citing the international regulations, in the text it is enough to state a shortened name of the document together with its number and year when it was accepted.

There is an example:

(Regulation No. 1052/2013) ili (Directive 2013/32)

If there is cited the text of the unknown year of publication or the unknown author's paper work:

In the paper work, such a kind of text should be cited in the way that in the place of the year there is stated "n.d." (non dated).

There is an example:

Their significance for parliamentary processes is unmeasureable (Ostrogorski, n.d.).

If there is a paper work of the unknown author used in a manuscript, there will be stated the title of the paper being cited together with the year, if it is known.

There is an example:

All these are confirmed by a mixed, objective-subjective theory (The elements of a criminal offense, 1986, p. 13).

An important note:

The cited sources (regardless the fact in which language they have been written) are not supposed to be translated into English, except the title of the paper work (publications, a legal act or bylaw) which should be translated and written in a square bracket.

The example:

1.) Matijašević Obradović, J. (2017). Značaj zaštite životne sredine za razvoj ekoturizma u Srbiji [The importance of environmental protection for the development of ecotourism in Serbia]. *Agroekonomika*, *46* (75), pp. 21-30.

2.) Jovašević, D. (2017). *Krivična dela ubistva* [*Murder as a Crime*]. Beograd: Institut za kriminološka i sociološka istraživanja.

3.) Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, no. 102/10

4.) Zakon o turizmu [The Law on Tourism]. *Službeni glasnik RS*, no. 17/19

At the end of each text, in the section under the name of "**References**", it is obligatory to state the list of all cited references according to an alphabetical order. The titles in foreign languages beginning with definite or indefinite articles ("a", "the", "Die", ...) are ordered as if the article does not exist. The reference list should only include the works that have been published or accepted for publication.

The editorial board insists on the references of recent date, which will specially be taken into account while choosing the manuscripts to be published. At the end of each reference, it is obligatory to state a DOI number, if the cited reference contains it. If the cited reference does not contain a DOI number, the author can refer to the URL address.

The example of the stated reference together with a DOI number:

Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2

The example of the stated reference together with an URL address:

Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf

The examples of the used references being stated at the end of the paper work:

References:

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2. *California Secretary of State*. Downloaded 2020, December 15 from https://www.sos.ca.gov/business-programs/
3. Dukić-Mijatović, M. (2011). Korporativno upravljanje i kompanijsko pravo Republike Srbije [Corporate Governance and Companies Business Law of the Republic of Serbia]. *Pravo -teorija i praksa*, *28* (1-3), pp. 15-22.
4. Dragojlović, J., & Bingulac, N. (2019). *Penologija između teorije i prakse* [*Penology between theory and practice*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
5. Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.
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9. Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of

Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2
10. Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013.
11. Škorić, S. (2016). *Uticaj poslovnog imena privrednog društva na njegovo poslovanje – doktorska disertacija* [*The influence of the business name of the company on its business – doctoral thesis*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
12. Škulić, M. (2007). *Krivično procesno pravo* [*Criminal Procedural Law*]. Beograd: Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.
13. Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, br. 102/10.
14. Veljković, N. (2017*). Indikatori održivog razvoja: Srbija i svet* [*Sustainable development indicators: Serbia and the world*]. Downloaded 2017, October 22 from http://indicator.sepa.gov.rs/o-indikatori
15. Zakonik o krivičnom postupku [Criminal Procedure Code]. *Službeni glasnik RS,* no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.

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