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C O N T E N T S

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S A D R Ž A J

ANNIVERSARY OF THE JOURNAL "LAW – THEORY AND PRACTICE": 40 YEARS OF CONTINUOUS PUBLICATION

JUBILEJ ČASOPISA „PRAVO – TEORIJA I PRAKSA“: 40 GODINA KONTINUIRANOG IZLAŽENJA

Dear colleagues, respected members of the Editorial Board, Publishing Council, authors, readers, and collaborators,

The journal "Law – Theory and Practice" boasts a rich tradition as a scholarly publication. Its inception and evolution have been shaped by the invaluable contributions of numerous distinguished domestic and international experts in the field of law. This year marks the 40th anniversary of the journal's uninterrupted publication and enduring commitment to promoting legal scholarship and meeting the needs of its readers.

We pride ourselves on the tradition of publishing scientific articles by both prominent and young authors. We are also proud of a tradition spanning four decades and striving to contribute to the affirmation of solutions in legislative, judicial, and administrative work through selected scientific articles, respecting the views of prominent experts in the field of law.

We are pleased that over the years, the quality of the journal has been actively improving; that we have systematically improved the parameters of editorial policy, the appearance, format of the journal, bibliometric parameters, the way we present it to the academic and professional audience, as well as to all interested readers,

in line with current trends in science and regulations, and standards governing the field of editing, publishing, categorization, and ranking of scientific journals.

We are delighted to highlight the fact that the journal "Law – Theory and Practice", according to the categorization of scientific journals by domestic publishers for the year 2023, has been recognized as a **national journal of international significance (category M24)** in the scientific fields of **Law and Political Science.**

Today, "Law – Theory and Practice" is an open-access journal and has been indexed in 17 significant databases, including HeinOnline, ERIH PLUS, CEEOL, DOAJ, CrossRef, Publons, doiSerbia, and other databases. The journal is published quarterly, and scientific articles are published exclusively in English. The issues of the journal are chronologically listed and made available in the Serbian Citation Index. Digital copies of all published issues are archived not only in the Digital Repository of the National Library of Serbia but also in the digital library – Internet Archive.

Celebrating this beautiful jubilee on the occasion of 40 years of continuous publication of our scientific journal, it is a chance to reflect on the early days, as well as the years that followed, and highlight the deserving individuals and values that have contributed over time to the position the journal holds today.

The journal "Law – Theory and Practice" was launched in 1983 by the decision of the Provincial Committee for Education and Culture of Novi Sad. Based on the Opinion of the aforementioned Provincial Committee No. 413-716/83 dated November 8, 1983, the journal "Law – Theory and Practice" was classified as a category of professional publications exempt from general sales tax and special sales tax.

The first issue of the journal "Law – Theory and Practice" was published in 1984. The introductory word was written by Dr. Darinka Nedeljković. The article on the current topic "Responsibility Today" was authored by Boško Krunić, while views and opinions were contributed by Dr. Branko Petrić (on the topic "Combatting Economic Crime as a Factor of Economic Stabilization"), Todor Gajinov (on the topic "Legal and Social Issues of Real Estate Transaction Tax and Rights"), Dr. Tibor Varadi (on the topic "Strategy of Our Technological Development and Legal Frameworks of International Technology Transfer"), and Drago Damjanović (on the topic "Some Questions Regarding the Composition of the Collegial Management Body"). The first issue also included examples of legal practice from different institutions (constitutional courts, courts of associated labor, regular courts, and misdemeanor bodies), commentary on regulations in the field of pension

and disability insurance, a review titled "Basic Principles of the Long-Term Economic Stabilization Program from 1983", and finally, legal bibliography.

The publisher of the first issue, and subsequent issues until 1991, was the Union of Lawyers' Association of Vojvodina. From 1991 until 2008, the publisher of the journal was the association "Pravo" LLC, Novi Sad. From 2008 until today, the publishers of the journal have been jointly the Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy, Novi Sad, and "Pravo" LLC, Novi Sad.

Until 2006, the journal was mostly published monthly. From 2006 to 2011, the journal was published as a double issue (six annual editions with dynamics 1-2, 3-4, 5-6, 7-8, 9-10, 11-12), from 2011 to 2020, the journal was published as a triple issue (four annual editions with dynamics 1-3, 4-6, 7-9, 10-12), and from 2020 until today, the journal has been published quarterly, with issues numbered 1, 2, 3, 4 for the current year. Over the 40 years of its publication, the journal "Law – Theory and Practice" has published a total of 267 issues.

The first editor-in-chief of the journal was Dr. Lajčo Klajn, a long-standing judge of the Constitutional Court of Vojvodina. Dr. Klajn served as the editor-in-chief until 1996. From 1996 to 2008, the editor-in-chief was Dr. Aleksandar Radovanov, a respected professor and long-standing judge in Novi Sad. From 2008 to 2012, Professor Dr. Aleksandar Radovanov served as the editor-in-chief, while during this period, the managing editor was Dr. Vuksan Lakićević, a distinguished lawyer from Novi Sad. From 2012 to 2015, the journal was led by Professor Dr. Marijana Dukić Mijatović as the editor-in-chief, who was then the Vice-Dean for Science at the Faculty of Law for Commerce and Judiciary, and currently serves as the State Secretary in the Ministry of Education. The managing editors during this period were Dr. Vuksan Lakićević (until 2014), and subsequently, until today, Dr. Snežana Lakićević, a respected professor and Advisor to the Deputy CEO of NIS (The Petroleum Industry of Serbia), Belgrade. From 2015 to 2019, Professor Dr. Aleksandar Radovanov served again as the editor-in-chief, and since 2019, until today, the journal has been led by Professor Dr. Jelena Matijašević as the editor-in-chief, who is a full professor and Vice-Dean for Science at the Faculty of Law for Commerce and Judiciary.

In the early years, the journal published scientific articles, views and opinions, reviews, legal practices, and regulatory commentaries in Serbian. Over time, the significance of publishing articles in English became apparent, leading the editorial board to start the practice of publishing articles in both Serbian and English whenever possible. Since 2020, the editorial board has

adopted the rule that all scientific articles are to be published in English to enhance the transparency of published articles and promote the citation of authors at both national and international levels.

During the first decade of the journal's publication, it was a practice to include an up-to-date legal bibliography at the end of each issue. This bibliography served to direct readers to other journals and publications dealing with legal matters or judicial practice. Additionally, selections of Latin legal maxims related to legal matters and brief reports on the activities of the Union of Lawyers' Associations of Vojvodina were also included. In its early years, the journal also featured the practice of publishing promotional messages to enhance its promotion and distribution and secure funding.

With the establishment of standards and rules for categorizing scientific journals in the field of social sciences by the Ministry responsible for science in 2008, the journal "Law – Theory and Practice" was recognized as a national journal and categorized as M53. Then, in 2019, the journal was recognized as an outstanding national journal and categorized as M52 for the scientific fields of Law and Political science. It is important to note that in 2020, the Ministry of Education, Science, and Technological Development issued regulations on categorization and ranking of scientific journals, which, alongside the standards of the Digital Repository of the National Library of Serbia, provided significant support to the editorial board of the journal "Law – Theory and Practice" in further enhancing the quality of editorial policy and other relevant parameters. In the same year, the journal was recognized as a top-tier journal of national importance and categorized as M51 for the scientific fields of Law and Political science. Finally, after significant efforts to strengthen and improve the journal, as well as bibliometric parameters applicable to domestic scientific journals, the journal "Law – Theory and Practice" was recognized in 2023 as a national journal of international significance and categorized as M24 for the scientific fields of Law and Political science.

The Editorial Board and Publishing Council of the journal "Law – Theory and Practice" comprise renowned university professors, academics, and researchers from Serbia and abroad, and it boasts excellent collaboration with an increasing number of authors and reviewers from both Serbia and abroad.

The journal "Law – Theory and Practice," in collaboration with the Faculty of Law for Commerce and Judiciary in Novi Sad, has been the recipient of several co-funding projects for each issue in the current year, in cooperation with the City Administration for Culture of the City of Novi Sad.

In line with the contemporary needs of efficient and practical information dissemination, the journal takes pride in its website within the official website

of the Faculty of Law for Commerce and Judiciary in Novi Sad: [link](https://casopis.pravni-fakultet.edu.rs/index.php/ltp/index).

Today, the editorial board of the journal works diligently and remains committed to upholding the established practice of enhancing the quality of scientific articles through timely, professional, and accurate communication with authors, as well as with reviewers. The objective, anonymous, and timely reviews provided by our reviewers are of great importance to us in the selection process of scientific articles received.

Every step we take is determined by our aim to establish cooperation with new authors through professional, ethically correct approaches, to have authors with whom we have already collaborated readily turn to us with new articles, and above all, to ensure that the texts of our authors are always cited and read by an even wider audience.

We will endeavor, as we have done so far, to successfully overcome all potential challenges and justify the trust placed in us by our authors, as well as by the current categorization of scientific journals.

We look forward to our future collaboration with you!

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UNDERAGE MARRIAGE – A COMPARATIVE ANALYSIS

ABSTRACT: Underage marriages represent a specific form of marriage, established between underage partners, one or both of whom are minors. Underage marriage is a complex social phenomenon that withstands social changes, highlighting the relevance of this topic. The aim of the research of this paper is to look at the legal solutions concerning underage marriage in the Republic of Serbia with special reference to the legislations of France, England, Germany, Romania and Poland. By using the normative method, the authors will analyze the provisions of the most important laws that are relevant to the topic in the mentioned countries, while comparative analysis will reveal similarities and differences on issues related to underage marriage. Drawing on research that has examined the prevalence of underage marriages worldwide, the authors will present these findings to gain insights into the "real-life" situation, i.e., the prevalence of these marriages.

Keywords*: underage marriage, underage, legal legislation, Republic of Serbia, France, England, Germany, Romania, Poland.*

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1. Introduction

By getting married, spouses are expected to take on the obligations and responsibilities that come with married life. This is also required of minors who enter into marriage, regardless of the fact that they are still children and are not prepared to assume these obligations. Therefore, we can ask the question whether minors can "bear" the responsibility imposed by married life and whether the responsibility lies only with them?

In the public in the broadest sense, for the last few years, the question of the necessity of banning underage marriages has been constantly emphasized, which was especially relevant in 2019 in the Republic of Serbia, when preparations and amendments to the Family Law were announced. At that time, it was foreseen "a ban on minor marriages, as well as criminal sanctions for parents who allow or contract such marriages, as well as for adults who start living together with a minor" (Đorđević, 2019). Several working groups that were formed with the task of proposing amendments to the family legislation generally did not make a name for themselves in their work, and amendments to the Family Law have not yet occurred.

From a comparative point of view, marital maturity coincides with the age of majority in most laws, as well as in our country. And the effect of minors as an impediment to marriage can be removed by obtaining permission from the competent authority. In most laws, this possibility is linked to the age of 16, and it is necessary that certain persons and (or) competent authorities agree to the conclusion of the marriage.

In order to understand the problem that underage marriages "carry" and to be able to approach its solution, we must deal with various aspects of this phenomenon, such as the historical analysis of the origin of underage marriages, traditions, customary and moral norms, religious understandings of the position of women, economic dependence of women, insufficient or the complete lack of education of girls and women, the traditional attitude towards early marriages and early initiation into sexual relations, the medical problem of early sexual relations, early births and high mortality, the cultural understanding of certain environments, the psychological maturity of persons entering into marriage, the social milieu of the environment in which minors live, etc.

Therefore, from this enumeration of aspects of looking at the problem, we can state with certainty that, in our opinion, the problem cannot be solved by adopting a certain legal provision or by simply normalizing a certain disputed relationship. The problem is so complex that it must be dealt with

in an interdisciplinary manner by teams of experts from different fields with a well-prepared program of activities and a multi-year calendar of activities. Therefore, although it is the state that has the obligation to provide the child with protection and care that will enable him to grow and develop properly, which is necessary for his well-being, it cannot act independently when it comes to the issue of underage marriages.

The minimum limit of marriageability has been different throughout history, and these differences are still noticeable among certain peoples today. It is relevant to note that there are also significant individual differences between individuals in reaching marital maturity. However, in law, a certain age must be set equal for everyone, as a legal presumption. The demand for legal certainty requires overcoming the individual differences that exist between people. And by reaching a certain age, a person acquires marriage capacity, without fulfilling any form (Ponjavić & Vlašković, 2022, p. 93). In order to accurately assess the state's position regarding marriage maturity and underage marriage, within this paper we will analyze the position of the legislators of the Republic of Serbia, France, England, Romania, Germany and Poland. Also, we will show to what extent and among which population these marriages are represented in a wider area. In this way, we can find out in which direction and in which way this problem should be approached in an interdisciplinary manner, which will be a special topic of a new work.

2. Underage marriage in the Republic of Serbia

The legislator in the Republic of Serbia, based on the interests of individuals and society, has precisely determined the principles that are important for marriage, as well as the conditions for concluding a marriage. In this sense, in the family legislation of the Republic of Serbia (Family law, 2005), the legislator has foreseen the conditions for entering into marriage. Thus, the provisions of Articles 17 to 26 of the Family law provide for obstacles to marriage, namely: marriage, incapacity for judgment, blood relationship, adoptive relationship, in-law relationship, guardianship and free will. Article 23 of the Family law expressly stipulates that marriage cannot be concluded by a person who has not reached the age of 18. Paragraph 2 of the same article stipulates that the court may, for justified reasons, permit the marriage of a minor who has reached the age of 16 and has reached the physical and mental maturity required for the exercise of rights and duties in marriage. On the other hand, minors under the age of 16 represent an irremovable marital obstacle and entail the relative nullity of the marriage (Počuča, 2010, p.

87). However, if it is about a person who is older than 16 years, this marital obstacle can be removed (Počuča & Šarkić, 2020, p. 109). It is necessary to fulfill the requirements determined by the law, that is, the provision of Article 23, paragraph 2 of the Family law, which in our opinion should cause controversy. Namely, this provision is insufficiently precise or perhaps does not fully reflect the will of the legislator, which should state that marriages of minors can only be allowed exceptionally, we repeat only exceptionally. Therefore, it must not become any kind of rule or routine procedure in which some mere process form is fulfilled and the desired goal is reached.

The first question refers to who will make the decision on the marriage of minors between the ages of 16 and 18. The answer to this question is given by Family law himself, who says that the court is an authority that can exceptionally make such a decision. Considering the nature and character of this procedure, it is a first-instance court (now a basic court), and the matter is non-contentious, which will be discussed later. The granting of permission, i.e. the passing of a decision by the court, is the way in which the marital disturbance (dispensation) is resolved (Kovaček Stanić, 2007, p. 80).

The legislator assigns the task to the court that it can, for justified reasons, allow the marriage of a child between the ages of 16 and 18, provided that he has reached the physical and mental maturity required for the exercise of rights and duties in marriage. The legislator does not provide any objective or at least objectified criteria regarding the set condition of what can be considered a justified reason, as well as what is the physical and mental maturity required for the exercise of rights and duties in marriage.

In the non-litigation procedure, the issues of granting permission for the marriage of minors are also regulated. Local jurisdiction for conducting these procedures is determined according to the territory where one or both future spouses live (residence or residence). In pre-war law, permission was granted by the county court that had jurisdiction over minors according to the rules of civil procedure on general local jurisdiction (Stanković, 1982, p. 198).

By provision of Article 80, paragraph 1 of the Law on non-litigation procedure Law on Non-Contentious Proceedings, 1982 (hereinafter LNCP) stipulates that if only one person is in the age category of 16 to 18 years, then he submits the proposal independently, while a joint proposal is submitted if both persons who want to enter into marriage are minors. A proposal for a marriage license can be submitted only by an interested minor, not by his parent, guardian or proxy. So the possibility of representation is excluded, and in this way the pressure of the family of minors is avoided in areas where these cases are widespread (Babić, 1999, p. 69).

It should be said that in the non-litigation procedure, the procedural form is not excessively strict and that the submitted proposal can only clearly understand what the basic goal is, and whether the conditions stipulated by law for the realization of that goal are met. However, the proposal must contain personal data about the persons who wish to conclude a marriage, such as first and last name, day, month and year of birth, residential address, etc. Facts must also be attached on the basis of which it is claimed that the request for consent is justified in the sense that the person has the appropriate mental and physical maturity. This would be, for example, a diploma from a school, a certificate of employment, work characteristics or a recommendation, a previously obtained opinion of the center for social work on the circumstances of the minor's earlier life, obtaining the opinion of a doctor on the circumstances of the health condition, obtaining the opinion of a gynecologist or obstetrician on a possible pregnancy of the applicant or of the applicant's partner, etc.

Data on parents naturally refer to parents who exercise parental rights without any hindrances or restrictions (they are not deprived of parental rights, they have not renounced parental rights, they are not deprived of legal capacity, etc.).

In our complete analysis, the most significant provision of Article 82 of the LNCP, which governs the obligation of the court to examine all circumstances that are important for determining whether there is a free will and desire of a minor to enter into marriage, as well as whether a minor has reached physical and the mental maturity required for the exercise of rights and duties in marriage. It is important that the decision of the court depends on whether the minor's proposal for early marriage will be accepted or rejected (Jović, 2003, p. 193).

In contrast to the Family law, which refers us only to the fact that the degree of physical and mental maturity must be determined as a criterion for granting permission, the LNCP quite justifiably insists on determining whether there is a free will and desire of the minor to enter into marriage. However, we have to make a digression on this question. Namely, the entire procedure for concluding a marriage is managed by the registrar, which is prescribed by articles 292-304 of the Family law. The registrar checks with each request for marriage whether the conditions for marriage are met, i.e. whether there is any marital impediment or marriage ban. If minors have applied to the registrar with a request to enter into marriage, when he determines that they are under 16 years of age, he will teach them that there are no possibilities for entering into marriage. If they are between 16 and 18 years of age, the registrar will refer them to the basic court in their place of residence, explaining that they must submit a request to obtain court approval for the marriage.

If the minors do not receive this permission, the registrar does not conduct any further procedure. If this consent is obtained by the court, the registrar is obliged to check all other elements that affect the validity of the marriage (whether the future spouses are in some kind of prohibition regime based on kinship, whether one of them has already established a marriage that did not end on legal way: death of spouse, divorce or annulment) etc. Of course, the registrar will also have to check the agreement of the will of the future spouses, i.e. whether there is any flaw in the will (force, threat or delusion).

The registrar is certainly not released from the obligation to take into account all other obstacles or prohibitions in the process of entering into a marriage, if consent has been obtained. once again and the will to get married. This is especially important from the point of view of removing any intention to deal with: a marriage arranged by the parents, the sale of a minor, a fictitious marriage with completely ulterior motives, the sale of a child into white slavery, etc. Certainly, we can express the most objections and justified indignation at paragraph 2, Article 82 of the LNCP, which enumerates the actions of the court that must be performed in this procedure, but in our opinion without the necessary "firmness" and procedural obligations for both the court and the participants in the procedure.

The law provides that the court will obtain the opinion of the health organization. This formulation does not satisfy us in any case because it is not defined as for example: the court will necessarily obtain the opinion of a health organization, it does not say which health organization (so it can be interpreted as a health center or a rural clinic, which was certainly not the intention). The legislator does not even say under what circumstances the health organization's opinion will be obtained, which would have to be apostrophized, because depending on that, an answer from the health organization may be obtained, for example, that the applicant is healthy, that he has the general health capacity required for work , that he is so and so tall, weighs so and so, well-nourished, or something similar.

The central task of the court is to exceptionally approve the marriage of minors. This exceptionality must be confirmed. In order for this specificity and deviation from the general rule that marriage is only allowed from the age of 18 and above, it must be clearly defined and it would be necessary to write that the court will necessarily obtain the opinion of a doctor – a psychiatrist or possibly a psychologist, on the circumstance of general health the condition of the applicant, his physical development and especially apostrophize on mental capacity – maturity. Why? Of course, because this certificate from a doctor or health care institution should help us to abandon the general rule

that underage marriage is not allowed and that only persons who are explicitly determined to meet that condition (of general physical and mental maturity) are allowed to marry.

In Article 82, paragraph 2 of the LNCP, it further states that the court will achieve appropriate cooperation with the guardianship authority. And this formulation is far from satisfying us. Achieving cooperation seems completely illegal and refers more to some informal contact of the type: they will talk, listen, talk, etc. The wording should read that the court will obtain an expert opinion from the appropriate center for social work (the guardianship body is a body within the body and the institution is the center for social work, which is a legal entity) and on the circumstances: the conditions in which the future spouses live, their economic situation, resolved housing issue, about family support for marriage, the existence of other circumstances that may influence the adoption of a positive or negative decision.

The law further provides that the court will hear the petitioners, which seems quite understandable. From this conversation with both future spouses, the judge must get an impression of whether it is a matter of sincere will and intention, what is the level of social culture of the future spouses, what is their motivation for entering into marriage, etc. Also, the legislator envisages the obligation of the court to obtain the opinion of the parents or associates of the person with whom the minor intends to enter into marriage. Parental support or prohibition can be very important for a future marriage. We know that even when it is not about a minor marriage, the support of parents is very important. On the other hand, the negative attitude of parents towards future spouses can have serious consequences on the quality of the marriage itself and its functioning. Furthermore, the LNCP foresees that the court will, if necessary, present other evidence and obtain other data, which could be data related to a possible pregnancy, employment, the possibility of continuing education, some data related to property status, etc. In addition to the aforementioned LNCP, there is also a procedural possibility to present certain evidence at the hearing (certainly hearing of future spouses, hearing of parents, hearing of medical experts, hearing of relatives, etc.). Other evidence can be presented by the court in the form of reading written evidence (medical certificates, cadastre certificate of property status, employer's certificate of employment and earnings, etc.).

The law stipulates that in the decision allowing the conclusion of marriage, the personal names of the persons between whom the conclusion of marriage is allowed, which practically means that the permission to conclude marriage cannot be given a priori. Each request (if, for example, there are more of them during the period from 16 to 18 years old), is a case in itself and here is a court

decision (the decision of a non-litigation court on granting consent to conclude a marriage must be individually precise and personally determined).

As we mentioned, the Law foresees the possibility of a two-stage process, so an appeal can only be filed by a minor who submitted a request to conclude a marriage. The joint proposal for a marriage license can be withdrawn by the proposers until the decision becomes final. It will be considered that the proposal has been withdrawn when one of the proponents withdraws from the proposal (more in: Trgovčević Prokić, 2002, p. 25; Trgovčević Prokić, 2011, p. 167).

3. Underage marriage – a comparative legal overview

Observed from a comparative legal aspect, we come to the knowledge that marital maturity generally coincides with adulthood. In modern laws, the age of eighteen is most often stipulated for the acquisition of business and marital capacity, with a note that many Western European countries introduced this limit in the seventies of the last century. So, for example, in France and Germany, the age of eighteen was introduced in 1974, and in Great Britain in 1969 (Glendon, 1996, p. 38). However, the effect of minors as an impediment to marriage can be removed by obtaining permission from an unauthorized authority or from the parents, so that it is possible to conclude minor marriages in comparative law as well. For the purposes of this research, and with the aim of a comprehensive analysis of underage marriages, we have selected the national legislation of France, Romania, Germany, England and Poland.

France. In France, permission to enter into an underage marriage is given by the parents, and in certain cases by the state prosecutor. The consent of both parents cannot be replaced by a court decision, so it depends on the will of the parents whether a minor will be able to marry. In case of disagreement between parents, consent is considered to exist. In the case of a female under 15 and a male under 18, consent for marriage is given by the state prosecutor in cases where there are important reasons, such as the woman's pregnancy (Glendon, 1996, p. 39). Until 2013, French law made a difference between female and male persons when it comes to the age at which marriage is allowed, and the minimum age for a woman was 15 and for a man 18. According to the Civil Code of France from 2013, the legal the age of marriage is 18 for both men and women. According to French law, minors under the age of 18 do not have business capacity, which means that they acquire business capacity upon reaching the age of majority. Minors under the age of 18 are represented by their legal representatives, usually parents, when exercising their rights (Rights of minors in court proceedings, 2020).

Romania. In modern Romanian law, until 2009, women acquired marital capacity earlier than business capacity, i.e. at the age of 16, and men at the same time as business capacity, i.e. at the age of 18. Also, the legislator provided that in exceptional circumstances, a woman can get married at the age of 15. Respecting the principle of full equality between men and women, the legislator in Romania in the current Civil Code from 2009 prescribed the same minimum age for marriage for men and women – 18 years. According to the Civil Code, the legislator allows marriage before the age of majority if certain conditions are met, namely: if the child who wants to get married has reached the age of 16, if there are good reasons for the marriage, such as the pregnancy of the future wife, then the existence of the consent of the parents, or, if necessary, the consent of the guardian, or the authority that was obliged to exercise parental rights, and the existence of the consent of the competent guardianship court in whose jurisdiction the child is. The Romanian legal system did not foresee conditions in terms of the age difference between the future spouses, but from the judicial practice it was concluded that an excessive age difference between the spouses can be an indicator of a fictitious marriage, which will be sanctioned by its annulment (Gidro, 2014, pp. 18-19).

Germany. In Germany, marriage maturity is attained at the age of 18, and for this reason, according to the Civil Code, marriage cannot be concluded earlier, but the family law can make an exception, i.e. a dispensation is possible for persons who have reached the age of 16, and approval is given by guardianship court, with the condition that the other spouse is of legal age. In order for a minor marriage to be possible in the event that both future spouses are minors, the consent of the parents is also required, and if the parents refuse to give their consent without a valid reason, it can be replaced by the consent of the court, at the request of the minor (Graue, 1995, p. 168). Many representatives of organizations for the protection of human rights, as well as lawyers and politicians, who are of the opinion that underage marriages should be prohibited, spoke about the subject of underage marriages. In order to harmonize common rules on this issue, the Minister of Justice of Germany, Heiko Maas, formed a working group consisting of representatives of the state and the German federal states (Hodali, 2016). Migration, and especially the recent influx of refugees, has led to an increasing number of child marriages in Germany, as well as in many other European countries. Girls very often get married very young before leaving their country or while fleeing, and the question arises about the recognition of these marriages. Thus, for example, a fourteen-year-old girl in Syria married her cousin who was 21 years old. They fled together from the war-torn country to Aschaffenburg. Their marriage was

refused to be recognized by the Office for Youth and took the girl under his guardianship, with the explanation that it was done for the child's welfare. The husband of this girl went to court and lost the case at first instance. However, the Higher Regional Court in Bamberg overturned this ruling citing the basic principle that applies in Germany, which is that marriages concluded abroad are judged on the basis of the law of the country of origin. The growing presence of married young migrant women led to a public debate and the adoption of the Law on Suppression of Child Marriage in 2017. This Act was designed to allow judges to retroactively annul marriages that took place outside the country, if the minor was between 16 and 17 at the time of the marriage, and if the person was under 16, the marriage would automatically be annulled (Dethloff, 2018).

England. In England, until the middle of the 18th century, marriages could be concluded anywhere, provided that they were concluded before an ordained priest of the Church of England. This encouraged the development of the practice of secret marriages, which did not have parental consent. For this reason, in 1753, on the initiative of Lord Hardwicke, the Marriage Act was promoted, which stipulated that all wedding ceremonies must be conducted in a parish church or chapel of the Church of England in order to be legally binding. During this period, no marriage of persons under the age of 21 was legal without the consent of a parent or guardian. In response to a campaign by the National Union of Societies for Equal Citizenship in 1929, Parliament raised the age limit to 16 for both sexes with the Marriage Age Act (UK Parliament, n.d.). Until 2023, in England, minors could marry at the age of 16, and consent was sought from their parents, that is, persons who had parental responsibility. If they did not get the consent of the parents, the court could allow the marriage (Jones & Welhengama, 1996). However, this practice was abolished because the new Marriage and Civil Partnership Act came into force in England and Wales this year, which stipulates the minimum age for marriage, i.e. 18 years. So it becomes illegal for 16 and 17-year-olds to marry or enter into a civil partnership, even with parental consent. This Act criminalizes arranged marriage for children under any circumstances and introduces harsher penalties for those found guilty of up to seven years in prison (Legal age of marriage increases from 16 to 18 in England and Wales, 2023).

Poland. According to the Family and Guardianship Act of 1964 in Poland, it was illegal for persons under the age of 18 to marry any person. However, the guardianship court may allow a woman who is at least 16 years old to marry, if there are justified reasons and if the marriage will be beneficial for the family's well-being. Also, the Law stipulates that each of the spouses can submit a request for the annulment of a marriage concluded by a man

under the age of 18 and a woman under the age of 16 or if she married without the consent of the court after she turned 16 and before she turned 18 And in the Law on Family and Guardianship from 2011, the minimum legal age for marriage remained 18 for both girls and boys. However, in this legislation a distinction was made, and still today, between boys and girls, which is reflected in the fact that girls who reach the age of 16 and who are older can ask for the permission of the family court in order to enter into marriage, while such an exception does not exist for boys (Poland – OHCHR, 2022).

4. Prevalence of underage marriages

In 2019, the United Nations Children's Fund published a report stating that the percentage of women who married before the age of 18 fell from 25% to 21% over the past two decades. Also, they estimate that there are currently 765 million child marriages worldwide (Knipp, 2019). Of these, 650 million girls and women were married before the age of 18. The total number of girls, globally, who are married as children is estimated at 12 million annually, while 10 million girls are at greater risk of child marriage after the corona virus pandemic (Stojić, 2021). And about 115 million men now aged 20 to 24 were underage when they married, while about a fifth were 15 or younger (Knipp, 2019). When it comes to more precise research on the prevalence of underage marriages, it is necessary to emphasize that they have not been carried out in most countries, so we cannot have detailed data on them. It is relevant to state that statistical data on underage marriages broken down by ethnicity are not available in most of the member states of the Council of Europe. This is supported by the fact that the Statistical Office of the Republic of Slovenia does not have precise data on underage marriages due to the fact that the lower limit for data collection is set at the age of 19 (Kraljić, 2023, p. 7). And there is a significant number of unregistered marriages due to the lack of personal documents or the age (ie "youth") of the spouse. Many researches conducted on the subject of underage marriages are not representative for the above reasons. However, many studies report that underage marriages are very common in the Roma population, although these data differ from country to country. Thus, for example, based on a survey conducted in Albania in which 661 Egyptian and Roma households were surveyed, which showed that the average age of marriage among the Roma population is 15.5 years. And in Bulgaria, on the basis of the research carried out in 2010, it was found out that the average age of marriage among all Roma is 18 years, and that 50% of respondents already started living together with their partner at the age of

16 (ERRC Submission to the Joint CEDAW-CRC General Recommendation, 2011). Based on the research of multiple indicators of the position of women and children in the Republic of Serbia for the year 2019, it was found that in the general population, 5.5% of women aged 20 to 24 got married before the age of 18, while this percentage of women who live in the poorest households is significantly higher and amounts to 22.6%. And in Roma settlements as many as 55.7% of women got married before the age of 18, and 15.8% before the age of 15 (A Childhood, not Marriage: A good practice guide for child marriage predvention for local communities, 2021, p. 8).

On the other hand, the collection of data on ethnicity is prohibited in Poland, so there are no statistics related to underage marriages. However, according to the 2011 census, it was found out that e.g. the Roma community in this country is relatively small, from 20 to 25 thousand. An interesting fact is that Poland had the highest average age of marriage in 2020, 30.2 years for men and 27.9 for women (Mean age at first marriage in the European Union in 2020, by country and gender, 2023).

Since 2015, based on information from the German authorities, more than a thousand underage marriages have been registered in this country. Most of these marriages were previously concluded abroad, but the number of marriages concluded in Germany is also increasing. In Germany, the new Law on Suppression of Child Marriage from 2017, according to research by the group Terre des Femmes, did not bring the desired results. More precisely, based on the data of this group, one year after the passing of the aforementioned Law, it was found that at least 813 minor marriages were registered, of which only 10 were annulled (Knipp, 2019). According to data for 2012, Niger had the highest rate of underage marriages in the world. In this country, more than three-quarters of girls under the age of 18 are married, and almost 30% are under the age of 15. Today, India has the highest number of child marriages. In 2020, there were 15.6 million women aged 20 to 24 in this country who were married or cohabiting with a partner before the age of 18 (Countries with the highest child marriage rate as of 2022).

5. Concluding considerations

In many European countries, the expected age for marriage is constantly increasing, and only a few decades ago it was lower than the age of majority, and very often lower for girls than for boys. On the basis of a comparative analysis, we came to the conclusion that in the analyzed legislation, marital and business capacity are acquired at the same time, that is, from the age of

18. So, over time, a clear trend has developed to determine the general age for marriage for both sexes. However, the majority of European legal systems provide for exemptions and allow minor marriage with parental approval or court authorization, at a younger age, mostly from 16 years, with the provision that, for example, in Polish legislation today still makes a distinction between men and women. More precisely, women, that is, girls, can ask for permission from the family court in order to enter into marriage, while men cannot. The only legislation from the ones analyzed that does not provide for exceptions in terms of marriage before the age of 18 is the legislation of England.

By analyzing the legal legislation, we come to the conclusion that in most legislations, minors as an impediment to marriage can be removed by obtaining a special permit for early marriage, at the competent court and according to the prescribed procedure. For this reason, we believe that it is of great importance to approach this procedure seriously and responsibly. What can certainly be the subject of different evaluations and additional polemics is the determination of whether the existing exceptions in the analyzed legislation should be regulated even more precisely by decisively determining what the court must do, all with the aim of tightening the criteria regarding the question of when permission to conclude the marriage of a minor can be given.

It should certainly be noted that the personal attitudes of the author of this article towards underage marriages are absolutely negative. We believe that persons aged 16 or 17 in no case have neither the intellectual nor the psychophysical characteristics that are necessary to understand the seriousness of marriage as well as the legal consequences of a constitutive community of life. It is very difficult for the authors to believe that a 16 or 17-year-old person has a developed level of physical and spiritual maturity to be able to understand the seriousness of marriage, the consequences of motherhood or fatherhood, the obligations arising from a community of life, etc. So there is no doubt that the author's opinion on this issue is completely negative. Of course, the diversity of our attitude is primarily reflected in the fact that we believe that the norm itself will not achieve much – in fact, nothing. In order for this problem to be solved at all, one must start from an interdisciplinary solution to the problem, which would first of all start from the cause of the phenomenon (tradition, customs, lack of education, social vulnerability, low level of social culture, etc.). Therefore, the problem cannot be solved by a mere norm and ban, but by permanent education about the harmfulness of underage marriages. This education must include arguments that relate primarily to the health conditions of girls who enter premature sexual relations (who, as a rule, are without adequate knowledge about health care, hygiene, possible consequences, etc.).

By analyzing the research that examined the prevalence of underage marriages, we came to the conclusion that the spread of these marriages in "practice" is, we can say, huge, with the fact that they are more widespread in the countries of South Asia and Sub-Saharan Africa, which represents an "alarm" that should be done as soon as possible and as loud as possible. The reason for this advertising is the fact that early marriages affect the interruption of further education, difficult employment, worsening of the financial situation of parents, etc. which again and again reflects on the quality of marriages concluded, their duration, the possibility of proper upbringing of children, the upbringing of a child in such a marriage, etc.

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MALOLETNIČKI BRAK – KOMPARATIVNA ANALIZA

APSTRAKT: Maloletnički brakovi predstavljaju specifičan oblik brakova, koje međusobno zasnivaju maloletni partneri, jedan ili oba. Brak maloletnika je kompleksna društvena pojava koja odoleva društvenim promenama, što nam ukazuje na relevantnost ove tematike. Cilj istraživanja ovog rada ogleda se u sagledavanju zakonskog rešenja koja se tiču maloletničkog braka u Republici Srbiji sa posebnim osvrtom na zakonodavstva Francuske, Engleske, Nemačke, Rumunije i Poljske. Korišćenjem normativnog metoda autori će analizirati odredbe najvažnijih zakona koji su od značaja za temu u navedenim zemljama, dok će komparativnom analizom doći do saznanja o sličnostima i razlikama

o pitanjima koja su u vezi sa maloletničkim brakom. Oslanjajući se na istraživanja koja su ispitala zastupljenost maloletničkih brakova u svetu autori će prikazati iste i na taj način doći do saznanja o stanju „u praksi", odnosno o rasprostranjenosti ovih brakova.

***Ključne reči**: maloletnički brak, maloletstvo, zakonska legislativa, Republika Srbija, Francuska, Engleska, Nemačka, Rumunija, Poljska*.

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INSTITUTIONALIZATION OF RIGHTS AND RESPONSIBILITIES OF THE OPPOSITION IN PARLIAMENT – A COMPARATIVE EUROPEAN PERSPECTIVE

ABSTRACT: The subject of this study is an analysis of different normative solutions and degrees of institutionalization of the role of the opposition in parliaments across a number of European states, ranging from stipulation in the parliamentary rules of procedure to formal recognition of the opposition in the constitution of the state. Balance of the parliamentary political power as well as acknowledgement of the legitimate role of opposition ensures prerequisites for democratic social dialogue and active participation of responsible citizens in the processes of strengthening institutions of representative democracy. Therefore, only consensual political culture contributes to the political trust that citizens place in political institutions. Although there is no universally adopted model that defines the role of the parliamentary majority and opposition, it is undeniable that the post-democracy era requires a redefinition of basic concepts, such as parliamentary majority and opposition, as well as the role of parliament. The scope of the analysis is limited to a comparative overview of constitutional solutions that guarantee the rights of the opposition and the legal framework regulating the part of

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the rights of parliamentary opposition, which are realized in the process of creating policies. The aim of the paper is to strengthen mechanisms of parliamentary democracy and, in particular, to strengthen trust in the work of the National Assembly of the Republic of Serbia, as only through the effective implementation of European experiences can public trust be built and standards of political culture be improved. Methodologically, the comparative approach is complemented by the analysis of comments and interpretations of constitutional acts, laws, rules of procedure, as well as recommendations of the Venice Commission.

***Keywords**: constitutional democracy, parliamentary opposition, constitutional guarantees, consensual political culture, institutional trust.*

1. Introduction

As Robert Dahl (1966) stated in his emblematic passage, the right of an organized opposition "to appeal for votes against the government in elections and in parliament" is one of the most important milestones in the development of democratic institutions; precisely, Dahl is talking about citizens' rights to participate in shaping institutional architecture of democracy: first is the establishment of citizens' right to vote, second is their right to be represented within the political polity, and third is the endowment of their right to organise opposition (p. 13).

Having acknowledged right to oppose government as one of the fundamental features of constitutional democracy, the opposition, consequently, should have guarantees that its voice is heard; even further, the guarantee of a democratic balance between political majority and opposition is a cornerstone of the political stability, democratic functioning and legitimacy of the system. It goes without any saying, that position of the opposition and its functioning differs in various political systems. This may typically include "procedural rights of information, representation and participation, speaking and voting rights, the right to table bills and motions, rights of supervision and scrutiny of the executive, and protection against mistreatment by the majority" (Venice Commission, Report 2010, § 11). In order to have established political system in which parliamentary majority and the opposition "share a joint responsibility in consolidating the citizens´ trust in the political system and democratic institutions, ensuring their good functioning and offering the public an informed choice" (European Conference of Presidents of Parliament, 2010, Recommendation 11), it is important to develop: 1. mutual

tolerance, i.e. culture of compromise, 2. institutional restraint, a principle that is exhausted in the attitude that political majority should not use the powers they receive with their position to the maximum, and 3. political culture of constitutional checks and balances. These are principles which kept us from falling to majoritanism and secure that democracy mechanisms meet integrity and political trust as an important indicator of political legitimacy.

When we come to the issue of political trust, process of government must be studied "not only in the light of what those with power under their control try to do and actually achieve, but also with regard to those who oppose those aims or whose interests and resistance have to be conciliated before those in power can act" (Schapiro, 1965, p. 2).

In essence, as Nemţoi concluded (2022), the opposition: is an institutional factor and an essential element of parliamentary democracy; has the legal role of questioning and contesting the government program as well as embodies a political substitute, an alternative for the parliamentary majority (p. 74).

For the purpose of this study, definition of the political opposition which Brack & Weinblum (2009) came up with, is accepted: as an organized subject actively involved into the public sphere that "permanently or punctually checks, informs and criticizes the current state of affairs, through different non-violent modalities (legislative processes, parliamentary questions, press releases, mobilization of the media..), while the targets of its critiques being the government and its policies or the political regime as a whole" (p. 12). In the light of classical political thought, opposition work is focused on parliament as the main political field and is led by major goal, to take power.

According to some scholars, *period 1990-2015 was the paradigm of achieved democratic ideals: as* Levitsky and Ziblatt (2018) stated, this period "was easily the most democratic quarter-century in world *history" (p. 206) while d*emocracy become for the first time ever a global political language and many drew from this conclusion "that democracy and democratic ethos has become *de facto* universal form of political legitimacy" (Podunavac, 2011, p. 20). Unfortunately, *after that we entered a period of democratic recession (phrase coined by Larry Diamond) and* the last decade changed dramatically political landscapes: "Global democracy's decline includes undermining of credible elections results, restrictions on online freedoms and rights, youth disillusionment with political parties as well as out-of-touch leaders, intractable corruption and the rise of extreme right parties that has polarized politics" (Global State of Democracy Report, 2022, Overview). We are faced with the fact that democracy is not a *panaceia*, a miraculous elixir that would cure all diseases, in a word: we enter the time of post-democracy.

For the purpose of this study, the meaning of this notion is accepted in a way Crouch (2018) understood it: that it is a time to reconsider the very idea of democracy that *We, the People* governing the *politeia* and to get the fact that politics is turned out to be a game played among elites; the very idea of post-democracy helps us to understand prevalence of "frustration and disappointment among majority of ordinary people, faced with absolute domination of interest of wealthy and mighty minority" (p. 25). Spirit of post-democracy is summarized in warnings "..that some governments, on gaining power in an election, are trying to dismantle democratic safeguards, rushing through laws without genuine political debate, and sacking independent judges and officials to make their own appointments" (Press Release, CoE Committee of Ministers, February 5, 2020).

However, time of post-democracy requires the basic notions of the role of political majority and opposition as well as role of parliament, to be reconsidered: whole spectrum of classical and new limitations of the constitutional and legislative function of the parliament leads not only to the restriction of its competencies but eventually to self-disempowerment. "Self-disempowerment of the parliament jeopardizes the realization of two fundamental principles: the principle of citizens' sovereignty and legitimacy." And, further, the topic of limiting the competencies of the parliament also calls into question the foundations of the functioning of modern representative democracies "endagering balance between democracy, order and constitutionalism" (Pásztor, 2022, p. 10).

2. Constitutional recognition of the legitimacy of the opposition

According to Bulmer (2021), there are three main advantages that stem from a constitutional recognition of the opposition: first, by acknowledging legitimacy of parliamentary opposition, any attempt of "establishing a one party regime and preventing governments and incumbent majorities from excluding opposition voices or evading scrutiny" is limited; second, the normative conformity of the legal system is improved, constitution and laws by which opposition "has been granted specific benefits in the legislative or scrutiny processes (e.g. giving the opposition a guaranteed share of legislative committee chairs or investigatory powers or veto powers)" are harmonized; and third, constitutional recognation provides an opportunity for the opposition to be involved in the process of electing judical or fourth-branch (regulatory and oversight) institutions (p. 8).

Constitutional recognition of parliamentary opposition, not only secure framework of legal guarantees to limiting the political influence of governing majority, even more, provides for both sides, prerequisites either for exercising or influence on exercising political power, under equal circumstances.

Some constitutions provide for the opposition considerable details, e.g., Article 114 (2) of the Constitution of Portugal (adopted 1976, last amended 2005, part: Political parties and Right to opposition) states that : "Minorities shall possess the right to democratic opposition, as laid down by this Constitution and the law" or Article 73 (12) of the Constitution of Cyprus (adopted 1960, last amended 2020) which states that: "Any political party which is represented at least by twelve per centum of the total number of the Representatives in the House of Representatives can form and shall be entitled to be recognised as a political party group". In France, Article 51-1 of the Constitution (added in 2008) states that: "The Rules of Procedure of each House shall determine the rights of the parliamentary groups set up within it, and shall recognize that opposition groups in the House concerned, as well as minority groups, have specific rights".

Some authors plead the idea that constitutions should create a regime of opposition rights, considering such a regime as an "institutionalized power" given to the parliamentary opposition groups "that encompasses but go beyond rights of individual legislators to speak and vote against government bills" (Choudhry, 2020, p. 3).

Constitution of the Republic of Serbia (2006, amended 2021) regulate status and immunity of deputies, and in Article 103 stipulates that "Deputies may not accept criminal or other liability for the expressed opinion or cast vote in performing the deputy's function", and that "…may not be detained, nor may he or she be involved in criminal or other proceedings in which prison sentence may be pronounced, without previous approval by the National Assembly." Also: "There shall be no deadlines stipulated for the criminal or other proceedings in which the immunity is established."

The Venice Commission advised against adopting a "specific law" on the opposition (Preliminary Opinion, 2007, §27) arguing that this did not correspond to the specific constitutional and political context, considering that it can be very difficult – and in "some cases problematic from the nondiscrimination viewpoint – to introduce rigid rules, especially when they tend to give specific powers to some political actors to the detriment of other, equally legitimate to speak as representatives of the citizens" (Venice commission, Draft Opinion, 2007, § 7).

In case of Portugal, there is a Statute Governing the Right of Opposition (in accordance with Articles 114, 161c, 164h, 166(3), and 112(5) of the Constitution, this Statute possess the force of a General Law of the Republic) and in article 2-1 (Content) concept of opposition is defined as a function: ”Opposition shall be understood to be the activity of monitoring, supervising and criticising the political guidelines followed by the Government…”.

The fact is that the most provisions regulating parliamentary opposition are to be found in the rules of procedure of the national parliaments. But the problem is, that rules of procedure are usually adopted by simple majority, and can thus be altered by simple majority, providing rather weak formal protection for opposition interests.

However, in some countries the constitution states that the parliamentary rules of procedure must be adopted by qualified majority. For example in Austria, where according to Article 30 of the Federal Constitutional Law (adopted 1920, last amended 2021): “the Federal Law on the National Council’s Standing Orders can only be passed in the presence of a half the members and by a two third majority of the votes cast”. According to the Swedish Constitution (Chapter 8, Article 17 of the Instrument of Government)[1] the main provisions of the Riksdag Act (Rules of Procedure) can be amended either by means of two identically worded Riksdag decisions with an election in between or by means of a single Riksdag decision taken by qualified majority. A qualified majority in this case means that at least three-quarters of those voting, and over half of the members of the Riksdag, must vote in favour of a decision for it to come into effect.

Another variant is the one found in Denmark and Norway[2] where the rules of procedure are adopted by Parliament by simple majority, but with provisions stating that they can not be derogated from in individual cases except by a qualified majority vote (3/4 of the MPs in Denmark, 2/3 in Norway). In other words, a majority in parliament is at any time free to alter the rules of procedure in a general manner, but not to derogate from them in specific cases. This kind of self-binding is not *stricto sensu* logical, but it functions quite well in practice, and provides a high degree of actual protection for opposition interests (Venice Commission, 2010 Comments, p. 20).

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[1] Sweden has four fundamental laws which together make up the Constitution: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. In addition, Sweden has a Riksdag Act which has an intermediate position between constitutional and ordinary law.

[2] Constitution of Norway was adopted on 17 May 1814 and is the second oldest written constitution in the world, last amended 2023.

According to Article 41 (2) of the Seimas Statute (adopted 1994, last amended 2022), political groups or their coalitions should proclaim in the Seimas their political declarations, wherein the provisions distinguishing them from the majority of the Seimas. Rules of Procedure of the German Bundestag (last updated 2022) defines parliamentary groups as "associations of not less than five percent of the Members of the Bundestag, and their members shall belong to the same party or to parties which, on account of similar political aims, do not compete with each other in any Land."

According to the Article 22 of the Rules of Procedure of the National Assembly of the Republic of Serbia (2012): "Parliamentary groups shall be formed in the National Assembly" and "..shell consist of at least five MPs."

There is also great variety as to how the principle of proportional representation is formally recognised. In a few countries it is explicitly regulated in the constitution. This includes Article 52 of the Constitution of Denmark (1953) which states that: "The election by the Folketing of members to sit on committees and of members to perform special duties shall be according to proportional representation", and Article 95 of the Constitution of Turkey (1982, last amended 2017) that: "The provisions of the Rules of Procedure shall be drawn up in such a way as to ensure the participation of each political party group in all the activities of the Assembly in proportion to its number of members...". Also Article 55 of the Constitution of Austria, that: "The National Council elects its Main Committee from its members in accordance with the principle of proportional representation".

According to the Article 158 of the Rules of procedure of the National Assembly of the Republic of Serbia, debates in detail shall be held on the articles to which amendments have been submitted and on amendments which propose introduction of new provisions, and: "The total time for a debate in detail for a parliamentary group shall be allocated to the parliamentary group in proportion to the number of MPs who are members of that parliamentary group."

3. Policy-making process: stages and comparative practice

According to Wegmann (2022) there are three stages through which opposition could influence policy-making process: legislative initiative, debate and parliamentary supervision. At the stage of legislative initiative: "Bill introduction and agenda setting are envisaged. Amendments, the committee structure and the committee procedures represent the stage of debate power" (p. 4). Finally, parliamentary supervision of the executive implays different

procedures by which veto-power of the opposition is demonstrated and which are formally defined as the rights of the qualified minority, e.g. interpelation, no confidence vote or referendum.

Just to illustrate, in this part of the study brief comparative review will shed a light on a several examples of how some rights of parliamentary opposition are legally insured in policy-making process.

The constitutions of Lithuania (**a**dopted in the Referendum of 25 October 1992, last amended 2022), Poland (accepted in a constitutional referendum on 25 May 1997, rev. 2009), the Czech Republic (16 December 1992, rev. 2013) and Ukraine (adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996, rev. 2019), enshrine the principle of pluralism and freedom, as well as certain rights of deputies or their small groups to initiate essential decisions, e.g. to submit bills to parliament: Constitution of the Czech Republic, Article 41 (2): "Bills may be introduced by (…) groups of deputies", and also, to amend them; Constitution of the Republic of Poland, Article 119 (2): "The right to introduce amendments to a bill in the course of its consideration by the Sejm shall belong to (…) Deputies (…)".

In addition, the parliamentary opposition may initiate amendments to the basic law proclaimed in the Constitution of Lithuania Article 147 (1): "In order to amend or append the Constitution of the Republic of Lithuania, a proposal must be submitted to the Seimas by either no less than one-fourth of the members of the Seimas...", the Constitution of Poland Article 235 (1): "A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies.." and the Constitution of Ukraine Article 154: "A draft law on introducing amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by no fewer National Deputies of Ukraine than one-third of the constitutional composition of the Verkhovna Rada of Ukraine."

The Article 107 of the Constitution of the Republic of Serbia stipulates that: "A right to propose laws, other regulations and general acts shall belong to every deputy, the Government, assemblies of autonomous provinces or at least 30,000 voters".

Some constitutions allow to parliamentary opposition to establish a committee of inquiry, enabling opposition to scrutinize and probe policy decisions. In Constitution of Portugal, Article 178, each member may, once per session, propose the formation of one committee of inquiry; if one-fifth of the members support the proposal, the committee is established. The Constitution of Georgia (1995, rev. 2020) in Article 42 allows investigatory commissions to be established at the request of one-fifth of the MPs, with the

approval of one-third of the members; the rule empowers the opposition to launch inquiries. All parliamentary factions in Georgia have a right to at least one member of an investigatory commission, with the opposition factions guaranteed a majority of the membership.

In Resolution 1601 (2008), the Parliamentary Assembly of the Council of Europe advocates introducing qualified minority rights for 1/4 of the MPs in a number of rules on supervision, scrutiny and control.

Following the spirit of the principle of checks and balances, Article 44 of the Basic Law for the Federal Republic of Germany (adopted 1949, last amended 2022) gives 1/4 of the MPs the right to demand the establishment of a parliamentary commission of inquiry. In the Norwegian parliament, 1/3 of the members in the Oversight Committee can initiate inquiries and call public hearings.

In some parliaments a qualified minority may have the right to delay majority decisions, for example by calling for extra hearings or periods of consultations. According to Article 41 of the Danish Constitution a minority of 2/5 of the MPs can demand that the third and last hearing on legislative proposals is delayed by up to 12 days, in order to give the minority the possibility to initiate public debate.

The Venice Commission recommends introducing more transparent rules for equal time distribution for debates between the parliamentary majority and the opposition. In document *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist*, Venice Commission stressed that it is possible to give the opposition a bigger share of time, especially as regards bills introduced by the Government or private bills sponsored by majority MPs, as well as, that allocation of an equal speaking time between majority and opposition, irrespective of their strength, should be privileged under certain circumstances (Checklist Parameters, 2019, § 102).

In that sense, there are suggestions that the principle of giving the opposition parties an appropriate share of parliamentary time can be written into a constitution (Bulmer, 2021, p. 27).

In the Constitution of France there is also a rule in Article 48 (5) giving "the opposition groups" the right to set the agenda for one day of sitting each month. Similar provisions are provided for by Article 43-1 of the Rules of Procedure of the Parliament of Moldova (1996, last amended 2023), ensuring the priority of the proposals of the parliamentary opposition when drawing up the agenda.

This issue is partially regulated by the Statute of the Lithuanian Parliament which stipulates in Article 105 (2) that the Speaker of the Seimas may change the order of speeches to provide more proportional representation in the debates of factions, committees, arguments for and against (Kovalchuk & Sofinska, 2022, p. 228).

4. Conclusion

"My lord, when no opposing opinions are presented, it is impossible to choose the better, but one must accept what is proposed. When such opposites are stated, it is as it is with gold, the purity of which one cannot judge in itself, but only if you rub it alongside other gold on the touchstone and see the difference...." (Herodotus, History, VII, 16, qtd. Anastaplo, 2003, p. 1009).

Degrees of institutionalisation of the role of opposition in national parliaments and normative models implemented differs, in a broad span, from largely unwritten, conventional recognition to formal regulation entrenched in the constitution, e.g. unwritten customary law or conventions, statutory law, parliamentary rules of procedure, the constitution. Concrete solutions depends of a complex circumstances, from *latent ambivalence* inherited to the constitutional democracy context (Hasanović, 2018, p. 51) to the number of political, economic, social, cultural.. features.

To secure rights of the opposition, in a traditional democracies with a strong political culture of tolerance and respect of political and social conventions, legal guarantees are not necessary. Unlike the political systems with the lack of strong political culture of tolerance and respect of political and social conventions, where the opposition may be severely restricted even if it enjoys a high degree of formal protection. Consequently, in the environment of parliamentary democracy opposition depend on a wide range of liberal freedoms, such as the freedoms of association, assembly and expression, backed by an independent judiciary.

As it stressed at the Venice Commission Report (2010), in a political theory distinction is sometimes drawn between "positive" and "negative political power". "Positive power" to adopt decisions should in a democracy rest with the elected majority. But the opposition may enjoy some degree of the so called "negative political power", to scrutinize, supervise, delay or even block the exercise of majority rule (§ 101).

Balance of parliamentary political power as well as acknowledgement of the legitimate role of opposition ensures prerequisites for democratic social dialogue and active participation of responsible citizens in the processes of strengthening

institutions of representative democracy. Therefore, the axiom of democracy is, that political culture in which parliamentary majority and opposition recognize each other as legitimate actors, each with its own rights and duties, responsibilities and privileges, could be built only as an joint effort of active citizens participation in compliance with the established rules and procedures of constitutional democracy. Consequently, only consensual political culture contributes to the political trust that citizens place in political institutions, including parliaments, political parties, governing majority as well as parliamentary opposition.

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INSTITUCIONALIZACIJA PRAVA I ODGOVORNOSTI OPOZICIJE U PARLAMENTU – UPOREDNA EVROPSKA PERSPEKTIVA

APSTRAKT: Predmet rada je analiza različitih normativnih modela i stepena institucionalizacije uloge opozicije u parlamentima jednog broja evropskih država, kojima se u širokom spektru, od utvrđivanja prava opozicije u poslovnicima o radu do formalnog priznanja u ustavima, normira uloga parlamentarne opozicije. Priznanje legitimne uloge opozicije i uspostavljanje političke ravnoteže u parlamentu je preduslov demokratskog društvenog dijaloga i aktivnog učešća odgovornih građana u procesima jačanja institucija predstavničke demokratije. Sledstveno, samo konsensualna politička kultura doprinosi jačanju političkog poverenja građana u političke institucije. Iako ne postoji opšte usvojeni model koji definiše ulogu parlamentarne većine i opozicije, nesumnjivo je da vreme postdemokratije zahteva redefinisanje bazičnih pojmova, kako parlamentarne većine i opozicije, tako i uloge parlamenta. Delokrug analize sveden je na uporedni prikaz ustavnih rešenja koja jemče prava opozicije kao i pravnog okvira koji reguliše deo pravâ parlamentarne opozicije, a koja se ostvaruju u procesu kreiranja politikâ. Cilj rada je jačanje

mehanizama parlamentarne demokratije i posebno, jačanje poverenja u rad Narodne skupštine Republike Srbije, budući da se samo efikasnom implementacijom evropskih iskustava može izgraditi poverenje javnosti i unaprediti standardi političke kulture. Metodološki, komparativni pristup zaokružujemo analizom komentara i tumačenja ustavnih akata, zakona, poslovnika o radu kao i preporukâ Venecijanske komisije.

***Ključne reči**: ustavna demokratija, parlamentarna opozicija, ustavne garantije, konsensualna politička kultura, institucionalno poverenje.*

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VOJVODINA IN THE NATIONAL POLICY OF THE COMMUNIST PARTY OF YUGOSLAVIA 1918-1945

ABSTRACT: The national policy of the Communist Party of Yugoslavia (CPY), between the two world wars, was formulated under the direct influence of the Comintern and was therefore subject to sudden and radical changes in the foreign policy of the USSR. Thus, in accordance with the foreign policy interests of the first socialist state, the national policy of the CPY ranged from demands for the disintegration of the Yugoslav kingdom to insisting on its constitutional reorganization. Within the federalist concept of the CPY, Vojvodina, as a "historical, geographical, and economic entity," was also envisaged to have the status of a federal unit, with occasional and conditional acceptance of its autonomous status. Although based on a different ideological matrix, the arguments used by the communists to justify the need for a special constitutional status for Vojvodina were identical to the demands of the Croatian political movement and a segment of the civic opposition in the Vojvodina Front, which the CPY formally supported in the mid-1930s. Despite the fact that autonomist and federalist projects for Vojvodina were not widely supported by either the Serbs or its national minorities for various reasons, Vojvodina became an autonomous province when the Communist Party of Yugoslavia, at the end of World War II, established a federal Yugoslavia in the context of agreements among the interested major powers.

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***Keywords**: Communist Party of Yugoslavia, Comintern, national policy, federalism, Vojvodina, autonomy.*

1. Unitarist position of the communist party of Yugoslavia

When, on December 1, 1918, the joint state of Serbs, Croats, and Slovenes was proclaimed, all Yugoslav leftist parties welcomed the unification as a "revolutionary act" and the beginning of the "Yugoslav national revolution." The Social Democrats of Croatia and Slavonia advocated the position of "national unity of Serbs, Croats, and Slovenes," while the Yugoslav Social Democratic Party of Slovenia saw the unification and the new state as "a precondition for the successful struggle for socialism and revolution." For the Social Democratic Party of Serbia, the unification was also significant as a precondition for "more successful class struggle" and "resistance to imperialist pressure," but the creation of a joint state was interpreted as a "political, economic, and cultural necessity beyond any discussion." The consensus in support of national unification was also expressed at the founding of the Socialist Workers' Party of Yugoslavia (Communists), at the Congress of Unification in April 1919, through the standpoint of "the national identity of the three tribes," national state, and national unity. The SWPY(C) criticized the manner of unification but simultaneously opposed tribal separatism (Petranović & Zečević, 1987, pp. 266-267).

At the Second Congress in Vukovar in 1920, it changed its name to the Communist Party of Yugoslavia but still advocated the idea of national unity and a national state and even lamented that the process of centralization in the Kingdom of Serbs, Croats, and Slovenes was not progressing faster, "resulting in the retention of different legislation in its provinces." Despite the fact that the Comintern called the division of territories among the Balkan members of the Entente "banditry politics," which, as stated, led to even greater national oppression than during Austro-Hungarian and Turkish domination, the Communist Party of Yugoslavia (CPY) initially insisted on national unitarism. Seeking to accelerate the overcoming of provincial specificities, historical, and national differences through its organization, it formed the Central Party Council and abolished all provincial centers, replacing them with regional secretariats (Petranović & Zečević, 1988, p. 235).

This relative and conditional autonomy regarding the national question, as well as the overall political action of Yugoslav communists, would be replaced by unquestioning obedience to the Comintern after an intra-party showdown

with opponents of centralization, the so-called centrists[1] (Petranović, 1988; Gligorijević, 1992), and legal measures that initially restricted and then completely banned the activities of the CPY. Declared illegal, the Communist Party remained in the underground until 1941.[2] As Gligorijević (1992) notes, "condemned and rejected, without membership control, party officials increasingly turned to Soviet Russia," from where they embarked "on the path of conspirators, not only against the ruling system but also against their own country" (p. 64).

During that period, the Communist Party of Yugoslavia did not seriously engage in the national question, which, according to its leadership, did not even exist because "the process of national assimilation for the Yugoslavs began with their state unification" (Muzej Vojvodine, Arhivska zbirka, Arhivska građa KPJ 1919–1941, NS, KI, br. 1921/10, *Political and Economic Situation in the Kingdom of Serbs, Croats, and Slovenes*).

However, the national policy of the CPY soon became conditioned by the foreign policy interests of the Soviet Union, which the Comintern, in the form of ideological principles, imposed on Yugoslav communists, and they unquestionably accepted them starting from 1924.[3] In line with Stalin's

[1] A group of reformists in the Communist Party of Yugoslavia publicly rebelled against centralization and subordination to the Comintern, challenging the Bolshevik centralization of the party. Acceptance of the "21 conditions," which envisaged the centralization of communist parties and their subordination to the Comintern, was treated as "political suicide," and Comintern leaders were labeled as dictators to whom one should "submit, not respond." Such public and explicit opposition to the decisions of the Comintern led to the expulsion from the party of 153 signatories of the "Manifesto of the Opposition of the Communist Party of Yugoslavia," including Živko Topalović and Dragiša Lapčević.

[2] *The Proclamation and the Law on the Protection of Public Safety and Order in the State* are interpreted as a success achieved by the Communists in the elections for the Constituent Assembly in 1920 (they received nearly 200,000 votes, making them the third-largest party in terms of seats and the fourth-largest in terms of votes), as well as strikes in Slovenian and Bosnian mines. The Proclamation was justified by the intention of the Communists to carry out a revolutionary coup in the country, accusations of being foreign spies, demoralizing the army, inciting violence, and undermining the state. The assassination of Milorad Drašković, the Minister of Internal Affairs, and the attempted assassination of Regent Alexander were the pretext for the Law on the Protection of Public Safety and Order in the State, which banned the Communist Party of Yugoslavia as a "terrorist and anarchist organization.".

[3] Recent analyses of the national policy of the Communist Party of Yugoslavia and its relationship with the Comintern, between the two world wars, indicate that the formulation of the national question in the Yugoslav party was heavily influenced by the Communist Party of Bulgaria, and its interest in the "Macedonian question," which it considered crucial to its national policy. The Communist Party of Bulgaria, as a section of the Comintern, had a much better status than the Communist Party of Yugoslavia, so the Third International, in the early post-war years, accepted the viewpoint of the Bulgarian Communist Party that Serbia "occupied Macedonia" in the Balkan Wars, where "about a million Bulgarians" lived, preventing their national unification. Bulgarian communists were also dominant in the Balkan Communist Federation, where, at the end of 1923, with the support of the Comintern, the idea of breaking up Yugoslavia began to mature.

assessment that Yugoslavia should be dismantled as an "artificial creation" and as a bulwark of French and British policies in the Balkans, the CPY would soon abandon the idea of national unitarism, and then the restructuring, or the survival, of the Yugoslav state. At the First Land Conference of the CPY in 1922, there was still talk of the "three tribes," but also of the "specificities of Serbs, Croats, Slovenes, Montenegrins, and Macedonians who should resolve their status in the state freely, based on the right to self-determination" (Petranović & Zečević, 1987, p. 273).

Under the dominant influence of the Comintern, Yugoslav communists, by mid-1923, abandoned the idea of national unity of Serbs, Croats, and Slovenes and adopted the principle that each nation in the Kingdom had the right to self-determination and its own independent sovereign state (Muzej Vojvodine, mikrofilm, Komunistička internacionala, F-I, K XVI/14 , inv. br. 21446, fk 1069, *General Situation in the Country and Tasks of the Communist Party – the Problem of Nationalities*). Unquestionably following changes in Moscow's approach to the national question, the CPY would, in the following decades, alternately insist on the breakup and federalization of Yugoslavia. The right to self-determination until the secession of all "oppressed nations and national minorities" was based by the communists on premises of "national oppression" and the "hegemony of the Serbian bourgeoisie and the dominance of the Serbian nation over other nations" (MV, AZ, Arhivska građa KPJ 1919-1941, NS, KI, br. 1924/66, *Resolution on the National Question*), but occasionally, as an alternative, they also offered federal arrangements or provincial autonomies as the "best solution to the constitutional issue" (MV, AZ, Arhivska građa KPJ 1919–1941, NS, KI, br. 1923/70, S. Marković, *The National Question in the Light of Marxism*) . In line with the Comintern's stance that "national conflicts create fertile ground for revolutionary movements," the Communist Party of Yugoslavia was instructed to call upon the Croatian Republican Peasant Party to join in the common struggle with the "revolutionary proletariat" (Gligorijević, 1992, pp. 109-113).

2. The fifth congress of the comintern

The Fifth Congress of the Comintern, held in 1924, formalized the change in the communists' approach to the national question, and the thesis on the existence of a distinction between "oppressor" and "oppressed" nations served as the basis for the decision on the disintegration of Yugoslavia. According to the interpretation of the Comintern, by creating the Yugoslav state, "imperialist state" Serbia "occupied" all other peoples, so the Platform of Agreement of

the CPY, adopted the same year, based on the decisions of the Fifth Congress of the Comintern, for the first time, instead of the formulation "ruling Serbian bourgeoisie," states that "the ruling nation is Serbian, which oppresses all other nations in Yugoslavia." In line with this stance, the recommendation of the Comintern was not to wage a struggle against "every nationalism" as it would hinder the national movements of the "oppressed nations," but rather "against the Serbian financial oligarchy and its instruments, camarillas, and militaristic cliques," as the "most dangerous enemy of the revolutionary proletariat" (Gligorijević, 1992, p. 122, 158). The Platform was adopted despite doubts and confrontations within the membership of the CPY, and with the Resolution on the National Question in Yugoslavia, the principle of federative organization was completely abandoned and replaced with an explicit demand for the breakup of the state. It was concluded that the right to self-determination "must be expressed in the form of Croatia, Slovenia, and Macedonia seceding from Yugoslavia and forming independent republics," and that the communists would support the right of the Hungarians to secede and the "struggle of the Albanian people for independence" (Gligorijević, 1992, pp. 118-120).

Soon after, Stalin corrected the decision to break up Yugoslavia, so the communists returned to the federalist concept, with seven Yugoslav provinces that "have their own particular political life," namely: Serbia, Croatia, Montenegro, Vojvodina, Macedonia, Slovenia, Bosnia and Herzegovina. Thus, at the Third Congress of the CPY in 1926, Vojvodina was mentioned for the first time as a federal unit, although as early as 1922, among the members of the Central Committee, there were opinions that "Vojvodina must not belong to Serbia", (Muzej Vojvodine, mikrofilm, Komunistička internacionala, F-I K XVI/14, inv. br. 21446, fk 308), and a year later, among the communists, the first ideas about the autonomous status of Vojvodina within the future Balkan-Danube federation emerged. Given the communists' stance on the "imperialist annexation of Vojvodina," its northern part was referred to as "Hungarian territory" where the Hungarian minority was "nationally oppressed," and therefore had the right to secede. Such Comintern propaganda played into Budapest's revisionist policy, and the communists were also ordered to support the Hungarian Party as a possible ally in the fight against the "interests of the Serbian bourgeoisie" (MV, Arhivska građa KPJ, NS, KI br. 1926/18, *Resolution of the Presidium of the Comintern on the Yugoslav Question*).

From 1928 onwards, the Comintern returned to the policy of breaking up Yugoslavia and committed the CPY to fight for independent Croatia,

Macedonia, Slovenia, and Montenegro, as well as for an independent and united Albania to which Kosovo and Metohija would be annexed, i.e., Yugoslav territories inhabited by an Albanian national minority (Pešić, 1983, p. 235). The Fourth Congress of the CPY assessed that "on Hungarian territory in northern Vojvodina, annexed to Yugoslavia by the Treaty of Trianon, the Great Serbian bourgeoisie is also implementing its denationalization policy." Therefore, the CPY recognizes the right to secede to the Hungarian national minority in northern Vojvodina and fights "against all forms of national oppression against the Hungarian and German populations of Vojvodina." A year later, the communists added "independent Vojvodina" to the list of "independent worker-peasant republics," alongside Bosnia and Herzegovina, although the Comintern rejected this concept as a "template and invented solution" that does not take into account the national structure of Yugoslavia but rests on pre-war borders of individual provinces (Petranović & Zečević, 1987, pp. 388-390). The Comintern believed that no nation in Vojvodina demanded its independence but rather the right to self-determination, and considered such an idea as "unserious." Therefore, in directives to the membership in the province, the leadership of the CPY emphasizes the right to self-determination up to secession, including the "right to secede the occupied Hungarian regions in northern Vojvodina" (MV, Arhivska građa KPJ, NS KI 1933/162, *Circular of the Central Committee of the CPY to organizations, groups, and members of the CPY in Vojvodina*).

The policy of breaking up Yugoslavia by the Comintern was based on ideological constructs according to which Serbia annexed all other peoples and territories in Yugoslavia, so the Serbian nation, as the ruling one, oppressed all others, even its compatriots in the Prečani regions. In a letter of the Central Committee to the provincial communists, it is stated that "through the plundering policy of the big Great Serbian bourgeoisie," not only towards "oppressed nations but also towards all the annexed provinces, the Prečani Serbian peasantry has been pushed into the front line of the struggle against national oppression" (MV, Arhivska građa KPJ, NS KI br. 1928/49, *Letter from the CC of the CPY to the Provincial Secretariat of the CPY in Vojvodina*).

Although based on a different ideological matrix, the national policy of the CPY was in line with the legal demands of the Croatian political movement, and the absurd claim that "Prečani Serbs are also nationally oppressed," insistence on the distinction between "Prečani Serbs" and "Serbians," and slogans advocating the expulsion of "Serbian occupiers, officials, and gendarmes" perfectly fit into the propaganda arsenal of the Croatian Peasant Party (Pešić, 1983, pp. 251, 259). As early as 1925, the Comintern instructed Yugoslav

communists to establish cooperation with the Croatian Peasant Party and vote for its candidates in elections, while simultaneously seeking to neutralize the influence of the Croatian Peasant Party and win over the peasants, whom they considered their natural followers, and to radicalize not only social demands but also national issues and thus "outbid the leadership of the Croatian Peasant Party" (Pleterski, 1986, p. 207). After the assassination in the Parliament, the CPY began a more intensive approach to the Peasant-Democratic Coalition, estimating that after the death of Stjepan Radić, the coalition was on the brink of collapse and that the peasantry, "liberated from bourgeois influence," would massively opt for the communist party (MV, Arhivska građa KPJ, NS, KI 1932/11, 1932/21, 1932/35). In the directives of the Central Committee to the provincial committees, the basic slogans were the convocation of the Assembly (Constituent Assembly of representatives of the independent state of Croatia) and the complete national liberation and secession of all "oppressed nations" (MV, Arhivska građa KPJ, NS, KI, br. 1928/77-a, *Proposal for a resolution in preparations for the Fourth Congress of the CPY*).

However, the new president of the Croatian Peasant Party and one of the leaders of the Peasant-Democratic Coalition, Vlatko Maček, did not agree with the "revolutionary orientation" of the CPY, nor with armed resistance to the regime, relying on diplomatic support from major powers and negotiations with England and Italy. The communists again accused the leadership of the Croatian Peasant Party of contacts with the civic opposition and, especially, the stance that the national issue, primarily Croatian, could be resolved within the Yugoslav state. On the other hand, the CPY was very uncritical towards the Ustasha movement and its terrorist actions and demanded from its membership, "workers and peasants" of Croatia and Serbia, to "assist with all their strength" the Ustasha fight in Lika and Croatia (Pešić, 1983, pp. 229, 258).

The new concept of solving the national question seems to have been most difficult to accept in Vojvodina, where, regardless of the national heterogeneity of the population, the directive on breaking up or federalizing the country was not easy to implement. The fact that posters and leaflets printed in the province did not contain messages about the creation of a "federation of worker-peasant republics in the Balkans and the Danube region," which were otherwise emphasized in party propaganda from the headquarters, attests to the lack of understanding for the policy of state disintegration in Vojvodina (Arhiv Vojvodine, Arhiva Oblasnog sekretarijata SK, 2670 /1924, K-306/1925).

The greatest resistance was caused by the order to support the Hungarian Party, or the directive that communists must not suppress its irredentism, as

it would serve the "Serbian hegemonic bourgeoisie." Neither the Hungarians themselves were enthusiastic about this strategy of the Central Committee, so the tasks of the CPY Central Committee for Vojvodina in 1926 include, among other things, "to fight against all cases of oppression of national minorities and against the hostile annexation of Vojvodina and to suppress the negative attitude of a part of Hungarian comrades towards Hungarian irredentism in Vojvodina" (Palić, 1980, p. 213).

3. The People's Front policy

The January 6th Proclamation in 1929 was seen by the Communist Party of Yugoslavia as a signal to begin the revolution, prompting the party leadership to issue a call to arms to workers and peasants. However, the communists found themselves isolated in their intentions, attributed by Končar (1995) to "incorrect and unrealistic views on the national question" (pp. 266-267). Practically dismantled during the dictatorship, the CPY began its organizational reconstruction in 1932 as a member of the global communist movement and a section of the Comintern, albeit with little influence in its organs and on the margins of its politics. It was an illegal and small party, directed from abroad and particularly burdened by misconceptions about the national question stemming from the foreign policy assessments of the party and the state leadership of the USSR (Petranović, 1988, p. 213). Until mid-1934, the Comintern considered fascism not as a threat to the international proletariat but merely as accelerating a new imperialist war and revolution that would ultimately abolish capitalism. Therefore, initially, Stalin cooperated with Rome and Berlin, with whom he was crucially bound by the identical goal of destroying the European order established by the Versailles Treaty, besides the militancy in organization and fanaticism of followers. However, when it became apparent that the balance between the countries of the so-called Western democracy and the fascist powers was rapidly shifting to the detriment of the former, there was a turnaround in the Comintern's policy and a revision of Soviet foreign policy, which began to seek new allies and gradually transitioned into the camp of defending the Versailles system (Karaivanov, 1953, p. 18).[4] In line with the changing attitudes towards fascism, the Comintern's stance towards social democracy also changed, and

[4] In the autumn of 1934, the Soviet Union joined the League of Nations, a year later formed an alliance with France, then with Czechoslovakia, met with the British Prime Minister, and changed its previously hostile attitude towards the Little Entente.

the idea of gathering all "left forces" matured. The People's Front policy, ratified at the Seventh Congress of the Comintern in 1935, was supposed to encompass all middle-class parties and political groups, liberal, radical, and even conservative, that expressed readiness to resist fascism.

The first and most important change in the party's national policy concerned its attitude towards the "Versailles Yugoslavia" and its, albeit conditional, affirmation. According to the explanation provided by the Politburo of the Central Committee itself, the change in the CPY's stance towards the Yugoslav state was influenced by foreign policy factors: the danger of German and Italian fascism to world peace, i.e., the fact that France and its allies no longer represented forces willing to provoke a new imperialist war. As for internal political reasons that influenced the change in the CPY's stance, the Politburo cited only one: the "categorical and clear" statement by Vlatko Maček regarding the maintenance of the "state community within today's borders on the condition of the freedom of the Croatian people" (MV, Arhivska građa KPJ, NS, KI, br. 1935/65, *On Cooperation with the Croatian Peasant Party*). The communists no longer sought the disintegration of Yugoslavia but rather "the right and freedom of each nation to determine for itself with whom and how it will form its state community" (MV, Arhivska građa KPJ, NS KI 1935/16, *Letter from B. Parović, Central Committee of the CPY, on the state of the organization in Vojvodina*). The CPY advocated for the "Serbian people to support the demands and struggles of other nations for equality" and declared support for "the convocation and free election of national assemblies for each nation in Yugoslavia, primarily the Croatian Sabor and then the Slovenian, Macedonian, Montenegrin, Bosnian, and Vojvodina national assemblies which should confidently resolve all issues" (MV, Arhivska građa KPJ, NS KI br. 1935/145). In parallel with giving up on breaking up Yugoslavia, at the suggestion of the Comintern, the CPY embarked on the reorganization of the party, namely the formation of national communist parties in Croatia and Slovenia, with the perspective of Macedonia as well (MV, Arhivska građa KPJ, NS KI, 1935/230, *Letter from the Central Committee of the CPY to the Comintern*).

The fact that the reorganization of the CPY proceeded selectively—since the Communist Party of Serbia was formed only in 1945, and Montenegro in 1948—caused doubts and criticism even then. It was later assessed as one of the biggest mistakes of the CPY, but neither the creators of the party's policy nor numerous researchers of the history and politics of the communist movement found convincing and justified reasons for it. Part of the answer, at least formally, lies in the limitation contained in the initial rationale of the

idea of national parties, whose establishment is envisaged only for "nationally oppressed countries that are compact" (Gligorijević, 1992, pp. 274-275; Pešić, 1983, pp. 267-268). This automatically excluded Serbia, which, according to the communists' understanding, was not "nationally oppressed," as well as Bosnia and Herzegovina and Vojvodina because they were not "ethnically compact." Skepticism about the possibility and necessity of creating the Communist Party of Serbia may have stemmed from the dilemma of which of the existing "national" parties to include Bosnia and Herzegovina and Vojvodina, even with a special status (Pleterski, 1986, pp. 330-331).

Yugoslav communists adapted slowly and with difficulty to the new course of party politics, as, practically from its inception, their struggle was directed against the Versailles order and "artificial creations" such as Yugoslavia, according to the Comintern's understanding. Moreover, in line with the Comintern directive that they "must rid themselves of sectarianism towards social democracy and opposition bourgeois forces," they were forced to call for cooperation with former ideological enemies (Petranović & Zečević, 1988, p. 377). However, a coalition between the Serbian bourgeois opposition and the communists was not formed, even though they occasionally appeared together at political gatherings, as the invitation was rejected by both democrats and left-wing agrarians and socialists. The only example of cooperation was recorded in Vojvodina, where the communists entered into an electoral coalition with the Vojvodina Front. Also, before the parliamentary elections in 1935, the Provincial Committee of the Communist Party for Croatia concluded an agreement with the Croatian Peasant Party, without the knowledge of the Central Committee and contrary to its directives. At the Seventh Congress of the Comintern, cooperation with the Croatian Peasant Party was positively assessed, with a recommendation to continue negotiations with Maček (MV, Arhivska građa KPJ, NS KI br. 1935/144 , 1935/166, Pismo PK KPJ za Hrvatsku kojim poziva vođstvo HSS u Dalmaciji na zajedničku akciju, *Information on cooperation with the "radićevci"*). The communists tried to win over the membership of the Croatian Peasant Party and even take the lead in the Croatian peasant movement, but instead, by "adopting a new national policy and supporting the Croatian Peasant Party, they were losing supporters instead of gaining them. At the April plenum in 1936, it could only be noted that there were communists who were "under the influence of the Croatian Peasant Party" (Gligorijević, 1992, p. 268).

After the consultations in Moscow in 1936, the leadership of the CPY concluded that the goal of the joint struggle of all the peoples of Yugoslavia against fascism was the "urgent solution of the national question," which,

as stated, "must coincide with the aspirations and will of all the peoples of Yugoslavia, especially those oppressed and neglected by Greater Serbian chauvinism." Communists see this solution in a democratic federative state, where all peoples must be equal or "have broad autonomy." Thus, according to the instructions received by the Central Committee of the CPY from the Comintern, the most important political slogan became: "For a democratic federative Yugoslavia" (MV, mikrofilm, Komunistička internacionala, K XVII/1, inv. br. 21446, fk 158).

That same year, the positions of the Central Committee of the CPY regarding federation were specified in a letter, in which, judging by the proposed seven federal units, Vojvodina is treated as one of them. It emphasizes the right to self-determination of all peoples, not only "Serbs, Croats, and Slovenes but also Macedonians and Montenegrins, as well as the right of the people in Vojvodina, Bosnia and Herzegovina to decide whether to preserve their regional autonomy in the federative state." The author of the letter[5] notes that the "Serbian united oposition (and even a part of the people's front) is ready to give freedom to Croats and Slovenes, while considering the other peoples and provinces Serbian. Serbian bourgeoisie wants to ensure its domination and hegemony over Macedonians and Montenegrins, over the people in Bosnia and Herzegovina and Vojvodina in a new and refined way." The letter also states that "the leftists' position coincides with the position of the Peasant-Democratic Coalition" (MV, mikrofilm, Komunistička internacionala, K XVII/1, inv. br. 21446, fk 69).

In line with changes in the national policy of the CPY, its attitude towards the status of Vojvodina also changed. Advocating for Vojvodina as a federal unit, or "broad autonomy," communists practically aligned their views with the demands of the Vojvodina Front. After initial reservations, caused by fear of too many political concessions, communists formally supported the Vojvodina Front, and this was actually the only example of cooperation between the Communist Party and civil opposition parties in Serbia. Thus, the platform of the People's Front was practically realized only in Vojvodina, based on identical understandings of its future position in the state community. In one document from the archival material of the CPY, signed under the pseudonym "Zweig," it is written that the "People's Front in Vojvodina is mainly formed from the following groups: United Workers' Party, left-wing

[5] The letter is unsigned, and in post-war literature, it was often attributed to Tito, although in more recent historiography, it is generally undisputed that the author is Adolf Muk, a member of the Politburo of the Central Committee of the CPY, executed in 1943.

agrarians, Vojvodina Front...” (Muzej Vojvodine, mikrofilm, Komunistička internacionala, K XVII/1 inv. br. 21446 , fk 89). The leadership of the CPY adopted the slogan “Vojvodina for Vojvodinians” from the Vojvodina Front and recommended to its members in Vojvodina to “positively express themselves on the issue of the Vojvodina Front” (MV, Arhivska građa KPJ 1919-1941, NS KI 1935/45).

In the tasks for building the People’s Front in 1936, autonomy was foreseen for Vojvodina: “If there are aspirations for autonomy and federation among certain peoples, communists support and help these movements as a step forward towards full national liberation. For this purpose, communists support the demand for the convocation of the Croatian and other assemblies and the movement for the autonomy of Vojvodina and Montenegro” (MV, Arhivska građa KPJ, NS KI br. 1936/398, *Communists and the Constituent Assembly*).

Seeking to emerge from illegality through the political activities of the Vojvodina Front, communists reached an agreement with it in October 1936, which, over the next two years, confirmed “unity of views on the political solution to the position of Vojvodina.” By a decision of the Central Committee from April 1936, the CPY “unreservedly supported the movement for the autonomy of Vojvodina as a step forward towards full national liberation, i.e., towards establishing national equality, seeking to give it the meaning of a struggle for social justice” (Milanović, 1971, p. 132). However, differences in the projection of Vojvodina’s future state-legal status, present in the policy of the civil opposition, are also noticeable in the program of the CPY, so, parallel to autonomy, communists seek “the democratization of the country and its reorganization on a federative basis, where Vojvodina would also be a federative unit.” In contacts with the membership, activists of the People’s Front in Vojvodina also present various options for state restructuring. Žarko Zrenjanin, secretary of the Provincial Committee of the Communist Party for Vojvodina, in 1938, emphasizes that communists seek organization based on “seven units with full rights to determine their position in federative Yugoslavia (Serbia, Croatia, Slovenia, Macedonia, Montenegro, Bosnia and Herzegovina, and Vojvodina)” (MV, Arhivska građa KPJ, NS KI, br. 2193, *Lecture by Žarko Zrenjanin*).

Cooperation with the Vojvodina Front was expanded in 1938 with a new agreement with the Initiative Committee of the Workers’ Party, or the Party of the Working People (PWP), through which communists intended to legalize their work. The platform for the work of the Initiative Committee of the PWP of Vojvodina formulated the standpoint according to which

"Vojvodina should be an equal unit in the future state arrangement with other provinces" (Popović, 1971, p. 161). Agreement was reached on joint action in the upcoming parliamentary elections and the participation of communists in the political rallies and conferences of the Front. The leadership of the CPY positively assessed cooperation with the Vojvodina Front, so Tito informed the Comintern in 1938 that "the majority of democratic elements are found in the Vojvodina Front," where "our comrades are not doing badly and are achieving great success in creating a people's front." Tito believes that the name Vojvodina Front should be retained because it "is popular in Vojvodina and enables some minorities to join this front, for example, Hungarians, who are quite numerous, as well as Romanians, Bunjevci (Croats), etc." (MV, Arhivska građa KPJ, NS KI 1938/23, *Tito's report to the Comintern*; NS KI 1939/8, *Tito's report to the Comintern*).

The state-legal status of Vojvodina is explicitly mentioned for the last time in the platform of the Party of the Working People from 1939, which criticizes the Cvetković–Maček Agreement and the "ruling Serbian circles" for their alleged intention to "split all Serbian and Croatian masses." Apparently motivated by current speculations about the future position of Vojvodina, communists state: "Exactly because Vojvodina has its special tasks, both in the economic and national fields, and because it is an independent historical unit with its tradition, it cannot be included in any province without consequences for its peoples. The Initiative Committee of the PWP of Vojvodina stands on the position that Vojvodina should be an equal unit in the future state reorganization with other provinces" (Končar, 1971, p. 40).

4. Formation of the Autonomous province of Vojvodina

A new change in the foreign policy of the USSR, crowned by the Non-Aggression Pact with Germany in 1939, marked a radical reorientation in the policy of the Comintern. According to the new interpretation from Moscow, the center of the "world reaction" had shifted to England and France, the states that, as guardians of the capitalist order, were the main culprits for the imperialist war. The anti-fascist policy of the People's Front and cooperation with all democratic civil forces were declared heresy, social democracy was once again labeled as the "treacherous ally of Western imperialism," and the main goal of the communists became "war against war" and the defense of the neutrality of the Soviet Union (Petranović, 1988, p. 243).

In accordance with the change in the general course, the Comintern softened its unequivocal demands for the federal status of certain regions,

so the Fifth Earth Conference in 1940 suggested a somewhat more moderate policy on the national question (Popov & Popov, 2000, p. 60). The resolution of this conference included, as one of the most important tasks, the "struggle for national equality of oppressed and national minorities in Yugoslavia," namely the "Macedonian and Montenegrin people" and the "Albanian minorities in Kosovo, Metohija, and Sandžak," the "true solution to the national question of Croats and Slovenes," as well as the "struggle against the attempts of Serbian and Croatian bourgeoisie to mutually divide Bosnia and Herzegovina." As for Vojvodina, the tasks of the Communist Party of Yugoslavia were defined as the "struggle for freedom and equality of Hungarian, Romanian, German, and other national minorities in Vojvodina, while simultaneously fighting against the attempts of Hungarian, German, and other reactionaries to allegedly solve the national question in these and other areas through imperialistic conquest" (Petranović & Zečević, 1987, p. 615). At that time, however, there already existed a provincial organization of the CPY for Vojvodina, equating it with Serbia, Montenegro, Bosnia and Herzegovina, and Dalmatia, since national party organizations existed only in Croatia and Slovenia.

At the Sixth Provincial Conference of the Communist Party for Vojvodina, there were also no concrete solutions regarding its possible state-legal status, nor explicit advocacies for its federal or autonomous status, as in previous party documents. However, in explaining the national policy, the "frontist" argumentation of "Vojvodinian distinctiveness" was again noticeable as a key theme: "The Serbian bourgeoisie attempts to justify its imperialistic policy of oppressing the people in Vojvodina solely by the fact that a relative majority of the Serbian people live in Vojvodina. However, it has no right to exploit the Vojvodinian peoples even if only Serbs lived in Vojvodina because Vojvodina historically has never been a Serbian province, just as it has never been Hungarian, although it was subjugated to Hungarians. Despite the fact that Vojvodina is inhabited by peoples of various nationalities, it has its own economic, geographical, and historical entity. If we agree that this is the case, and bourgeois theoreticians do not deny it either, then it belongs solely to the Vojvodinian peoples and only to them" (Končar, 1995, pp. 291-292).

Changes on the political map of Europe, the Cvetković-Maček Agreement, and the radical turn in the policy of the Comintern, i.e., the USSR, before the Second World War, temporarily and apparently pushed into the background the views of the CPY on the national question, including the question of Vojvodina, which was not explicitly addressed even in the early years of the war. This was the result of understandable caution prompted by the influence of German National Socialism and Hungarian revisionism on the

most populous national minorities in Vojvodina even before the April War. At that time, Serbs and Croats constituted only a relative majority in Vojvodina, while there were more Hungarians and Germans, overall. Their behavior after the outbreak of the war and the breakup of Yugoslavia necessitated caution in proclaiming the state-legal and political solutions for the future status of Vojvodina. This did not call into question the policy of the CPY towards national minorities, nor its efforts to mobilize them to fight against fascism. The fact that the CPY, especially its cadres in Vojvodina itself, did not abandon the idea of autonomous status is evidenced by the demands to renew the Provincial Committee of the CPY in 1942, to establish a provincial organ of people's power, and to launch a Vojvodinian party newspaper (Popov & Popov, 2000, p. 62).

The AVNOJ Decision on the construction of Yugoslavia on a federal basis did not mention Vojvodina because it was not considered opportune. Thus, AVNOJ (The Anti-Fascist Council for the National Liberation of Yugoslavia, commonly abbreviated as the AVNOJ), in fact the Central Committee of the CPY, did not want to diminish the prospects for the mass accession of Croats to the People's Liberation Movement, while at the same time seeking not to exacerbate the Serbian-Croatian relations regarding this issue. Disagreements had already arisen between the communist leaderships of Croatia and Vojvodina regarding the political and military jurisdiction over the territory of Srem. Thus, in June 1943, the Provincial Committee of the CPY for Vojvodina warned that "the Central Committee of the League of Communists of Croatia (KPH) and ZAVNOH (The State Anti-Fascist Council for the National Liberation of Croatia) in some of their publications speak about Srem as a province of Croatia." Deeming this to be incorrect, Vojvodinian communists emphasized that "Srem is an integral part of Vojvodina" and that "the national composition of Srem is such that, in our opinion, it cannot become part of Croatia" (Petranović & Zečević, 1988, p. 645). In this context, it is also important to note that in January 1942, Tito directed the leadership of the partisan movement in Srem to the effect that this area henceforth "directly falls under the Main Headquarters of the People's Liberation Partisan Detachments of Croatia" (Petranović & Zečević, 1988, pp. 749-751). In mid-1943, the Central Committee of the CPY recognized the renewed Provincial Committee for Vojvodina, and soon resolved the issue of the territorial-political affiliation of Srem by deciding that "up to the lines Vukovar–Vinkovci-Županja, and all eastward, including Zemun, belong not only as a military-operational area to the Main Headquarters of Vojvodina but also as the area of the Provincial Committee of Vojvodina on which it

will develop its party and political activity." The Second AVNOJ session definitively dismissed assumptions about Vojvodina as the seventh federal unit and opened the question of the form and political framework of autonomy. In March 1944, Tito said that "Vojvodina, like other regions aspiring to it, will receive the broadest autonomy, but the question of autonomy and the question of which federal unit the respective region will be attached to depend on the people themselves, or their representatives when addressing the definitive state organization after the war." It became clear that Vojvodina would be an autonomous province within one of the federal units, not an autonomous province directly included in the federation, as implied by the demand of the Provincial Committee of the CPY for Vojvodina in May 1943 to form an Antifascist Council of People's Liberation in the province, so that Vojvodina would become "like the rest of our provinces." However, the question of which federal unit Vojvodina would belong to remained open, and on this occasion, the need for political expediency in resolving Serbian-Croatian relations prevailed, which was postponed for the post-war period (Popov & Popov, 2000, pp. 69-73).

The Seventh Provincial Conference of the CPY in April 1945 pointed out the solution of the autonomous status of Vojvodina, unanimously declaring for the "inclusion of autonomous Vojvodina in federal Serbia." At this conference, Jovan Veselinov stated that "from the national composition of Vojvodina, it is clear that Vojvodina should be in federal Serbia," but at the same assembly, he explained that "there was already a decision of the Central Committee for Baranja to belong to Croatia." Regarding this statement, Popov (2000) evaluates that the verification of the situation in the field and the collection of data conducted by the AVNOJ Commission for demarcation between Serbia and Croatia in Baranja in the summer of 1945 was "unnecessary and insincere" (p. 88). Four months later, the Assembly of Delegates of the People of Vojvodina in Novi Sad once again expressed support for the unification of Vojvodina with Serbia, a proposal confirmed by the vote at the Third AVNOJ session.

In the meantime, a special AVNOJ Commission dealt with the demarcation between the two federal units, Serbia and Croatia. The Commission decided that the districts of western Srem, Vukovar, Vinkovci, and Županja, as well as Baranja, which was excluded from the province's composition as early as May 1945 by the decision of the Main People's Liberation Committee of Vojvodina, would belong to Croatia. Thus, the border line followed the Danube from the Hungarian border to Ilok, then crossed the Danube, leaving Ilok, Šarengrad, and Mohovo in Croatia, as well as the surrounding villages

in the Šid district: Opatovac, Lovas, Tovarnik, Podgrađe, Adaševci, Lipovac, Strošinci, and Jamena. Šid and the villages of Ilinci, Mala Vašica, Batrovci, and Morović became part of Serbia. This "temporary" border entered into the second provision of the first article of the Law on the Establishment and Organization of the Autonomous Province of Vojvodina, enacted by the Presidency of the National Assembly of Serbia on September 1, 1945. The status of Vojvodina, as an autonomous province and "integral part of Serbia," was also confirmed by the first Constitution of the Federal People's Republic of Yugoslavia in January 1946. (Petranović & Zečević, 1988, p. 784).

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VOJVODINA U NACIONALNOJ POLITICI KOMUNISTIČKE PARTIJE JUGOSLAVIJE 1918-1945.

APSTRAKT: Nacionalna politika Komunističke partije Jugoslavije, između dva svetska rata, formulisana pod neposrednim uticajem Kominterne i stoga podložna naglim i radikalnim zaokretima u spoljnoj politici SSSR, kretala se u rasponu od zahteva za dezintegracijom jugoslovenske kraljevine do insistiranja na njenom državnopravnom preuređenju. U federalističkom konceptu KPJ, za Vojvodinu je, kao "istorijsku, geografsku i ekonomsku celinu", takođe, bio je predviđen status federalne jedinice, uz povremeno, uslovno pristajanje i na njen autonomni položaj. Mada na različitoj ideološkoj matrici, argumentacija kojom su komunisti obrazlagali potrebu posebnog ustavnopravnog položaja Vojvodine, identična je zahtevima hrvatskog političkog pokreta i dela građanske opozicije u Vojvođanskom frontu koji će KPJ i formalno podržati, sredinom tridesetih godina. Uprkos činjenici da autonomističke i federalističke projekte Vojvodine, iz različitih razloga, nisu masovnije podržavali ni Srbi, niti njene nacionalne manjine, ona će postati autonomna pokrajina kada Komunistička partija Jugoslavije, krajem Drugog svetskog rata, u kontekstu sporazuma zainteresovanih velikih sila, uspostavi federativnu Jugoslaviju.

Ključne reči: *Komunistička partija Jugoslavije, Kominterna, nacionalna politika, federalizam, Vojvodina, autonomija.*

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INDEPENDENCE OF THE JUDICIARY AS A PATH AND A GOAL – THE VOICE OF THE PROFESSION

ABSTRACT: The views and experiences of the judges are important for the performance of their duties, as well as for the improvement of their social and professional position. Therefore, the topic of this paper is the suggestions for improving the independence of the judiciary, which come from the representatives of the judicial profession. The paper is based on the results of extensive empirical research of the judges from all courts of general jurisdiction in Serbia. For the interpretation of the respondents' answers (N=599), thematic analysis was used, allowing us to further categorize the received statements by the perspectives of the respondents. The conclusion is that judges see the greatest space for improvement in the area of institutional guarantees of independence, while they are significantly less oriented towards guarantees of personal independence. Apart from the theoretical contribution, the paper primarily has a practical goal in advocating social change, i.e. a normative framework based on the guidelines that come from those to whom the regulations refer.

Keywords*: judiciary, judges, guarantees of judicial independence, thematic analysis, Serbia.*

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1. Introduction

The always ever-present issue of judicial independence gains particular in developing countries where various systems for its implementation are still being "tested". Therefore, the subject matter of this paper is suggestions for improving the independence of the judiciary and solving existing problems originating from the judges i.e. employees themselves. Divided into two parts, the paper first provides an overview of the specific social context in which the legal framework of judicial independence is developed, and then it provides an analysis of the theoretical grounds. The second part of the paper presents the perspectives of the judges, obtained through qualitative research, regarding the challenges they face in performing their duties, as well as the profession's proposals for solving these problems.

2. Social context, normative framework of judicial independence, and research objective

The example of the transformation of the social order of Serbia, shows us that various attempts at radical systemic changes have on several occasions failed the expectations of citizens, as well as judges. During the period of blocked transformation (1991-2000), Serbia was going through an economic crisis, a state of civil (pre)war and the international community's sanctions, which is why the improvement of the position of judges was certainly not high on the list priorities (Lazić, 2014, pp. 9-33). The ruling state apparatus largely controlled the economic, political and cultural changes, and consequently, Serbian judges were faced with various types of direct and indirect pressures, illegal dismissals, salary decreases, corrupt practices, etc. Following the democratic changes of the 2000s and the creation of greater political and cultural pluralism, international support (and pressure, if necessary) encouraged the reform of the normative framework in the field of the judiciary (International Commission of Jurists [ICJ], 2016, pp. 4-5).

As in the other Western Balkans countries, this reform was aimed at harmonizing domestic regulations with the European *acquis*. However, many problems are not recent ones, so the accelerated normative change was slowly followed by the substantive *de facto* implementation of the new regulations (Lazić, 2014, pp. 9-33). As for the normative politicization of the judiciary, it was evident in the example of the judicial budget which is divided between the High Court Council and the Ministry responsible for the judiciary. Also, the process of selection of judges, where the appointment is made by the

High Court Council, as an expert body, composition of which now formally guarantees a greater degree of judicial independence (Nikolić, 2021, pp. 121-125). What remains a problem and opens room for concern is the role of the parliament, i.e. "a possible way of politicization of appointments" in case of abuse of entrusted powers for the selection of one part of the High Court Council members (Škero, 2022).

This change in the legal framework, i.e. mainly institutional guarantees of independence (*de jure*), guided and monitored by international partners, failed to bring about the changes judges hoped for (Dabetić, 2023).[1] The great economic dissatisfaction is evidenced by several surveys showing that as many as 89% of judges in Serbia believe that the current amount of salary is not in accordance with the dignity of the judge (Trifunović & Petković, 2017, pp. 8-9, 26). The presence of inappropriate political influence that many judges (almost every second judge (44%)) also reported as an obstacle to the impartial and independent performance of their duties (Judges' Association of Serbia, 2017, p. 47). Career uncertainty, i.e. the selective application of the principle of meritocratic selection should not be disregarded either (as many as 72% of judges believe that the performance of judges is inadequately evaluated, while 59% of them believe that the selection and career development of judges is not transparent), which is why judges in Serbia face serious obstacles to improving its independence (Judges' Association of Serbia, 2017, p. 20, 24).

Despite many challenges, some of which have lasted for decades, unfortunately, professional opinion was generally not respected to a sufficient extent, even in the judicial system reforms, which is why judges often felt like observers of this process. This resulted in feelings of helplessness, dissatisfaction and disappointment, which often led to personal or group withdrawal from any social change process (Golubović, 2007, p. 9). As a result, this paper has special practical importance as its main goal is to restart the political dialogue for the improvement of the guarantees of an independent judiciary and encourage the change of the normative framework in accordance with the recommendations of the representatives of the judicial profession.

[1] A more detailed analysis of the constitutional amendments and their influence on the independence of the judiciary in the process of European integration was tackled in one of the previous papers, therefore, only the basic findings will be presented here (Dabetić, 2023).

3. Theoretical framework

Many different definitions of an independent judiciary may be found in literature, some of them being "...the ultimate legal and political tool for achieving the rule of law" (Đorđević, 2020, p. 373), "... the absence of political and other pressures on this authority, but not the creation of an autonomous system, without any cooperation with other political authorities" (Petrov, 2013, p. 5),"... to perform (judges and courts) duties free of influence or control by other actors, whether governmental or private" (Law, 2023) etc. Although there is no universal and generally accepted definition, it is generally agreed that there are two basic forms of independence: the personal and institutional one. They are inseparable, permeate one another, and can hardly be realized without the other. In other words, selected individuals must obtain certain knowledge and skills, as well as virtues, qualifying them to be a judge. Despite high professional and moral criteria, judges, like other people, are to a greater or lesser extent subject to external influences. Therefore, the guarantees (such as fact-finding procedures, institutional organization of the court, selection procedure, competence of judges etc.) are those that protect judges, while additionally binding them (Fleiner, 2009, p. 94). The experiences of other post-communist countries show that internal socio-economic factors also play an important role in the achievement of an independent judiciary, including successful privatization, transition, protection of property rights, as well as external political factors such as the EU accession process, harmonization of regulations etc. (International Monetary Fund, 2017, 39-96).

If we step aside from this legal definition for a moment, with no intention of neglecting the general social importance of an independent judiciary, we can also consider judges as employees. They cannot completely be defined as "ordinary" i.e. any other employed bureaucratic officer, whose performance is measured by the number of completed submissions, calls made, texts published, deadlines met, etc. In the case of judges, in addition to the number of adjudicated cases, the so-called achieved monthly performance norms, the behaviour of judges is also evaluated, both in the professional and private domain (Posner, 2010, pp. 130-131). Nevertheless, judges share certain common features with other employees in terms that "the correct treatment is reflected in correct actions" and that fair treatment of employees, as well as a productive and dignified work environment has positive effects on performance, as well as vice versa (Dessler, 2007, p. 252). How employees perceive the attitude of their superiors towards them affects work organization, the degree of commitment, the degree of motivation, the sense of belonging,

etc. (Dessler, 2007, p. 252). Altogether, this reflects the organizational culture of the judiciary as an institution, where judges as employees may or may not be satisfied with the existing set of shared values.

4. Empirical framework

4.1. Sample

The analysed data represents part of an extensive empirical research with the participation of 620 judges from all courts of general jurisdiction in Serbia (basic, higher and appellate courts). The quantitative part of the research was conducted during the second half of 2022, by distributing the questionnaire electronically and by mail to all courts in Serbia (a total of 95 courts). The aim was to enable the participation of each of the 1890 judges, as many as there were on the day when the research started.[2] The close-ended questions predominated in the questionnaire, still the topic of this paper is the following open-ended question: "What needs to be done to make the judiciary independent of external/internal influences?"

The sample on which qualitative data processing was performed on this specific question consisted of 457 respondents. Of these, 451 persons declared their gender, with a noticeably higher number of women (Table 1), which is almost double the number of male judges. The largest number of respondents belongs to the group of middle-aged (from 36 to 65 years of age, taking those three categories together), while the sample includes the least number of oldest respondents over 65 years of age. Table 1 also shows that the largest number of respondents come from large and medium-sized cities (from 25,000 to 100,000 inhabitants), then a regional centre (cities up to 500,000 inhabitants), small towns (up to 25,000 inhabitants), Belgrade, and finally villages (below 5,000 inhabitants).

[2] The research started in 2021 and ended in 2023. It was conducted in four stages, and apart from the quantitative part, it also included a qualitative part, in the form of semi-structured interviews (N=52) and focused group discussions (N=3). This paper will deal with one open question from the questionnaire only, the analysis of which was not the subject of any previous papers. More details about the research process and the method of data collection. (Dabetić, 2023).

Table 1. – The structure of respondents in the sample according to gender, age and place of residence

Variable		Number of respondents	%
Gender	Female	307	61.8 %
	Male	144	31.9 %
Years of age	Below 35 YoA	21	4.7 %
	From 36 to 45 YoA	130	29.0 %
	From 46 to 55 YoA	145	32.4 %
	From 56 to 65 YoA	150	33.5 %
	Over 65 YoA	2	0.4 %
Place of residence	Belgrade	71	15.6 %
	Regional centre	94	20.7 %
	Larger and medium-sized cities	181	39.8 %
	Small towns	95	20.9 %
	Villages	14	3.1 %

Source: Author's research

As shown in Table 2, the largest number of respondents stated that they work in a basic court, followed by a higher court, and then the Court of Appeal, mainly in the area of civil proceedings, followed by criminal proceedings, non-contentious proceedings and, finally, in the area of enforcement. Also, the largest number of respondents have been performing their judicial office from 1 to 5 years, followed by the group of oldest respondents who have been employed for over 25 years, while the least number of judges have been performing their judicial office from 6 to 10 years.

In a large number of cases, respondents presented several suggestions in one answer, which is why the content of each answer was analysed in detail. Therefore, the number of answers that were the subject of the final analysis (N = 599) exceeds the number of respondents whose answers were the subject of this particular analysis. We also note that non-informative answers ("*no comment*" = 115 and "*I don't know*" = 5) were previously excluded from the qualitative processing, as well as all answers that related to some personal introspection and emotions of the respondents ("*other*" = 58). The obtained data were primarily interpreted inductively, i.e. from the bottom-up, which, after several repeated readings of the received statements, allowed us to form 9 categories that were further grouped into two broader topics.

Table 2. – The respondents' structure in the sample in relation to employment

Variable		Number of respondents	%
Place of work	Basic court	333	73.3 %
	Higher court	83	18.2 %
	Court of Appeal	38	8.3 %
Duration of office	From 1 to 5 years	132	28.9 %
	From 6 to 10 years	37	8.1 %
	From 11 to 20 years	97	21.3 %
	From 21 to 25 years	80	17.5 %
	Over 25 years	108	23.6 %
Trial area	Civil proceedings	289	63.2 %
	Criminal proceedings	161	35.2 %
	Non-contentious proceeding	66	14.4 %
	Execution	53	11.6 %

Source: Author's research

Thematic analysis is a frequently used method in qualitative research that primarily aims to systematically identify, organize, and provide insight into patterns of meaning within a specific set of data. By focusing on meaning across a set of data, thematic analysis enables researchers to recognize and interpret collective or shared meanings and experiences (Braun & Clarke, 2012, p. 57-71). However, each research method has its advantages and disadvantages, therefore, we faced various challenges when applying the thematic analysis. In the first place, it was certainly a search for repetitions and patterns in the respondents' answers (Vesić, Vujačić & Joksimović, 2018, p. 151). Some statements were already clear at first reading, while others required deeper interpretation and repeated reading. A special problem were ambiguous answers that could be classified into several different categories. The third difficulty resulting from this challenge was the creation of categories within which the obtained statements should be classified (Vesić et al., 2018, p. 151). The mentioned difficulties were overcome by the instrumentalisation of the theoretical framework, i.e. by categorization within general topics, i.e. institutional and personal independence of the judiciary, which enabled us to better understand all the statements received. In other words, the categories are formulated inductively, while the themes are the result of a deductive approach.

4.2. Results

By analysing the answers obtained and coding their content, we initially came up with 10 categories, which we managed to finally group into 9 categories that were further united into two basic, broader topics: institutional (N = 518) and personal (N = 81) independence. In Table 3, the categories are sorted according to the frequency of the respondents' answers, and explained in more detail below, with accompanying examples of the respondents' narratives.

1) The most represented suggestion and perhaps the key institutional problem pointed out by the respondents refers to **the improvement of the financial position and working conditions**. It has several dimensions, the first being a) *the budget of the judiciary.* When we say "budget", we often have in mind only the judges' salaries, and perhaps the fee for maintaining the court infrastructure, or even more vaguely, the "court operation and functioning". Judge Škero exposes this layman's, somewhat naive view, reminding us that hearings in Serbia are postponed due to a lack of paper; that the parties in the proceedings and lawyers have to bring their own paper for the trials to take place, thereby damaging the court's reputation; that due to unpaid bills, judges do not have access to the Internet and cannot use telephones; that the duration of the trial is further delayed, because the costs of experts and lawyers were not paid in a timely manner; that roofs in some courts leak, that judges do not have enough chairs and offices, etc.[3] These and similar problems were pointed out by our respondents in some of the following statements:

> *Form a separate judicial budget to allow for independent judiciary... A separate budget needs to be set aside. At the moment, when using annual leave, 1,500 dinars per day are deducted from our pay. In case of a malignant disease, an associate receives 100% of his/her salary (salary compensation/paid leave benefit). The salary of an assistant ranges from 120,000-150,000 dinars, and in case a judge falls ill with a malignant disease, he/she receives 65% of his/her salary (salary compensation).*

[3] Vida Petrović Škero, Sudski budžet – Zašto sudije moraju da učestvuju u pisanju budžeta za sudove, https://www.emins.org/sudski-budzet-zasto-sudije-moraju-da-ucestvuju-u-pisanju-budzeta-za-sudove/, accessed on 11 August 2023.

Table 3 – Suggestions for improving the position of the judiciary coming from the holders of judicial office

Topics	Categories	Frequency of answer (f)	Typical statements
Institutional independence of the judiciary (*de jure*) (N = 518)	Improvement of financial position and working conditions	211	*Strengthen the economic position and status of judges, adequate number of cases, judicial assistants, and technical equipment.*
	Reducing undue political influence	98	*Remove the influence of politics, nepotism and cronyism, and executive power interference... politicians should not comment on (predict) court proceedings at all.*
	Apply clear and transparent selection and promotion criteria	97	*Ensure the conditions for the election of judges which must be independent and impartial with expertise and worthiness as the exclusive criteria that should be complied with... depoliticize the election of judges.*
	Changes in and adherence to the legal framework	87	*Improve legal solutions in the existing set of judicial laws... effective law enforcement... compliance with norms without exceptions.*
	Reduce the negative influence of the media on the work of the judiciary	25	*Suppress the negative influence of the media and improve reporting objectivity... react to any indirect and direct influence on the court's work ... provide the public with insight into all court decisions, while protecting the privacy of the parties.*
Personal independence of the judiciary (*de facto*) (N = 81)	Introduce training and education as a principle of lifelong learning	45	*An independent judiciary is an educated judiciary... Enable continuous professional training for all judicial office holders, not just a few.*
	Strengthen the integrity of judges as individuals	19	*To build personal and professional identity (as) a relief from external and internal influences... Primarily conscientious, professional, up-to-date, and responsible work of a judge.*
	Raise citizens' awareness of the importance of an independent judiciary	11	*Raise people's awareness and knowledge about the functioning of the system, citizens' trust... about the necessity of an independent judiciary as the foundation of a democratic society.*
	Associate professionally to strengthen judges as a professional community	6	*Stronger engagement of professional associations and notification of individual cases of attempts to influence judges.*

Source: Author's research

b) The second dimension concerns the *amount of salaries*, i.e. increase in monetary income originating from the limited possibilities of judges to possibly earn additional money through other activities related to their basic job. Due to these normative constraints, there is great dissatisfaction with the amount of salary, which is often subject to reductions, since until recently, it was a part of the state budget planning outside the competence of the judiciary (Law on the Organization of Courts, 2023). It should be noted that the amount of salary should correlate with the degree of responsibility imposed by a certain occupation, that is, it should match the level of expertise required for its performance and the scope of work. In the case of judges, it is particularly important, since this is a profession of general social importance requiring a special way of conduct from its representatives, not only in the line of duty, but also in private life.

> *Unlike other professions and branches of government, judges are not allowed to engage in any other work that could contribute to their financial position, which in my opinion is justified. However, if they do not have such a possibility, the salaries of judges should be increased by that ban... Judges should be granted reduced service years and paid a salary that would be a reward for their work and compensation for any sacrifice.*

c) *The number of court staff* is the third important dimension of improving the financial independence of judges as pointed out by the participants. On the one hand, a large number of cases leads to a significant workload for a judge, and additionally, each case requires a large number of administrative actions. It is not that the judges cannot perform all these activities themselves, but they need not undertake all procedural activities independently. The trial is a special process which requires not only expertise but also reasoning as a special mental process from the single trial judge, which is why the respondents appeal to hire more incumbents to assist them in this:

> *Reduce the workload of judges with a large number of cases and administration, each judge should have a judicial assistant, improve the economic position, conditions for retirement, technical equipment of the courts... Enable better organization of judges, i.e. relief from a large number of cases by greater involvement of associates in work on less difficult cases.*

2) The second most represented suggestion of the respondents refers to the **reduction of undue political influence.** In the current system of division of power in our country, the judiciary is defined as the third branch of government, therefore, it will always be in some relationship with the other two branches of government. The respondents' answers showed dissatisfaction with the implementation method of this system of division and balance, which is why the negative political influence is noticeable in different segments of the judiciary.

> *To stop the undue influence of the other two branches of government on the judiciary, which is achieved by establishing mechanisms that ensure the division and balance of power... Remove political influence from every segment of the judiciary... non-interference of the executive branch in the selection of judges and leave it exclusively to the profession.*

3) **Clear and transparent selection and promotion criteria** are third-ranked on the list of problems the representatives of the judicial office are facing. The prevailing opinion is that a) the *selection of judges* is not the result of expertise, competence, worthiness and other moral qualities that every judge should have, but the product of negotiations and interests, with inconsistently applied selection criteria often with a political note, etc. The general conclusion of the respondents is that such an unfair method of selection opens the door to inadequate human resources who will not have the capacity to fight for judicial independence.

> *The first step is selecting honourable and professional people for judges, and not "suitable" people with the "best" connection... Choosing candidates/judges with both theoretical and especially practical knowledge and skills for performing the judicial function, with a strong awareness of the social responsibility of the judicial function, i.e. profession of a judge... Choose the optimal number of judges so that the judicial function is exercised in a truly professional manner (so that quantity does not come at the expense of quality).*

b) With reference to the *performance evaluation method*, a qualitative criterion is used in some countries, and a quantitative one in others, sometimes even a combination of the two, while in some countries the work of judges is not evaluated at all. In the USA and Canada, qualitative criteria are not used at all, while quantitative data on the number of

resolved cases are used as useful inputs for the possible hiring of additional staff, reducing the workload of single trial judges, etc. In Ireland, Great Britain, and Northern Europe (Denmark, Finland, Sweden) the individual work of judges is not evaluated, but the work of the courts is measured qualitatively and quantitatively (Judges' Association of Serbia, 2005/2007, p. 5-6). This issue is not adequately regulated in Serbia, so previous surveys show that 86% of judges are not satisfied with the current, regular method of evaluation, which is predominantly oriented towards quantitatively measurable results, i.e. the so-called "monthly performance norm" (Trifunović & Petković, 2017, p. 8-9, 26). This attitude also correlates with our results:

> *Ensure career development according to the results that judges achieve... Fair promotion... define criteria for assessment of judge's expertise... ensure that only fellow judges should decide on judges... that the members of the High Court Council are only from among judges... Introduce the adoption of a written decision on selection and promotion with the right to appeal, since it is the only sector where the selection is made without a reasoned written decision on the selection and promotion.*

4) The fourth most common suggestion is **changes in and adherence to the legal framework**, showing dissatisfaction with the level of legal culture of the authorities and the current way of law enforcement, but it also confirms the lack of two-way communication between authorities. This type of communication is a key feature of any democratic system, and apart from enabling cooperation between government officials, it gives judges as employees the feeling that they are working in a fair working environment. Therefore, the need for judges to be actively involved in the processes of changes in legal framework is understandable as it directly concerns them, and so is the need to explain to them why certain decisions were made and to know in advance on what principle these decisions will be made (Dessler, 2007, p. 262).

> *Changes to the legal framework contributing to the preservation and protection of the judge's integrity and reputation in society (reduced service years, financial position, sanctioning of any behaviour that, under the circumstances, is aimed at disrespecting judges and the judicial profession)... Applying applicable law without exception which is quite enough for achievement of an expected goal... To establish European standards for judicial functions.*

4.3. Discussion

The thematic analysis of 599 responses provided by judges of basic, higher, and appellate courts resulted in a total of nine categories or factors that can improve the independence of the judiciary. Due to the limited scope of the work, but with no intention of ignoring the importance of each category of suggestions, only the most frequent suggestions within institutional independence (N=518) will be the subject of scientific discussion. A very large disparity in the representation of suggestions within one topic shows that the vast majority of judges see the improvement of judicial independence primarily through *de jure* changes.

As for the first and most represented category, *improvement of financial position* (N=211), the fact that judges raise the question on the autonomous court budget, salary amount, the number of court staff and pensions is largely in line with the current unsatisfactory situation and solutions. Like all employees, judges also need external and internal equality which is a key variable in determining the price of work (Dessler, 2007, p. 217). The first type of equality refers to the price of work in other similar organizations, i.e. the price of work in a court must be similar and appropriate in comparison with the salaries of other state authorities, for the judicial office to attract and retain professional and qualified individuals (Dessler, 2007, p. 217). If we take into account the specificity of the judicial duty, which requires moral qualities and worthiness among other things from its holder, we believe that it should be higher than the other bureaucratic officials. On the other hand, internal equality refers to the level of compensation of other employees in the same organization, which is represented in the legal system of Serbia through salary grades, implying that all judges of the same rank receive the same salary. The problem is the lack of clear standards for promotion, therefore, judges can hardly plan and develop their careers.

Such a solution leads us to the second category for improving the position of judges in Serbia, that is, *reducing undue political influence* (N=98), and the third category, *selection and promotion based on an objective assessment of performance* (N=97). Unfortunately, the political influence in the selection of judges in Serbia is not an isolated case, because politicians usually have a similar *modus operandi*. History, as well as examples of other countries (e.g., political factors play an important role during the election of presidents and senators in the USA), confirm that the selection of future judges is not based solely on the objective qualifications and abilities of the proposed candidates. When we take into account that the main goal of politicians is

to stay in power as long as possible, this kind of behaviour is completely understandable and anything to the contrary would defy logic (Peretti, 2002, p. 109). Moreover, unclear and non-transparent selection criteria, waiting too long for promotion, or fear of rejection can lead to a greater degree of meeting the expectations of those in power, be it the minister of justice, hierarchical superiors, or even a "self-governing" body (Fiket, Pavlović, & Pudar, 2017, p. 53, 77; Guarnieri, 2003, p. 226). Therefore, the desire of the respondents to fundamentally change the selection process is completely understandable and justified.

Finally, the frequency of responses i.e. their grouping around the fourth most represented category, *change of the normative framework* (N=87), shows that the research participants are primarily oriented towards the reform of regulations, which they assume would consequently have an impact on different segments of personal independence. In other words, judges are predominantly normatively oriented, i.e. they are very inclined to see the world in which they work (and often live) as a "world of laws". This finding is understandable, considering their legal education and that representatives of legal professions generally have a higher degree of legal culture than other members of society. What is interesting is that the respondents view the independence of the judiciary primarily through an institutional prism, i.e. rather narrowly, as they do not perceive themselves as agents of social change, but primarily as employees. This view can be a consequence of a great trust in the regulative power of laws. On the other hand, it can also be a mirror of specific cultural and professional practices characteristic for countries with a communist past, where judges were not nurtured to be independent, rather as an "extended arm" of the executive.

5. Conclusion

Everyone has their own vision of an independent judiciary and these are the opinions of a part of Serbian judges that we may or may not agree with. What certainly cannot be denied is that job satisfaction, and especially remuneration, is one of the prerequisites for greater employee motivation, but also a guarantor of good and responsible performance of tasks. Therefore, it is understandable why the issue of improving material guarantees is so highly rated among the respondents. Although we agree that the existing compensation is insufficient for the dignified life of a judge and his/her family in Serbia, which is expressly foreseen by European and domestic legislation, we recall a somewhat controversial question by judge Richard Posner: if

salaries were significantly increased, would the job of a judge attract only those who want to be judges or also those who want to enjoy pecuniary and nonpecuniary benefits (relatively secure government job, independence at work, free time management, etc.) (Posner, 2010, pp. 169-170.)? Posner is primarily referring to the motivation of judges for court work, which should certainly have a dose of altruism and the desire to help others in need. Aware of the risk that for the job of a judge could opt those whose with instrumental and lucrative motives, we believe that increasing salaries in Serbian society as it is today can only contribute to a greater degree of economic independence of judges.

Nevertheless, the question arises: if the problem of an independent judiciary is solved by raising salaries, isn't that the easiest way to solve it? If the budgetary funds are insufficient, as could often be heard in the public political discourse, why don't we then take a loan to improve the judiciary, just as we take out a loan for road construction? Isn't the problem a bit deeper and more complex? We believe that this is the case, since personal and institutional independence are inseparable, and the improvement of normative guarantees would certainly contribute to a better position of judges, however, it would not automatically make judges as individuals absolutely independent. Independence is influenced by many aspects of the judge's personality, as well as the level of legal education and legal culture of a country, i.e. as argued by Fleiner (2009), "the judiciary depends not only on good laws and good legal principles, but also on procedures, the legal system and legal culture, as well as on the position of the court and judges." (p. 119). Which is why both sides of judicial independence needs to be nurtured and improved equally, encouraging judges to adjudicate expertly and live with dignity.

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NEZAVISNOST SUDSTVA KAO PUT I CILJ – REČ STRUKE

APSTRAKT: Mišljenja i iskustva nosilaca sudijske funkcije značajna su za obavljanje njihove dužnosti, kao i za unapređenje društvenog i profesionalnog položaja. Stoga su predmet ovog rada predlozi za unapređenje nezavisnosti sudstva koji dolaze upravo od predstavnika sudijske struke. Rad se bazira na rezultatima opsežnog empirijskog istraživanja u kome su učestvovale sudije iz svih sudova opšte nadležnosti u Srbiji. Prilikom tumačenja odgovora ispitanika (N=599) korišćena je tematska analiza, koja nam je omogućila da dobijene iskaze dalje kategorizujemo u skladu sa perspektivama ispitanika. Nameće se zaključak da sudije najveći prostor za unapređenje vide u oblasti institucionalnih garancija nezavisnosti, dok su značajno manje orijentisane ka garancijama personalne nezavisnosti. Osim teorijskog doprinosa, rad primarno ima praktičan cilj – zagovaranje društvene promene, odnosno normativnog okvira na osnovu smernica koje dolaze od onih na koje se ovi propisi i odnose.

Ključne reči: *sudstvo, sudije, garancije nezavisnosti, tematska analiza, Srbija.*

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DETERMINANTS OF EFFECTIVE TAX RATES OF PUBLIC ENTERPRISES AS AN INDICATION OF TAX AVOIDANCE ON PROFIT TAX

ABSTRACT: Scientific research related to the avoidance of calculation and payment of profit tax in public enterprises is very rare, due to the belief that public enterprises do not avoid paying profit tax because their owner is the state, city, or local government unit. The research conducted in this paper has shown that the largest public enterprises in Serbia, which have a high profitability rate, as well as capital-intensive enterprises, have a higher effective tax rate and do not use tax planning techniques to avoid taxes. These findings can be considered scientifically adequate. All other determinants used in this paper did not show a statistically significant impact on the effective tax rate. When deciding and implementing the profit tax rate policy, as well as tax exemptions, the state must take into account the specificities of the operations of public enterprises and assess the effects of these policies on this sector of the economy.

Keywords: *public enterprises, effective tax rates, tax avoidance.*

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1. Introduction

Public enterprises are significantly different from other business entities in many ways (Pavlović, Knežević, Bojičić, 2022). According to the Serbian Law on Public Enterprises, public enterprises can be established by different political authorities: The Republic, the autonomous province, or the local self-government unit. Public enterprises in Serbia are governed by the supervisory board and the director (Law on Public Enterprises, Article 15). The supervisory board comprises members appointed by the political authority that has established the public enterprises (in the majority) and an employee representative (in the minority).

Public enterprises are all firms that have separate legal existences and provide goods and services of specific public interest, where most of their revenue is earned. They operate partially as commercial entities in terms that return on investment is the primary measure of their profitability. However, they partially operate as any other governmental unit with many benefits from this safeguarded position. In practice, those enterprises are less directly controlled by the political authority that has established them.

At the beginning of 2021, 549 public enterprises operated at the national, provincial and local levels in Serbia. They employ about 115,000 workers, 10 percent of the total employees in the Republic of Serbia (Ladjevac, 2021). They represent a huge national fixed investment, although their economic effects are quite disappointing (they contribute to 5.9% of total income generated in Serbia by all business entities).

In order to research them, we have chosen a specific sample of those entities consisting of 49 public enterprises owned by the big cities in Serbia. Those 49 public enterprises were chosen because they had the highest revenue during the observed period. In the context of effective tax rates, the position of public enterprises implies that public enterprises need to pay taxes, but at the same time, they can do tax planning to minimize the tax burden. This feature makes them quite interesting in academic research and analysis in the context of effective tax rates. The corporate tax rate in Serbia is 15% annually, and it is considered a high rate compared with the neighboring countries: in Bosnia, it is 10% as well as in Nort Macedonia, while it is 9% in Montenegro and 12% in Croatia (Eurofast, 2020).

The higher is the rate, the higher is the tax evasion by all business entities. According to the PriceWaterhouseCoopers and World Bank report, if the total tax rate increases by 1%, it is associated with a 3% increase in tax evasion (PWC and World Bank, 2014). All businesses, whether private

or governmental, believe that the tax rates constrain their normal business operations, so they will try to avoid them. However, this avoidance is quite specific in the context of public enterprises. On the one side, their political connections could make them pay fewer taxes than other entities (Adhikari, Derashid & Zhang, 2006; Meng, Wang & Zhou, 2008; Rijkers, Arouri & Baghdadi, 2017), but on the other side, they need to pay more taxes because their owner is a governmental unit, so not paying taxes or doing tax planning could be unacceptable practice if the governmental unit like municipality or city is financed through income taxes paid by public enterprises.

Bradshaw, Liao and Ma (2019) found that state-owned enterprises' (SOEs) taxes are a dividend to the controlling shareholder, which is the state in this case, and that SOEs experienced lower tax avoidance than other entities. Eberhartinger and Samuel (2021) found that state activities and monitoring incentives affect SOEs' tax planning in German SOEs. "SOEs only engage in less tax planning relative to privately owned firms (i.e., non-SOEs) if the SOE's state owner benefits from the tax revenues" (Eberhartinger & Samuel, 2021). While prior research interprets lower tax planning in SOEs as an indicator of governmental power over the firm, the results of Eberhartinger and Samuel (2021) "imply that state owners, just like any other shareholder, can have different monitoring incentives". So, it seems that public enterprises in our analysis should be incentivized to pay as low taxes as possible.

This topic seems to attract academic attention worldwide, and according to our knowledge, this is one of the rare studies that has taken into analysis Serbian public enterprises. That is why we have tried to correlate the effective tax rate with its major determinants in order to find evidence about public enterprises' tax behavior in terms of tax avoidance. According to academic researchers, major contributing factors or determinants of effective tax rates are the size of the entity, profitability, leverage, inventory levels, and capital intensity (Mocanu, Constantin & Răileanu, 2021; Pattiasina, Tammubua, Numberi, Patiran & Temalagi, 2019; Kovermann, 2018; Ann & Manurung, 2019; Mohd & Saad, 2019 etc.).

Our study contributes to the literature because it is the first one to examine the effective tax rate of Serbian public enterprises correlated with the contributing factors that influence the behavior of public enterprises in the context of tax management. The study's result can be useful for policymakers in formulating policies to establish an effective tax framework for public enterprises to increase the payment of taxes in the government budget or before considering tax concessions. Our results should also interest managers of public enterprises in order to use tax planning more carefully and avoid aggressive tax avoidance, as well as possible tax law violations.

2. Literature review

Wang, Xu, Sun and Cullinan (2020) find that corporate tax avoidance can range from legal activities with the legitimate use of tax rules to the other extreme consisting of violation of tax laws. They "consider theoretical developments and the related empirical findings about the interconnected issues of measuring tax avoidance and the possible causes and outcomes of corporate tax avoidance" (p. 793). Our paper will use this approach to support the idea that contributing factors to tax avoidance depend on its expected outcomes. Tax avoidance depends on many factors, some of which are measurable, such as accounting performance indicators (Mocanu et al., 2021; Pattiasina et al., 2019; Kovermann, 2018; Ann & Manurung, 2019; Mohd & Saad, 2019 etc.), some of them are behavioral (Amberger, Eberhartinger & Kasper, 2015) and other are governance-based and have indirect influence (Kovermann & Velte, 2019) on tax avoidance. Tang (2020) synthetizes the empirical findings regarding tax avoidance in China, and four main areas were highlighted: "1) the mechanisms through which Chinese firms avoid income taxes; (2) the effects of government ownership and agency problems on tax avoidance; (3) tax avoidance and political connections; and (4) the roles of book-tax conformity, tax enforcement, and corporate governance" (p. 327).

Payne and Raiborn (2018) discuss the ethical dimension of tax avoidance. Aggressive tax avoidance is related to a corporate entity's tone at the top. "The conclusion is drawn that the use of the letter of the law to avoid payment of taxes sorely needed by governments for the good faith provision of public goods and services is ethically unacceptable" (Payne & Raiborn, 2018, p. 469). Lenz (2020) did a thorough ethical analysis of tax avoidance based on Kant's deontological approach and demonstrated that "aggressive tax avoidance as a special case of operating on the edge of legal boundaries is potentially immoral" (p. 681).

Koverman and Velte (2019) found that "various aspects of corporate governance, such as incentive alignment between management and shareholders, board composition, ownership structure, capital market monitoring, audit, enforcement and government relations, and other stakeholders' pressure have a strong influence on corporate tax avoidance" (p. 1). They also demonstrate that "corporate governance institutions not only have the potential to increase tax avoidance, making firms more profitable but also to limit tax avoidance to a level where the arising risks do not outweigh the benefits" (Koverman & Velte, 2019, p. 1) Amberger et al. (2015) found that behavioral aspects of corporate managers affect tax planning activities.

Vitols (2023) found a correlation between tax avoidance and employee representation at the board level.

Although we do not underestimate the importance of those environmental factors on tax avoidance in our analysis, our analysis is based on the idea of public enterprises' specific determinants of tax avoidance. Mocanu et al. (2021) found that larger companies with better financial performance are less inclined toward tax avoidance. "The link between financial performance (ROA) and scaled BTD is significant but negative. In other words, the more profitable a company is (namely, the higher its ROA), the less inclined towards tax avoidance that company is (the lower its scaled BTD)" (p. 2013).

On a sample of Indonesia's listed companies, Pattiasina et al. (2019) examined the capital intensity effect on tax avoidance. They found that capital intensity does not influence tax avoidance, while audit committee composition and institutional ownership have influenced it. Koverman (2018, p. 683) found that "tax avoidance has a negative effect on the cost of debt and that tax risk increases the cost of debt." On a sample of Indonesian manufacturing firms, Ann and Manurung (2019) showed "that liquidity, profitability, and firm size have a negative and significant effect on the level of tax aggressiveness, while inventory intensity has a positive and significant effect, but related party debt has no significant effect on the level of tax aggressiveness" (p. 105).

Mohd and Saad (2019) found "that a firm's size, profitability, the extensiveness of a foreign operation, capital intensity and leverage are the determinants of the tax avoidance of multinational companies in Malaysia" (p. 74).

Knežević and Pavlović (2023) showed "that state-owned companies in Serbia owned by local municipalities and cities use tax planning to obtain lower effective tax rates than the statutory rate, therefore using their preferential tax status from size and ownership" (p. 503).

Barbera, Merello and Molina (2020) "contributed to the current debate on the need for harmonization of corporate income tax in the European Union (EU)" (p. 427). The same authors found a "significantly positive relationship with leverage and a negative with size and financial profitability." They also "found that ETR have different determinants depending on the countries analyzed. The European authorities must consider the differences in the ETR determinants because they hinder taking measures limiting tax competition" (Barbera et al., 2020, p. 427).

McClure (2018) uses a structural dynamic model and finds that average non-tax costs decrease pre-tax earnings, and tax risk disclosure decreases tax avoidance. He states that "the cross-sectional dispersion in effective tax

rates primarily arises from differences in the ability to avoid taxes rather than differences in non-tax costs". Delgado, Fernandez-Rodrıguez and Martınez-Arias (2018) investigated the "relationship between ETR and company size in Germany to test tax planning-political power versus political cost theories" and found that "leverage, inventory intensity and return on assets are significant determinants of the ETR".

Other studies presented in the following paragraphs explain the determinants of effective tax rates for commercial entities.

Kraft (2014) found that "larger companies and growth firms with higher free cash flow appear to have higher ETR" (p. 1). "Leverage and operating lease expenses tend to be negatively correlated with the ETR", underlines Kraft (2014, p. 1). Wang, Wu, Yang, Li and Liu (2019) examined the effect of ownership concentration and state ownership on tax reporting practices in China's listed firms and found that "firms with concentrated share ownership have lower effective tax rates and that firms whose largest shareholders are government-related have higher effective tax rates compared to firms whose largest shareholders are non-government related." Fernández-Rodríguez, García-Fernández & Martínez-Arias (2021) explored effective tax rates in emerging economies and found that "both business variables (size, leverage, asset composition, and profitability) and institutional factors (statutory tax rate, level of development, index of economic freedom, GDP growth, and institutional quality) have a significant effect on the tax burden." Yinka and Uchenna (2018) examine the the tax rate of Nigerian listed firms and found that "effective tax rates were lower than the statutory tax rate during the period and that there are differences in ETR from one sector of the economy to the other" (p. 19). Yinka and Uchenna (2018) further reveal that "larger and more profitable firms face a high tax burden, while firms with high leverage, capital intensity, and tax expert (auditor type) face lower ETR" (p. 19). Yahaya and Yusuf (2020) revealed that "firm size and leverage have a positive and significant impact on aggressive tax avoidance, while a firm's profitability and age have a negative and significant impact on tax avoidance" (p. 101). Kusbandiyah and Norwani (2018) indicated in their paper that "size and family ownership have no negative influence on aggressive tax avoidance." Meanwhile, "foreign ownership positively influences aggressive tax avoidance" (p. 132).

Other aspects of tax avoidance, such as corporate social responsibility and hypocrisy, dominate the academic sphere of research on this topic (Alsaadi, 2020). Alsaadi (2020) shows "a positive association between firms' CRS activities and tax avoidance, and firms headquartered in low financial-tax

reporting conformity jurisdictions are more likely to engage in CSR to hedge against the potential negative impact of tax avoidance" (p. 639). Abid and Dammak's (2022) results show that "firms with high CSR scores are more likely to engage in aggressive tax avoidance. The findings also show that firms audited by high-quality auditors are more likely to get involved in CSR to hedge against the potential consequences of aggressive tax avoidance practices" (p. 618).

Huang and Zhang (2020) find that "financial expert CEOs are associated with a more aggressive tax avoidance policy", while Wen et al. (2020) find "that there is a negative association between directors with foreign experience and tax avoidance, suggesting that these directors can help constrain their firms' tax aggressiveness." "The negative relation between directors with foreign experience and tax avoidance only holds when directors' foreign experiences are derived from countries or regions with higher investor protections." García-Meca, Ramón-Llorens and Martínez-Ferrero (2021) examined "the effect of chief executive officers (CEOs) narcissistic tendencies regarding corporate tax avoidance and found that firms with larger audit committees help to control the consequences of CEO narcissism on tax avoidance" (p. 223). Jihene and Moez (2019) examined "the effect of CEO compensation on corporate tax avoidance". They found "a negative association between CEO compensation and tax avoidance in well-audited firms, supporting the moderating effect of audit quality on the relation between CEO compensation and tax avoidance" (p. 131).

According to all of the above-presented studies, we have chosen 4 determinants of the effective tax rates for public enterprises: a) leverage, b) capital intensity, c) profitability and d) level of inventory and several different measures of tax avoidance (ETR – effective tax rate – ETR acr accounting based effective tax rates and ETRZ and ETRc are cash flow based effective tax rates).

Based on all the above presented, the following relationships are expected:

Table 1. Determinants of the effective tax rates for public enterprises and expected relationships

Dependent variable	Independent variable	Expected relationship
ETR (effective tax rates)	Leverage measured by Debt to equity ratio	Negative, firms are expected to use tax planning to avoid taxes
ETR (effective tax rates)	Capital intensity	Negative, firms are expected to use tax planning to avoid taxes
ETR (effective tax rates)	Profitability measured by ROA and ROE	Positive, firms are not expected to avoid taxes
ETR (effective tax rates)	Inventory level	Positive, firms are not expected to avoid taxes

Source: Authors'

3. Methodology

Effective tax rates are of various kinds (Zimmermann, 1983), and many researchers use different rates in order to formulate better whether companies apply tax planning or not. In our case, accounting and cash-flow-based rates are used. Accounting effective tax rate is the ratio of total tax expense divided by the accounting pre-tax profit, while Cash flow-based effective tax rate is a ratio of cash outflow for taxes divided by the net cash flow from operations. Zimmerman's (1983) effective tax rate uses total tax expense minus deferred taxes as the numerator and operating cash flow as the ordinator.

All those rates reach different results in terms of firms' tax planning activities and measure differences in public enterprises' tax avoidance. Effective tax rates described as ETRa (ETR accounting-based), ETRc (ETR cash flow-based) and ETRz (ETR based on Zimmerman's 1983 paper) are used as dependent variables.

The sample consists of the 49 largest Serbian public enterprises, and variables are taken from the PKS Partner database (https://pkspartner.rs/sr/). The ETR and their various modalities are calculated for 2020 and not compared with other years to eliminate the possibility of changes in accounting policies after Covid 19 and its effects on the tax rate**.**

Table 2 shows the industry sample distribution. Most of the firms in the sample are in the oil and gas sector, water supply and city hygiene firms, community firms and energy production and distribution firms.

Table 2. Sample distribution per industry

Industry	Number of firms	%
Electrical industry	3	6,1%
Oil and Gas and Coal	7	14,2
Road industry	4	8,1
Production and distribution of heat energy	5	10,2
Postal services	1	2,04
City travel services	2	4,0
Water supply and city hygiene company	7	14,2
Foreign trade in armaments and defense equipment	1	2,04
Forrest management	2	4,0
Community Company	5	10,2
Parking lot	1	2,04
Funeral services	1	2,04
Ski management	1	2,04
Technics and connections	1	2,04
City land	1	2,04
City green market	1	2,04
Other	6	12,2
Total	49	100%

Source: Authors' own calculations

4. Results

The study results are presented in two sections: descriptive statistics and correlation analysis.

4.1. Descriptive statistics

Table 3 shows the dependent and independent variables (effective tax rates, debt to equity, ROA, ROE, capital intensity, and inventory variable) at their minimum and maximum with the respective mean and standard deviation.

Table 3. Descriptive statistics of main variables in the research

Descriptive Statistics

	N	Minimum	Maximum	Mean	Std. Deviation
ETRa	49	.0000	.9911	.192422	.2466914
ETRc	49	.0000	.7719	.119402	.1867692
ETRZ	49	.0000	.4777	.074818	.1094766
DE	49	.0000	16.2000	1.442857	3.0755081
ROA	49	-.2940	.7150	.025143	.1219423
ROE	49	-.1460	1.0960	.059388	.1853427
INVA	49	.0000	.2323	.052876	.0638795
CAPITINT	49	.0000	.3478	.017279	.0508769
Valid N (listwise)	49				

Source: Authors' own calculations

According to the statistics, ETRa has a minimum of 0 and a maximum of .9911, while ETRc has a minimum of 0 and a maximum of .7719. Zimmermann ETR labeled in the table as ETRZ has a maximum of .4777. This shows that different tax rate formulas reach different results for the same sample of companies, therefore affecting the effective tax rate results. Debt The debt-to-equity ratio maximum is 16.2 while the minimum is 0, meaning that some companies do not use long-term debt in business while others show huge indebtedness. ROA minimum is negative -.2940 while the maximum is .7150 with a mean of .025143. In the same period, companies' ROE minimum was also negative -.1460, while the maximum was 1.0960, with a mean of .059388. The inventory ratio has a minimum of 0 and a max. of .2323 with a mean of .052876. The capital intensity ratio has a minimum of 0 and a max. of .3478 with a mean of .017279.

4.2. Correlation analysis

When testing and answering the research questions, we prepared a Pearson Correlation analysis shown in Table 4.

Table 4. Pearson correlation between effective tax rate modalities and ratios of intensity and profitability

		ETRa	ETRc	ETRacr	DE	ROA	ROE	INVA	CAPITINT
ETRa	Pearson Correlation	1	-.084	.195	.170	-.033	.034	-.110	.039
	Sig. (2-tailed)		.565	.180	.243	.823	.819	.452	.792
	N	49	49	49	49	49	49	49	49
ETRc	Pearson Correlation	-.084	1	-.064	.028	-.008	.082	.029	.056
	Sig. (2-tailed)	.565		.663	.850	.954	.576	.846	.701
	N	49	49	49	49	49	49	49	49
ETRz	Pearson Correlation	.195	-.064	1	-.135	.117	**.377****	.092	.033
	Sig. (2-tailed)	.180	.663		.356	.423	**.008**	.530	.824
	N	49	49	49	49	49	**49**	49	49
DE	Pearson Correlation	.170	.028	-.135	1	-.017	.219	-.261	.036
	Sig. (2-tailed)	.243	.850	.356		.905	.131	.070	.808
	N	49	49	49	49	49	49	49	49
ROA	Pearson Correlation	-.033	-.008	.117	-.017	1	.252	.168	.082
	Sig. (2-tailed)	.823	.954	.423	.905		.080	.249	.573
	N	49	49	49	49	49	49	49	49
ROE	Pearson Correlation	.034	.082	.377**	.219	.252	1	-.147	.228
	Sig. (2-tailed)	.819	.576	.008	.131	.080		.315	.115
	N	49	49	49	49	49	49	49	49
INVA	Pearson Correlation	-.110	.029	.092	-.261	.168	-.147	1	-.070
	Sig. (2-tailed)	.452	.846	.530	.070	.249	.315		.633
	N	49	49	49	49	49	49	49	49
CAPITINT	Pearson Correlation	.039	.056	.033	.036	.082	.228	-.070	1
	Sig. (2-tailed)	.792	.701	.824	.808	.573	.115	.633	
	N	49	49	49	49	49	49	49	49

**. Correlation is significant at the 0.01 level (2-tailed).

Source: Authors' own calculations

When ETRa is correlated with ROA and inventory level, it is shown that the relationship is negative but not statistically significant. All other correlations between ETRa, capital intensity, and debt-to-equity ratios have shown a positive relationship, although not statistically significant.

When ETRc is correlated with the independent variables, only one negative correlation is evident, and this is a correlation between ROA and ETRc. All other correlations are positive. None is statistically significant.

When ETRz is correlated with debt to equity (leverage), this relationship is shown to be negative, while all other correlations are positive. The correlation between ETRz and ROE is statistically significant and positive (corr. .377 with the sign. .008)

5. Discussion

Various studies find that profitability correlates with no tax avoidance, meaning profitable firms have higher effective tax rates (Ann & Manurung, 2019; Barbera et al., 2020; Yahaya & Yusuf, 2020). Our findings suggest that ETRz, ETRa and ETRc are higher for firms with higher profitability (higher ROE). These variables are all positively correlated, but ROE and ETRz show a significant correlation at the level of .377 with the sign. of .008. This means that public enterprises with huge equity and higher return on equity in Serbia are those that pay higher income taxes. However, in other countries, such as Germany and France, profitability and effective tax rates are shown to be negative (Barbera et al., 2020). So, country-specific positions and tax rates influence the relationship between profitability and effective tax rates. So, our results are country-specific and cannot be extended beyond our research.

Regarding capital intensity ratio and ETR, our results show that ETRa, ETRc, and ETRz are all positively correlated with capital intensity. Firms that are capital-intensive pay higher taxes. Our results are in line with Barbera et al. (2020), who found that "when focusing on the economic structure, CAPINT is only significant in Germany and Italy but opposes the expected direction." Pattiasina et al. (2019) find no relationship between capital intensity and tax avoidance. So, we can conclude that in Serbia public enterprises, capital intensity and tax avoidance are positively associated, and Serbian public enterprises pay higher taxes if they purchase more fixed assets.

Barbera et al. (2020) explained "the positive significant effect of leverage by the tax particularities of each country, specifically the introduction of temporary limitations to the deductibility of interests in response to the crisis period and for budgetary reasons." Mocanu et al. (2021) claim that the leverage

ratio seems to significantly and positively impact the book-tax differences for the sample of companies accused of tax avoidance. The influence of leverage on the effective tax rate should be negative because firms in debt avoid tax payments, but we did not find any conclusive evidence about that. The same holds true for the inventory variables and effective tax rates.

In the case of Serbian public enterprises, only one relationship has been found to be statistically significant (ETRZ and ROE). The correlation between ETRz and ROE is statistically significant and positive (corr. .377 with the sign. .008), meaning that 37.7% of ETRZ variations could be explained by the ROE profitability variable.

6. Conclusion

Regarding our expected relationships between ETR and capital intensity, if the capital intensity is higher, public enterprises will pay lower effective tax rates, meaning they will have a better possibility of avoiding taxes. This does hold true in our research. For all three variables of ETR, the capital intensity relationship is positive. So, we found conclusive evidence that public enterprises with more fixed assets do not avoid taxes in Serbia.

When the relationship between leverage or debts and ETR is considered, our results confirm that public enterprises with higher debts pay lower taxes only when the effective tax rate is measured by the ETRZ, but not for other measures. So, there is no conclusive evidence about this relationship in our case.

We have expected a positive relationship between profitability and ETR, and this holds true for the one measure of profitability, such as ROE, and all three measures of effective tax rates (ETRa, ETRc, ETRZ). So, only this fact could be considered conclusive evidence about profitability (measured by ROE) and effective tax rates.

We have expected a positive relationship between inventory and effective tax rates, which holds true for the ETRc and ETRZ measures but not when ETRa is used. Again, no conclusive evidence is found in Serbia.

In conclusion, we can add that profitable public enterprises (when profitability is measured by ROE) do not avoid taxes, as well as public enterprises that engage many fixed assets (capital intensity is high). For public enterprises having huge leverage (debts) and huge levels of inventory, we cannot find conclusive evidence about the relationship with the effective tax rates.

Some of our results are in line with expectations, but many of them are not. So, we advise future researchers to investigate public enterprises

individually on a case study basis because it seems that Serbian public enterprises are involved in tax management and tax planning, but determinant factors (besides profitability ROE measured and capital intensity) cannot be found. It is evident that each public enterprise follows its individual tax planning policy and avoids payment of taxes wherever possible and in line with the tax laws. Although large public enterprises in Serbia have political power, they do not use it to avoid taxes. Our analysis does not consider small and medium-sized public enterprises. Future research should be done to gain a better understanding of this problem and should take into analysis public enterprises of all sizes.

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DETERMINANTE EFEKTIVNE PORESKE STOPE JAVNIH PREDUZEĆA KAO INDICIJA IZBEGAVANJA POREZA NA DOBIT

APSTRAKT: Naučna istraživanja vezana za izbegavanje obračunavanja i plaćanja poreza na dobit u javnim preduzećima su veoma retka, a to se duguje činjenici da za javna preduzeća postoji jasno ubeđenje da ona ne izbegavaju plaćanje poreza na dobit jer im je vlasnik država, grad ili jedinica lokalne samouprave. Istraživanje obavljeno u ovom radu pokazalo je da najveća javna preduzeća u Srbiji koja imaju visoku stopu profitabilnosti, kao i da kapitalno intenzivna preduzeća imaju višu efektivnu poresku stopu, ne koriste tehnike poreskog planiranja u svrhu izbegavanja poreza. Ovi dokazi se mogu smatrati naučno adekvatnim. Sve ostale determinante korišćene u ovom radu nisu pokazale statistički značajan uticaj na efektivnu

poresku stopu. Kada se odlučuje i donosi politika stope poreza na dobit, kao i kod poreskih oslobođenja, država mora da uzme u obzir specifičnosti poslovanja javnih preduzeća i da vidi efekte tih politika i na ovaj sektor privrede.

Ključne reči: *javna preduzeća, efektivna poreska stopa, izbegavanje poreza na dobit.*

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REASONS AND FORMS OF LEGAL HERMENEUTICS

ABSTRACT: Hermeneutics, or interpretation, can be defined as a procedure to clarify something that is incomprehensible, unclear or insufficiently understandable, insufficiently clear, and to interpret it to the level of comprehensibility. Hermeneutics can rightfully be called the art of understanding. Legal hermeneutics as an art is, in principle, a very complex process that can also be characterized as a process requiring the application of knowledge from various scientific fields. Legal knowledge, in the specific case of interpreting legal norms by procedural bodies, cannot be disputed. However, legal knowledge is not always sufficient to ensure adequate interpretation and application of law in a given case. The need for legal hermeneutics arises in situations where there is a discrepancy between the spirit and letter of a legal norm, when the legal norm is unclear, contradictory, ambiguous, or even polysemous, and of course, in situations where there is an absence of legal norms regulating a specific issue. The above indicates the importance and dimension of the application of legal hermeneutics as a timeless skill in the field of law and the application of

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legal norms. In line with the topic, the paper analyzes several important questions: how to define the term legal hermeneutics, what are the reasons leading to the need for legal hermeneutics, and finally, which characteristic forms of legal hermeneutics can be singled out and presented more closely, according to the criterion of means or methods of interpretation.

Keywords: *interpretation of law, hermeneutics, legal norms, value judgements, theory of law.*

1. Introduction

Hermeneutics, or interpretation, can be defined as a procedure to actually clarify something that is incomprehensible, unclear or insufficiently understandable, insufficiently clear, and to interpret it to the level of comprehensibility. Hermeneutics can rightly be called the art of understanding, or clarification, and it originates from Greek mythology. In this regard, the authors point out that "the youngest of the twelve Olympian gods – Hermes – was the mediator, transmitter and interpreter of the will of the gods" (Srejović & Cermanović, 1979, p. 473). In modern theory, one can often read the position that interpretation is "the skill of understanding a text and discovering its meaning" (Vukadinović & Stepanov, 2003, p. 400), or also that it is "the skill of avoiding misunderstanding" (Beti, 1988, p. 53), as well as the fact that in contemporary hermeneutics "linguistic universality and linguistic environment are very important, bearing in mind that the understanding of the world is based on speech and understanding" (Aćimović, 1999, p. 109). In addition to this, it should also be emphasized that "the basic interest of hermeneutics is language and especially language in its written form, and accordingly, hermeneutics, above all, represents learning about the skill of understanding a written text" (Spaić, 2014, p. 147).

Some authors emphasize that different texts can be the subjected to interpretation, and that therefore attention should be paid to this, because, ultimately, which form of interpretation will be applied depends primarily on the type of text being interpreted. One of the oldest divisions of hermeneutics as a skill implies a dichotomous division – into "*hermeneutica sacra* and *hermeneutica profana*" (Vasić & Čavoški, 1996, p. 230). On the other hand, a number of authors advocate the position that no division should be made according to the subject of interpretation, but that the emphasis when interpreting any text should be the usefulness of the interpreted in practical application. This is especially true for legal hermeneutics.

Here, Medar (2014) points out that "all humanities are based on the interpretation of texts, whereby the interpretation of law is one of the most complex and most subtle issues of general legal theory and philosophy of law, the importance of which stems from the fact that it realizes the interdependence between legal theory and positive legal disciplines, on the one hand, as well as between them and the practical application of law, on the other hand. The practical significance of the interpretation of law is that it finalizes the positive legal regulation, making it ready for immediate application" (pp. 224-225).

According to some authors, "interpretation works in all stages of the application of a legal norm – from the recognition of a legally relevant relationship, through the choice of a legal norm and the determination of facts and normative qualifications, to the explanation of a new normative action" (Visković, 1989, p. 145; Medar, 2014, p. 225).

Ćorić (2013) points out that "the position of the interpreter assumes that he is a step higher and ahead in relation to the one to whom they are interpreting something. Establishing equality between reality and the legal text, which in its formulation often bears the burden of time, tradition and social relations of the time in which it was created, is an extremely difficult and demanding job" (p. 321).

In accordance with the topic and the introduction, the paper will discuss several important questions – how to define the concept of legal hermeneutics, what are the reasons that lead to the need for legal hermeneutics, and finally, which characteristic forms of legal hermeneutics can be distinguished and presented more closely, according to the criterion of means, that is, the method of interpretation.

2. The concept of legal hermeneutics

In order to apply the legal norm, "as a previous step, it is necessary to perform an interpretation. Sometimes it will be easy to interpret a legal norm, but in difficult cases it will be necessary to apply different methods, arguments and techniques in order to determine and choose the sense of the legal norm that is best used" (Tomić, 2020, p. 106). It is almost impossible to say "that in some legal system there is a legal norm that can be applied without interpretation" (Visković, 2001, p. 248).

In the triadic hermeneutic phenomenology represented by Emilio Betti, "a special place is occupied by normative interpretation, which covers the field of legal science and theology. In contrast to the contemplative orientation of historical interpretation, the interpretation of lawyers and theologians has a

directional or normative task. Legal hermeneutics is undoubtedly an integral part of general hermeneutics, in which it has always had great significance" (Medar, 2014, p. 224; Betti, 1988, p. 111).

According to Lukić (1995), "interpreting a legal norm is nothing more than determining the true meaning of a norm, a meaning that is not always easy to discover" (p. 223). Kelsen (2012) believes that interpretation is "an act of the mind that accompanies the law-making process in its progression" (Kelsen, 2012, p. 73; Kelsen, 1949, p. 133). Vrban states that "interpretation in law represents finding the meaning of legal expressions, statements, messages and texts" (Vrban, 1998, p. 80).

It is important to note that some authors specify the term interpretation in their review of legal hermeneutics. Namely, Lukić (1995) states that there are "two types of interpretation – one is the interpretation of law in a narrower sense, i.e. the interpretation of law through the existing legal norm, and the other is the interpretation of law in a broader sense, i.e. the interpretation when the norm does not exist, when there is legal gap, that is, the search for a norm that will fill the legal gap" (p. 223). According to Ćorić (2021), "it seems that life in the world of legal norms is easy: you have rules of conduct that guide you in many life situations and what will happen to you if you do not behave as determined. Legal norms predict the future, in a certain way, and give us guidelines for life. Although the legal system tries to cover all areas of social life with its rules, there are situations that cannot be foreseen at the time of the adoption of this regulation" (p. 31).

The interpretation of law in the narrower sense is also designated in theory as the immediate object of interpretation, while the interpretation of law in the broader sense is also designated as the indirect object of interpretation.

Interpretation of law in the narrower sense "exists when the immediate object of interpretation is one or several closely related legal norms. That is why it is said to represent the true interpretation, according to the position that only the existing legal norm can be interpreted" (Mitrović, 2008, p. 237).

When interpreting legal norms, "it should be borne in mind that no norm has a completely precisely determined meaning, except perhaps for technical legal norms" (Matijašević Obradović, 2016, p. 29). In fact, legal norms acquire meaning "only when they are brought into connection with other norms, their sets, and even with the entire legal system of which they are a part, which means that a concrete norm as an immediate object of interpretation is only a reason for interpreting the legal system as a circumstantial, intermediate object. Therefore, the subject of interpretation is always twofold: either one norm, i.e. their smaller or larger set, or entire legal areas and the entire legal

system. In this way, the so-called circles of interpretation are obtained, where the first circle consists of one or more norms that are the immediate subject of interpretation, the second circle is of closely related norms, the third circle is of one or more narrower or wider sets of related norms, etc., all the way to the legal system itself" (Lukić, 1977, p. 324).

Interpretation in a broader sense exists "when the immediate object of interpretation is not one or several closely related legal norms, but one or more sets of closely related norms or the entire legal system. Based on this, interpretation in a broader sense can be said to represent the interpretation of legal norms that exist, and not norms that 'do not exist'. However, the interpretation of the legal system, based on its 'spirit', is very rarely used, that is, only in one and very rare case can the entire legal system be the subject of direct interpretation. This is a case of filling several large legal gaps, i.e. areas, based on the spirit of the entire legal system. This happens because law can never fully encompass life, which is always more complex and faster than law. From this discrepancy arise legal gaps, i.e. social relations that are not regulated by law, although they should be due to social interest. But not all legally unregulated relationships are legal gaps. A legal gap is not represented by social relations that are regulated only by an individual norm, nor by relations for which the social interest does not require that they be regulated by a general or individual legal norm. Beyond those two areas, therefore, there is the area of legal gaps" (Mitrović, 2008, p. 238).

The interpretation of law, namely, represents "only one subtype of a very complex and diverse phenomenon of interpretation in general. It is a complex intellectual activity that consists of determining the true, real meaning of a legal norm. Interpretation of law is a necessary constant activity, without which the existence of law cannot be imagined" (Lukić, 1977, p. 318).

Observed from the aspect of the obligation of interpretation and from the aspect of the subject who performs the interpretation, there is a very significant division into authentic (original) interpretation, judicial interpretation and doctrinal (interpretation of legal science).

Ćorić (2015) states that "the procedure and effects of interpretation are completely different when they are performed by state bodies and when they are performed by non-state bodies. The interpretation of acts performed by state bodies, if the same act was passed by the body that interprets it, is binding for the body and its subordinate state bodies, as well as for other subjects to which these norms apply. The legislative body takes an exceptional approach to the interpretation of the acts it passes. If it does so, the same interpretation is called authentic interpretation or interpretative law, and forms an organic unity with the

act that was the subject of interpretation. Courts, on the other hand, approach the so-called casuistic interpretation of law, because they do it in order to sum up a specific situation on the occasion of which they have to make a certain decision under certain general legal norms" (p. 521). Thus, judicial interpretation of legal provisions is "binding only for that specific case in which the interpretation is performed. In theory, it has no binding force for any other case, in criminal proceedings. In practice, the situation is somewhat different. Court decisions, especially those of higher courts, have a significant impact on other procedures and decisions, especially those of lower courts. This points to the conclusion that judicial practice affects the interpretation and application of legal norms in criminal proceedings" (Lukić, 1977, p. 324). Finally, doctrinal (interpretation of legal science) "is given by legal science and is a type of optional interpretation that is of great importance, although the goal of this type of interpretation is not the direct application of a legal norm to a specific case. It is also said that doctrinal interpretation belongs to the category of directly non-authoritative interpretations, but still indirectly very important for practical application and creation" (Lukić, 1977, p. 325; Bejatović, 2014, p. 46; Matijašević Obradović, 2016, p. 32).

It is interesting to mention the classification of hermeneutics into binding and non-binding interpretation.

Namely, "the binding interpretation is the one performed by the entities that exercise some form of legal authority and to whom the powers are assigned by the legal norm that regulates the competence of those bodies" (Antić, 2015, p. 622; Tomić, 2020, p. 110). Miličić (2003) builds on this position by stating that "explanations of only certain individuals and/or institutions have binding power" (p. 354). The category of binding interpretation includes authentic and judicial interpretation, as previously presented.

Non-binding interpretation is the interpretation "made by individuals in order to establish a legally permissible framework and align their behavior with this framework. A special type of interpretation that can be classified as a non-binding is the interpretation of legal science, which is considered extremely significant because it can significantly influence the entities that make regulations, as well as those that apply them" (Antić, 2015, p. 622).

3. The reasons for legal hermeneutics

It is completely justified to ask why do we even need to interpret legal norms, that is, why are they not so rarely unclear, insufficiently clear or even ambiguous? In his work, Tasić (1938) arouses interest with the question: "How does it come to be that a seemingly simple procedure such as sending

the signs of a norm and understanding them can be a problem? Because the expression of the norm is one thing, and the meaning is another" (p. 273).

In legal theory, the interpretation of law as an art attracted attention in the first half of the 20th century. In this period, they began to "deal more seriously with the problem of legal interpretation, albeit to a limited extent, due to the fact that the treatment of interpretation in law at that time was reduced to the application of analogy" (Joksić, 2015, p. 313). From the very beginning, the need to interpret legal norms was often associated with "failures in the work of police and judicial authorities. They primarily refer to a large number of canceled verdicts, unfounded deprivation of liberty and attempts to find justification for such actions in the so-called legal action. From a historical point of view, such situations were known before, so it is interesting to review the provision of Article 5 of Hammurabi's Code, according to which – *If a judge presides over the process and renders a verdict, and if he later cancels his verdict and it is proven that the verdict he made, is annulled, he will receive twelve times the punishment, which was determined in that process, and he will be publicly driven from the judge's chair, so that he will no longer return to the judge's place in the process*" (Joksić, 2015, p. 313). Here one can actually see the true sense of the reasons that speak in favor of legal hermeneutics. Namely, "without a properly learned norm, there is no application of it either. The subject to whom the norm applies cannot adjust his behavior to it if he does not know it, or worse, if he does not know it properly. Then the subject will violate the norm, even though he has the desire to harmonize his behavior with the request it sets" (Lukić, 1961, pp. 18-19).

Legal hermeneutics finds the reasons for its application in the fact that before applying a legal norm to a specific case, "it is necessary to first determine its content and its meaning. This work on research and determination of legal regulations cannot be purely mechanical. By its very nature, an abstract general rule of law cannot be realized by itself as an automatic mechanism, but requires a conscious and human will to adapt its application to a given situation. That action consists in defining the meaning of a legal text and determining its content, considering its application to a specific factual situation" (Stojković, 1941, p. 151). It can also be noted here that modern legal norms are characterized by a general approach, which corresponds to different social relations. And that can pose quite a significant problem in the area of interpretation. Namely, "the more social relations a legal norm has to cover, the more general it is. The more general the norm, the harder it is to recognize a specific case in it" (Vuković, 1953, p. 99).

Interpretation is, therefore, "a condition for the application of law. Only then can it be said that the right has been exercised, that is, that it is effective" (Mandić, 1971, p. 128).

Here, Ristivojević (2009) notes that problems in the application of legal norms "obviously arise when signs are not understood in the same way" (p. 348). According to Žižić (1988), "the first cause of misunderstanding is the language – certainly the most important system of signs that human society uses today" (p. 431). Anyone who "uses even one language knows how imperfect, sketchy or undeveloped it can be" (Ristivojević, 2009, p. 348). Another cause of misunderstanding, according to Lukić (1961), is "knowledge of the language. It is quite possible that both the subject sending the signs and the subject interpreting them do not know the language well enough" (p. 7). The third cause of misunderstanding, according to Vuković (1953), is the most significant one – "it will often happen that the sender of signs is not completely sure what meaning he wants to attach to the signs, that is, he does not know what he wants" (p. 7).

Vukadinović and Stepanov (2003) singled out four basic reasons for approaching the interpretation of law. Those reasons are presented below in Table 1.

Table 1. The reasons for approaching the interpretation of law

	Reason	**Explanation of the reason**
First reason	The relationship between complex social relations and the attitude of the legislator	The extraordinary complexity of social reality, the layering and dynamics of the social-political reality that the lawmaker regulates, especially when it comes to a general norm, cannot always be fully and precisely expressed in words.
Second reason	Peculiarities of linguistic expressions	Linguistic expressions themselves do not have unique and precise meanings, but are always more or less polysemic. In other words, linguistic expressions can have (and often do have) multiple possible meanings. Therefore, the identification of their adequate meaning (in a given situation) is often very difficult, complex and relatively unreliable.

	Reason	Explanation of the reason
Third reason	Dynamics of changing social relations	Social relations (economic, political, cultural, religious) that are regulated by the norms are changing, so when changing older norms, the meanings of those norms should also be changed, in order to adapt them to the changed relations, while some old, obsolete or inappropriate meanings should also be changed and be given new meanings so that norms can really influence social life and be effective.
Fourth reason	Change of values and ideologies	It should be borne in mind that the values and ideologies that determine the content of a legal norm also change, which also causes changes in the meaning of that norm over time.

Source: Vukadinović & Stepanov, 2003, pp. 404-405.

4. Division of legal hermeneutics according to means (methods) of interpretation

Of all the divisions of interpretation, "probably the most significant is the division according to the means or methods of interpretation. The very act of interpretation in the narrowest sense of the word refers to the application of these means. Hence, the application of one of these tools is itself called an interpretation, which is linked to that tool. Thus, interpretation using language is called linguistic interpretation, using logic logical interpretation, etc." (Ristivojević, 2009, p. 363). Authors often classify the division of legal hermeneutics according to the means (methods) of interpretation into the group of general rules of interpretation.

Therefore, when interpreting any legal norm, one starts from these general rules of interpretation (Matijašević Obradović, 2016, p. 29). This group definitely includes:

- linguistic interpretation – this interpretation determines the meaning of the norm by linguistic rules that are standardized and codified in the science of language. According to Lukić (1961), "linguistic interpretation is the first task of the interpreter and it determines the linguistic meaning of the legal norm. The method of linguistic interpretation uses the rules to which language is subjected as a means of expressing legal norms. These rules are found in the science of language, which

can be divided into parts according to the elements of language that are the subject of their study. Thus, the basic elements of language are words, expressions, sentences and punctuation marks. Therefore the linguistic interpretation can be divided into lexical, grammatical, syntactic and punctuational interpretation" (p. 66);

- logical interpretation – this interpretation checks and determines the meaning of the norm by applying legal logic to the meanings obtained by other means of interpretation: linguistic, systematic, historical and objective ones. First of all, this interpretation "serves to check the meaning obtained by linguistic interpretation" (Mandić, 1971, p. 184; Lukić, 1961, p. 104). There are "four basic principles of logic that are used in this type of interpretation: the principle of sameness, the principle of contradiction, the principle of exclusion of the third and the principle of sufficient reason" (Mandić, 1971, p. 184);
- systematic interpretation – this interpretation determines the meaning of the norm by connecting it with other norms in the legal order. According to Vuković (1953), "every set of various details needs to be arranged in order to make it concise and thereby facilitate the knowledge of the set. This arrangement is achieved by systematizing according to one criterion in order to create a system. If by any chance more than one criterion were used, then the system would not be unique, and could not even be called a system. A system that is made correctly, on the basis of one standard, creates different relationships (equalities, similarities, opposites) between the details that make up a part of the system. Those relationships enable knowledge of parts of the system, although only to a certain extent" (pp. 119-120);
- historical-legal interpretation – this interpretation determines the meaning of the norm by examining the impact of various social circumstances on the adoption of the legal norm, as well as the types, but also the reasons for changes in meaning which the legal norm experienced from adoption to interpretation;
- objective (teleological) interpretation – this interpretation examines which and what kind of consequences are produced by different meanings of the norm, and then compares and ranks those consequences according to the quantity and quality of the achieved goal. The key issue with this method of interpretation is "the way in which the goal of the legal norm is determined, because this is how its true meaning is determined" (Ristivojević, 2009, p. 368). When "the goal of the norm is determined, then the result of interpretation by other methods

is compared with the goal of the norm. It should be determined which of the results of the interpretation, reached by other methods, achieves the goal of the norm in the best way and to the greatest extent. This is where the value assessment of the outcome of the interpretation is carried out from a social point of view" (Vuković, 1953, p. 110);

– comparative law interpretation – with this interpretation, the true meaning of the norm is arrived at by comparing the same or similar norms that are part of at least two parts of two different national laws.

5. Conclusion

Legal hermeneutics as a skill is, in principle, a very complex process that can also be described as a process that requires the application of a multidisciplinary approach, i.e. the application of knowledge from different scientific fields. Legal knowledge, in the specific case of interpretation of legal norms by the procedural authorities, cannot be contested, however, legal knowledge is not always sufficient to ensure adequate interpretation and application of law in a given case. A legal norm, no matter how clear and complete it may seem at first glance, is often general, abstract, with hidden content or outdated by life situations that occur in practice, and it is necessary to correctly and completely determine its true and full meaning. Therefore, in the field of legal hermeneutics, the knowledge and skill of all those who participate in its application can be best observed and emphasized.

It is important to note that it is very wrong to define the field of legal hermeneutics as the exclusive activity of acting representatives of the judiciary, which is often done in practice. On the contrary, representatives of legal doctrine play an important role in the field of legal hermeneutics, because, more often than not, they are the objective party that has the opportunity to see the wider dimension of the legal norms being interpreted. Accordingly, it should be emphasized that the interpretation of law, that is, legal hermeneutics, carries with it a great responsibility for those who participate in that interpretation.

The paper discussed several important questions – how to define the concept of legal hermeneutics, what are the reasons that lead to the need for legal hermeneutics, and finally, which characteristic forms of legal hermeneutics can be distinguished and presented more closely, according to the criterion of means, and methods of interpretation. We should not lose sight of the fact that the need for legal hermeneutics arises in situations where there is a certain bypassing of the spirit and letter of the legal norm, when the legal norm is unclear, contradictory, twofold and even manyfold, and of course, in

situations where there is no legal norm that would regulate a certain question. The above indicates the importance and dimension of the application of legal hermeneutics as a timeless skill in the field of law and the application of legal norms.

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RAZLOZI I OBLICI JURISTIČKE HERMENEUTIKE

APSTRAKT: Hermeneutika, odnosno tumačenje može se opredeliti kao postupak da se nešto što je nerazumljivo, nejasno ili nedovoljno razumljivo, nedovoljno jasno, zapravo razjasni, tj. protumači do nivoa razumljivog. Hermeneutika se sa punim pravom može nazvati veštinom razumevanja. Juristička hermeneutika kao veština u načelu je veoma složen proces koji se može označiti i kao proces sa potrebama primene znanja iz različitih naučnih oblasti. Pravničko znanje se, u konkretnom slučaju tumačenja pravnih normi od strane organa postupka, ne može osporiti, međutim, pravničko znanje nije uvek dovoljno da bi se u datom slučaju moglo osigurati adekvatno tumačenje i primena prava. Potreba za juristočkom hermeneutikom javlja se u situacijama kada postoji određeno mimoilaženje duha i slova pravne norme, kada je pravna norma nejasna, kontradiktorna, dvosmislena ili čak i višesmislena, i naravno, u situacijama odsustva pravne norme koje bi regulisale određeno pitanje. Rečeno ukazuje na značaj i dimenziju primene juristočke hermeneutike kao vanvremenske veštine u oblasti prava i primene pravnih normi. U radu se, shodno temi, analizira

nekoliko važnih pitanja – kako opredeliti pojam jurističke hermeneutike, koji su razlozi koji vode ka potrebi jurističke hermeneutike, i konačno, koji se karakteristični oblici jurističke hermeneutike mogu izdvojiti i bliže predstaviti, shodno kriterijumu sredstava, odnosno metoda tumačenja.

Ključne reči: *tumačenje prava, hermeneutika, pravne norme, vrednosni stavovi, teorija prava.*

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MOBBING AS RETALIATION AGAINST WHISTLEBLOWERS

ABSTRACT: *Directive (EU) 2019/1937 of the European parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law prohibits retaliation against whistleblowers, particularly in the form of coercion, intimidation, discrimination, unfavorable or unjust treatment. This potential of relation to EU anti-discrimination legislation is not entirely clear. The current limited judicial practice from the Czech Republic still lacks clear answers. The aim of this paper is to assess and analyze the relationship between EU legislation on whistleblower protection and anti-discrimination legislation.*

Keywords*: whistleblower, retaliation, mobbing.*

1. Introduction

Mobbing is a form of hostile behavior occurring in the workplace. This social phenomenon is gaining more and more attention due to its adverse effect on the health and work performance of individuals who are exposed to it. However, the frequency and severity of the abuse of mobbing as retaliation against whistleblowers escapes increased public attention.

In order to bring about redress, it is necessary to understand the use of mobbing as a means of punishing whistleblowers, who are singled out and humiliated for their actions in an effort to prevent corrupt and illegal practices.

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The aim of this paper is to evaluate and analyze the relationship between EU legislation on the protection of whistleblowers and anti-discrimination legislation. Further this paper describes the forms and consequences of mobbing in the workplace, including its observable consequences for the victim (the whistleblower), his surroundings, and the overall negative impact on the society where such behavior occurs. Subsequently, it describes legislatively anchored measures serving to protect whistleblowers in the workplace at the level of the Czech Republic as well as related EU legislation.

These findings in the matter of mobbing of whistleblowers in the workplace, will help map the current situation of the use of bullying as a form of retaliatory measures against whistleblowers. They will also be useful to design sets of proposals and recommendations that can potentially lead to improvements in the area and contribute to increasing transparency, safety and fairness in the working environment, and to find an effective solution.

2. Non legislative view of mobbing, bossing and staffing as forms of bullying in the workplace

Mobbing has long been associated with bullying in the workplace, but in reality this word itself is closer to psychological abuse or psychological terror. An apt comparison was introduced into psychology as a pack attack on an intruder trespassing into a foreign territory (Lorenz, 1963). This situation was later compared to the behavior of people during workplace bullying (Leymann, 1990).

Later, mobbing came to be seen as bullying in the workplace between colleagues, together with bullying by superiors (Bossing) and bullying by subordinates (Staffing). All of these can be found under the collective name Bullying (Occupational Safety Research Institute of the Czech Republic, 2016).

Mobbing represents a systematic process directed against the victim, which at first glance may seem like pranks or small pranks to non-participants, but even if it does not show obvious signs of bullying in the true sense of the word, its effects on the psychological state of the victim can be immense and it is only a matter of time when the victim can no longer bear such treatment and breaks down psychologically.

The basic principles of mobbing are the iron regularity of attacks by the aggressor or their group and long-term pressure. The attacks are carried out subtly and covertly, but even so, it creates consistent pressure on the victim without the slightest sign of compassion, with the aim of harming

the victim, damaging her work results, mental state, private life and good reputation, whereby sooner or later she will be forced to leave her job position (Svobodová, 2008).

Other forms of workplace bullying are bossing and staffing. Bossing again means manifestations of bullying in the workplace, but in this case the master worker is the superior of the victim or victims. By this action, the latter usually seeks to enforce the subordinate's obedience, adaptation to his own intentions, or does so with a view to discouraging the subordinate worker from his job position, if not from the company as such (Chromý, 2014).

Indicators of bossing can include, for example, excessive control of work duties and behavior in the workplace, unjustified criticism, putting down or ridicule in front of colleagues, as well as the deliberate creation of psychologically demanding situations and limiting the necessary conditions for the proper performance of work, such as withholding key information, limiting the necessary resources etc. (Chromý, 2014).

The consequences of such tension will appear sooner or later, and thus the initiator of the coercion will gain additional ammunition, with which he can escalate the terror towards the subordinate or thus receive a valid reason to proceed to disciplinary measures, which are, however, suddenly justified and therefore the victim he loses the slightest chance of any support from his surroundings. Under these circumstances, it can be assumed that the victim will not endure this situation for long. Either he collapses, or he gives up and asks for a transfer of the place of work, or for the termination of the employment relationship (Ministry of Labour and Social Affairs of the Czech Republic, 2023).

On the other hand, staffing is a form of bullying where a superior worker is the victim and his subordinates play the role of aggressors. The motivations for their actions can be different, from jealousy of the success of a promoted colleague to a simple reluctance to accept a new superior who is supposed to replace their favorite former executive (Beňo, 2003).

However, his expressions are quite unambiguous. Together, the collective initiates the sabotage of the superior's activities. They can hide from him essential information necessary for decision-making processes, they can deliberately reduce the results of the departments entrusted to him, repeatedly file complaints about his dealings with them and, of course, boycott any of his efforts to resolve conflicts. Everything can eventually escalate, and even though the executive is significantly more stable in his position, he does not have many options to solve the situation. This fact can significantly affect his psychological health and negatively affect his further success at work (Chromý, 2014).

The common features of all types of workplace bullying, regardless of the relative position of the attacker and the victim, is the negative impact on both the work group or society where the bullying takes place, and of course also its victim. The consequence of bullying in the workplace for the company as a whole can be a decrease in productivity, i.e. a decrease in work efficiency, which will adversely affect the company's income and may cause damage to the company's reputation. This is also related to the more frequent absence of some employees, the weakening of work teams, and more employee resignations. If the company discovers the problem of bullying, it must invest significant resources in solving it (Ministry of Labour and Social Affairs of the Czech Republic, 2019).

On the other hand, the victims themselves are particularly affected by the psychological side of the bullying they have experienced. Dvaenportová described the consequences of bullying as a sleep disorder, inability to concentrate, irritability and a tendency for the victim to withdraw into herself. Depending on the time, this can progress to unhealthy weight fluctuations, a tendency to avoid the scene of bullying, depression, feelings of anxiety, up to the use of addictive substances to relieve the burden experienced, panic attacks and, in extreme cases, self-destructive tendencies. All accompanied by an effort to minimize the time of their stay in the place where the victim is exposed to bullying (Davenport, Schwarz & Elliot, 2005).

2. Legal protection of whistleblowers against bullying in the workplace in the Czech Republic

Until recently, there was no legal regulation in the Czech Republic preventing whistleblowers from retaliatory measures. Some laws, such as Act No. 198/2009 Coll., on equal treatment and on legal means of protection against discrimination and on the amendment of certain laws (hereinafter referred to as the "Anti-Discrimination Act") were devoted to it in more detail. Its task was to prevent discrimination against persons of different race, ethnic origin, religion, gender, age, sexual orientation, disability or belief (§2 Act No. 198/2009 Coll.).

Among these "disadvantaging" elements with the possibility of provoking a discriminatory reaction from the surrounding area, whistleblower activity can also be counted to a certain extent. A law to protect whistleblowers was being prepared for a long time in the Czech Republic, but it was not successfully voted on several times. However, sooner or later its approval was inevitable due to the increased interest of the European Union in this

particular legislative regulation. Indeed, in October 2019, the Union adopted Directive (EU) 2019/1937 of the European Parliament and Council on the protection of persons reporting violations of EU law (hereafter referred to as Directive 2019/1937) and strove for its implementation in the legislation of the member states.

Directive 2019/1937 requires Member States to establish effective reporting channels and to introduce effective measures to protect whistleblowers from reprisals. The aim of these activities is to create an environment in which, if they have a well-founded suspicion about the progress or planning of an illegal act, they can report this fact without fear of imminent retaliatory measures. Until recently, there was no legal regulation in the Czech Republic preventing A similar situation as until recently for the issue of whistleblowers, however, continues to apply in the field of workplace bullying.

In the Czech Republic, there is no specific law that deals exclusively with the problem of workplace bullying, however motivated. When dealing with this situation, employers are thus dependent on tracing and deriving from other legal regulations, such as Act No. 262/2006 Coll., the Labour Code (hereinafter referred to as the "Labour Code"), Act No. 251/2005 Coll., on Labour Inspection, the Anti-Discrimination Act or Act No. 89/2012 Coll., the Civil Code (hereinafter referred to as the "Civil Code"). Bullying can be indirectly found in these regulations in §4 and §4a of the Labour Code, which determine the legislation governing labour relations (§4 Act No. 262/2006 Coll.).

Furthermore, the issue of bullying in the workplace is marginally dealt with by §301 of the Czech Republic Labour Code, which obliges employees to make appropriate efforts in the performance of work, quality performance during working hours, compliance with the law and responsible treatment of the employer's resources and interests, i.e. also with their colleagues, because intentionally negative influencing other colleagues is certainly against the interests of the entire company and therefore also of the employer (§301 Act No. 262/2006 Coll. Czech Republic Labour Code). Subsequently, §302 of the Labour Code specifically obliges superiors to "create favorable working conditions and ensure safety and health protection at work" (§302 Act No. 262/2006 Coll.).

In the Czech Republic, following the mentioned EU directive, on 1 August 2023, the new Act No. 171/2023 Coll., on the protection of whistleblowers (hereinafter referred to as "171/2023 Coll.") came into force, which should hopefully finally bring order to this issue.

The law clearly defines a notification as the transmission of information about a possible illegal act, the originator of which is a person with whom the

whistleblower is or has historically been in an employment relationship. This act has the characteristics of a criminal offense or a misdemeanor punishable by a fine of up to CZK 100,000, or violates this law or other European Union legislation in selected areas (§2 Act No. 171/2023 Coll.), but at the same time contains certain exceptions which, according to this Act, cannot be regarded as notification of illegal activity (§3 Act No. 171/2023 Coll.). These can be, for example, obligations to ensure confidentiality in the performance of certain professions or to preserve the protection of information. At the same time, the law warns against communicating facts that could threaten the important security interests of the Czech Republic (§3 Act No. 171/2023 Coll.).

The law also clearly defines the retaliatory measures against which it is tasked to protect whistleblowers. Specifically, these are actions or omissions in connection with the whistleblower's work or activity motivated by his decision to report, and which have the potential to cause harm to the whistleblower. Specific examples include invasion of privacy, restriction of information, intentionally disproportionately negative assessment of work performed, unjustified changes to the place of work, job description or remuneration for work performed and, of course, unjustified termination of employment. In addition to the whistleblower, his relatives, colleagues, subordinates and employers, legal entities and projects related to the whistleblower are also protected by law from these expressions (§4 Act No. 171/2023 Coll.).

There are also mechanisms for the protection of the whistleblower, which he acquires when the whistleblower uses the methods of submission in the specified manner and to the specified authorities (§7 Act No. 171/2023 Coll.). In a prescribed manner, we mean the internal reporting system that the law requires mandatory entities such as public procurement contractors, companies with more than 49 employees or public authorities performing activities in the field of civil aviation, maritime transport or activities in the oil and natural gas sector to set up (§ 8 Act No. 171/2023 Coll.).

With this system, the obliged entities are supposed to help make it easier for whistleblowers to file a report, and at the same time, in this event, the establishment of an authorized person is expected, who will be responsible for the proper handling of the submitted reports. Its task will be to communicate with the appropriate authorities regarding the procedure for investigating received notifications and to inform the notifier back about the progress of the process according to the appropriate measures (§9 Act No. 171/2023 Coll.).

The law also establishes in §10 the conditions for the selection of an authorized person, his duties when performing this position, including the handling of the notification received and the choice of subsequent procedures

for its verification or handing over to the responsible authorities (§11 Act No. 171/2023 Coll.) and the rights of the employer when choosing it. In the same way, the procedures of the Ministry in relation to the receipt and investigation of notifications, communication of information, archival activities and control activities are determined by law (Chapter 3 Act No. 171/2023 Coll.).

Last but not least, the law sets the rates for offenses for all parties involved who would attempt to distort or otherwise abuse or contradict the measures or procedures established by the law in any way. These rates can reach up to a million Czech crowns, if they are revealed and proven (Part 4 Act No. 171/2023), because it is he who should ensure the safety of his subordinates and resolve the situation (§302 of Act No. 262/ 2006 Collection).

In contrast, the Anti-Discrimination Act in the Czech Republic focuses much more on manifestations of discrimination and bullying, which it describes in more detail for its purposes. The law defines the differences between direct and indirect discrimination, what behavior similar to discrimination is objectionable and, conversely, what is considered permissible under specific conditions (§2 to §7 Act No. 198/2009 Coll.).

However, the common feature of both regulations is the prohibition of neglecting or discriminating against the persons for whose protection the law was created in the work environment, and the fulfillment of these protective measures is mandated by both laws to the employer. In other words, the employer is obliged to ensure equal conditions for all its employees without distinction, and in the event of a violation of their integrity, it is forced to resolve the situation in accordance with the procedure established by law.

However, unlike the Act on the Protection of Whistleblowers, the Anti-Discrimination Act in §14 amends Act No. 99/1963 Coll., the Code of Civil Procedure, in its updated version and thus allows for the so-called reversal of the burden of proof. In principle, this act consists in the fact that if the plaintiff manages to present to the court facts from which it can be deduced that the plaintiff has been a victim of discrimination, it is up to the defendant to convince the court that there was no discrimination and that the principle of equal treatment was not violated treatment (§14 Act No. 198/2009 Coll.).

If the whistleblower feels exposed to bullying at the workplace and intends to resolve the situation, he must first report this fact and its circumstances in appropriate places in an appropriate manner. The essence of bullying as defined in §4 paragraph 2 of Act No. 171/2023 Coll. must also be fulfilled. The law directly names termination of employment or restriction of performance of service, demotion, imposition of disciplinary punishments, change of job classification, change of place of employment, but also not

allowing professional development, unauthorized request of medical reports, or unauthorized interference with the privacy of persons (Article 1 §4 of Act No. 171/2023 Coll.), further §27 paragraph 2 of Act 171/2023 Coll. exposes the whistleblower or a person close to him to retaliatory measures, or allows retaliatory measures against the whistleblower or a person close to him (§27 par. 2 and 4 of Act No. 171/2023 Coll.).

Whoever commits one of these offenses and it is proven that he was motivated to commit it by filing a report, may be punished according to §27, paragraph 7 of Act No. 171/2023 Coll. by a fine of up to CZK 1,000,000 from the labour inspectorate (except, for example, at the Ministry of the Interior of the Czech Republic (MVČR), where the labour inspectorate would need permission from the MVČR to investigate, if the inspectorate does not receive it, the matter will be investigated by the Ministry of Justice of the Czech Republic).

However, the question arises to whom to report anti-whistleblower bullying? It is the correct procedure to contact the authorized person again following a violation of §2 paragraph 1 d) point 11 of Act No. 171/2023 Coll. or a superior worker/employer and inform him that there is a violation of §301 of the Labour Code? Act No. 171/2023 Coll. does not directly mention the reporting of retaliatory measures, however, the retaliatory measures will meet the statutory conditions for filing a report according to §2 of Act No. 171/2023 Coll.. Subsequently, the report would be accepted by the relevant person and proceed in the same way as for the acceptance of a normal report on illegal activity according to §12 of Act No. 71/2023 Coll. The whole matter would then go to the Ministry of Labour and Social Affairs, which would impose corrective measures on the company and set deadlines for their implementation with the possibility of inspection by the labour inspectorate (§22 of Act No. 171/ 2023 Coll.).

However, the remedy itself will have to be arranged by the superior worker or the employer, whose obligation this is also according to §302 of the Labour Code. The second option is to look for a direct superior or employer in order to solve the situation (especially if it is specifically a case of bossing) and leave out the whistleblowing manager. After all, problems regarding bullying should also be reported to the superior in accordance with the instructions from all manuals on the issue of bullying issued by the Ministry of Labour and Social Affairs. The superior worker is obliged to ensure favorable working conditions according to §302 of Act No. 262/2006 Coll., which undoubtedly solves workplace bullying and prevents retaliation among employees.

Omitting the whistleblowing manager from the entire process could act as a certain form of simplification. On the other hand, no third party would be involved in the events and therefore no form of objective control from the external environment of the organization could occur. At the same time, a whistleblowing manager would probably be able to investigate the whole situation more objectively than a senior employee, but without more specific knowledge about the common methods and wider contexts in his usual operation.

Therefore, the authors´opinion in this case is that the best possible course under the current circumstances is to report the ongoing retaliation to both. This should lead to an acceleration of the entire correction process on the part of the manager and at the same time to an objective assessment of the whole situation by the whistleblowing manager, which could be especially useful in the event that the aggressor or one of them is a superior employee. At the same time, in this way, external control over compliance with the adopted measures would be guaranteed and everything would be approached according to the defense measures established by Act No. 171/2023 Coll. to protect whistleblowers.

3. Mobbing in the workplace and Directive (EU) 2019/1937 of the European parliament and of the council of 23 october 2019 on the protection of persons who report breaches of Union law

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 october 2019 on the protection of persons who report breaches of Union law makes demonstrative enumeration of retaliation forms against whistleblowers on workplace:

a) suspension, lay-off, dismissal or equivalent measures;
b) demotion or withholding of promotion;
c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
d) withholding of training;
e) a negative performance assessment or employment reference;
f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
g) coercion, intimidation, harassment or ostracism;
h) discrimination, disadvantageous or unfair treatment;

i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
j) failure to renew, or early termination of, a temporary employment contract;
k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry; m) early termination or cancellation of a contract for goods or services; (n) cancellation of a licence or permit;
o) psychiatric or medical referrals.

According to authors of this paper refers to bossing forms of retaliation mentioned in points: a), b), c), d), e), f), i), j), k), l), m), n), o). According to authors of this paper refers to bossing forms of retaliation as well point h):

h) discrimination, disadvantageous or unfair treatment.

However discrimination can be in some cases supported by mobbing. So, bossing and mobbing can be combined in this case.

While g) coercion, intimidation, harassment or ostracism;

Can be also related to bossing, however can be also in form of clear mobbing while ostracism is quite clear form of mobbing (however can be supported by boss as well).

Ostracism is very sophisticated tool against whistleblowers since it is very hidden and in some cases almost "invisible" form of mobbing.

"Ostracism means being ignored and excluded by one or more others. Despite the absence of verbal derogation and physical assault, ostracism is painful: It threatens psychological needs (belonging, self-esteem, control, and meaningful existence); and it unleashes a variety of physiological, affective, cognitive, and behavioral responses" (William 2011).

4. Future research directions

In the future, it is necessary to evaluate in which cases it is appropriate for whistleblowers to refer to anti-discrimination or whistleblower protection legislation, especially in potential lawsuits, or whether these protections can be combined and in which cases.

5. Conclusion

Based on the knowledge gained from the available legislation and mentioned court case study, it follows that employers should implement internal reporting systems appropriately as soon as possible and select persons responsible for their management. Alternatively, the persons responsible for managing the information channels for all employees, who through them will have the opportunity to educate themselves not only in the matter of reporting and applicable protective measures, so that in theory, in the event of the need to report an illegal act, they would not have to be exposed to such a dilemma as to whether procedures at all, due to fears of impending retaliatory measures. They can also get some sort of overview of the sanctions they face if they participate in any form of retaliatory measures; this would also lead to awareness of the issue of whistleblowers as such. If employees take whistle-blowing activity as a completely normal matter, the aim of which is to defend the interests of the company, and not as an attempt to compromise them or their colleagues, the overall tendency of the work collective to resort to retaliatory measures will also decrease, according to the author. Also, another measure that could be beneficial for companies could be a comprehensive crackdown on and investigation of workplace bullying. For this purpose, employees should be properly trained, who, similarly to the internal information channels for reporting, would receive warnings about ongoing bullying, verify their relevance and, if the truth of the claim is proven, deal with the situation. Although this would incur costs for the establishment and operation of such a workplace, if handled correctly, tendencies towards bullying in the workplace could be suppressed, regardless of its causes, which would have a positive impact on the entire company. Such an approach to workplace relations would undoubtedly send a clear signal about corporate policy and management's relationship with employees and their interpersonal relationships.

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MOBING KAO ODMAZDA PROTIV UZBUNJIVAČA

APSTRAKT: Direktiva (EU) 2019/1937 Evropskog parlamenta i Saveta od 23. oktobra 2019. o zaštiti lica koja prijavljuju kršenja prava Unije zabranjuje odmazdu protiv uzbunjivača, posebno u vidu prinude, zastrašivanja diskriminacije, nepovoljnog ili nepravednog tretmana. Ovaj potencijal odnosa prema antidiskriminacijskom zakonodavstvu EU nije mnogo jasan. Dosadašnja skromna sudska praksa iz Češke Republike još uvek nije u mogućnosti da pronađe takve odgovore. Cilj ovog rada je da se proceni i analizira odnos između zakonodavstva EU o zaštiti uzbunjivača i antidiskriminacionog zakonodavstva.

***Ključne reči**: uzbunjivač, odmazda, mobing.*

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THE GROWTH OF E-COMMERCE IN THE REPUBLIC OF SERBIA

ABSTRACT: E-commerce has an increasing importance in the world and every year the volume of e-commerce in the world and in all individual countries increases, and Serbia is no exception in this sense. It is the result of the fact that more and more advanced devices (mobile phones, smart watches, computers, tablets) are more and more available, then faster and faster internet and the increasing presence of payment cards and the increasing security of online payments. During the pandemic and lockdown, shopping suddenly became electronic, and the growth was huge – companies were pressured to make rapid digitalization, and although the post-pandemic trend is such that the growth of e-commerce has decreased, it has remained at a high level and is growing. In Serbia, trends follow similar paths. The growth in Serbia coincides with the trend of increasing online trade transactions, as well as increasing the share of mobile transactions. On the other hand, the Serbian market is specific in that the largest niche is occupied by fashion and not books and music as in the West, and the largest supplier is China. Taking over the market from classic, physical stores is not expected. The take-up percentage is too small, unless there is a big shift in the coming years, i.e. unless Generation Z comes to a dominant position with completely different buying habits and suddenly reverses the tendencies, which is very possible.

Keywords: *e-commerce, Serbia, digitalization, trends, e-market.*

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1. Introduction

Electronic commerce – also known as e-commerce or electronic business or e-business (electronic commerce or e-commerce) is an economic activity that enables the trade of various products and services from digital media, such as websites, mobile applications and social networks (OECD, 2019). Originally, the term referred to conducting transactions through electronic means. Electronic commerce has increased dramatically in recent decades, especially with the acceleration of the Internet and the strengthening and improvement of security protocols for e-payments. In this way, a wide range of commerce takes place. The advantages of adopting e-commerce are non-stop business and the creation of a single international market in the cross-border area (Pezderka & Sinkovics, 2011) as well as rapid response to demand conditions and more cost-effective personalization of offers for global market clinets (Gregory, Ngo & Karavidic, 2017; Vapa Tankosić, Lekić, 2018).

In 2017, two billion people made at least one mobile e-commerce transaction (Lee, 2018), which led to a significant increase in the growth rate in countries that preferred direct purchases, meaning that e-business is slowly shifting to traditional Mediterranean countries with traditional "live shopping" (face-to-face, live shopping) and live word of mouth. It is important to note that e-commerce has skyrocketed during the pandemic and that due to the lockdown, a huge part of humanity was simply forced to buy and trade in this way, which also forced businesses (businesses, shops, cultural institutions) to turn this way of trading, that is, selling its products and services. In 2020, e-commerce collected a total of $4.2 trillion worldwide. Latin America showed the highest growth of the entire 36.7%, even higher than in the Asia-Pacific region (26.4%). In 2021, this growth trend was no different, with global e-commerce estimated to have grown by 16.8% in revenue compared to 2020, representing approximately $4.9 trillion for the year (Tienda Nube, 2022).

We can freely say that the lockdown has introduced a completely new business era and business customs, both for businessmen and for consumers and for users (buyers), and digitalization became a top priority. Consumers' habits have changed, and they continued to shop online, although less (there was also a yo-yo effect where, to a large extent, customers wanted to shop live and enjoy the ritual, because they longed for the old life), but part of the old, "pandemic" habits and retained, since some things that customers have found to be non-essential, can be done easily and effortlessly, electronically.

Businessmen and institutions continued with digitalization, or maintained the achieved levels of digital business, because they saw the benefit of digital platforms. In particular, the order of food delivered has increased all over the world, and the delivery business has multiplied, and these platforms have taken advantage of the "acquired laziness" of users to continue with profitable branching. The IT industry gained unprecedented momentum in the period 2020-2023, but a certain crisis and saturation can be observed in the West. In e-commerce contracts, the supplier has a strong obligation to provide information on the data necessary to understand the risks of contracting through that electronic means (Derecho Fácil, 2020). Starting from the role of electronic commerce in modern business conditions, the paper will point out the tendencies of electronic commerce at the global level, as well as at the level of the Republic of Serbia since the beginning of the pandemic until today.

2. Electronic trade in the world from the pandemic until today – tendencies

The origin of e-commerce dates back to the Berlin blockade of 1948–49 and air transport with a system of ordering goods primarily via telex (Encyclopaedia Britannica, 2023). Online shopping was essentially invented by entrepreneur Michael Aldrich in Great Britain in 1979 (Miva, 2020). Today, e-commerce is conducted through mobile devices and not only mobile phones, but also tablets, laptops and wearables such as smartwatches (Encyclopaedia Britannica, 2023).

Electronic commerce has had its bright moments in the last two decades, since, as the Internet has gained in speed and security, so did interest in e-commerce and electronic shopping. In the days of dial-up internet, everything was much slower – one song you'd buy would take hours to download, enough to go to the store and buy a CD and come back. On the other hand, the electronic payment protection was weak and hacking crime was much easier, so customers avoided sharing their data with websites. The first commercially available song on the Internet in digital format, prepared for electronic sale, was the 1997 single "Electric Barbarella" by the band Duran Duran. However, this pioneering venture did not go well because people were afraid of e-shopping, so in 1998 and 1999 the single was still released in a physical edition. The song sold for 99 cents (US).

Before that, e-commerce first appeared 6 years earlier, in 1991 when Thompson Holidays Inc was founded – a travel agency with an unusual and

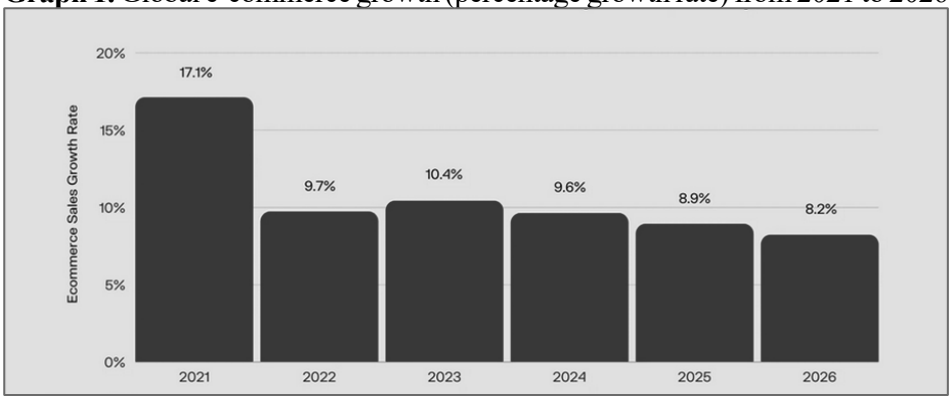
daring way of doing business – which allowed its customers to book trips online. According to the available data, the volume of trade almost doubled every 3 years, and jumped from a figure of 2.3 trillion dollars in 2017 to 4.2 trillion dollars in 2020, and it can be expected to be over 6 trillion dollars in 2023. Namely, the global e-commerce growth rate for 2023 is predicted to be 10.4% (total of $6.3 trillion global sales worth). This marks an increase of 0.7 percentage points over the 2022 growth rate, while in 2021, global e-commerce growth rates has reached 17.1% due to the pandemic Covid-19 (OBERLO, 2023).

However, an advancement of digital technologies and digitalization shows how companies can drastically change their behavior (Katsikeas, Leonidou & Zeriti, 2019). Some of the good examples of how digitalization has pushed trade internationalization, improved productivity of companies, transformed or created new business models and improved interactions relation with the clients are found in numerous works (Sinkovics, Sinkovics & Jean, 2013; Katsikeas, Leonidou & Zeriti, 2019; Bouncken & Barwinski, 2020).

E-commerce enables ordering and paying for, say, airline tickets, even outside working hours, at night, on weekends and on holidays, and facilitates the organization of travel (not only on-the-spot shopping, but also the notorious fact that airline tickets often and unpredictably change in price, although no change in the service itself). Geographical distance in the formation of relations is decreasing. For example, as airlines began to sell tickets on the Internet, travel agencies market share decreased, as did their numbers (Encyclopaedia Britannica, 2023). Overall, the progress of the digitalization is transforming the existing models of the global economy (Ahi, Sinkovics & Sinkovics, 2023). In 2021, the percentage of consumers who have made at least one purchase online in the previous year has risen to 74% in the US, 81% in the UK and 69% in China.

The share of e-commerce in retail sales is expected to increase (OBERLO, 2023). Marketplaces like Amazon and AliExpress are booming, while many independent merchants are struggling to find their unique selling proposition and China, with its advanced technical solutions and huge market, is therefore the one who dictates trends for the global e-commerce in the next decade (Hinto, 2020). For example, in 2026, online retail sales are predicted to grow by 8.2% (Graph 1).

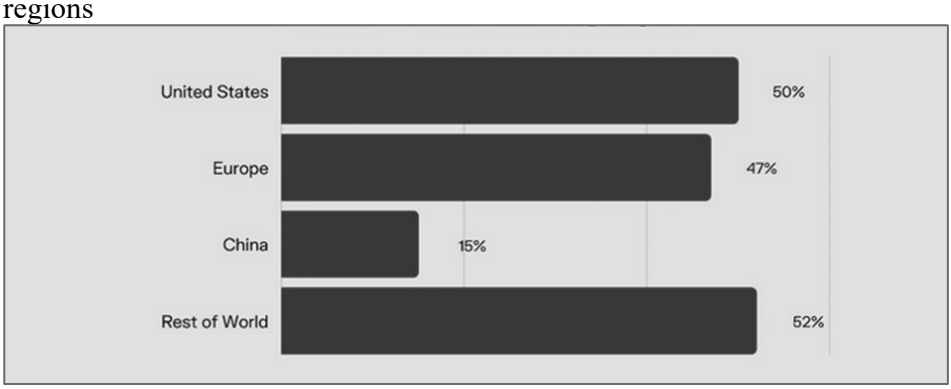
Graph 1. Global e-commerce growth (percentage growth rate) from 2021 to 2026



Source: OBERLO/eMarketer

Traders and marketers rightfully ask the question: in which parts of the world e-commerce has the largest growth? The e-commerce sales in the US are forecasted to grow by an astonishing 50% from $907.9 billion in 2022 to $1.4 trillion in 2025 (Graph 2).

Graph 2. Growth of e-commerce in the world until 2025, forecasts by the regions



Source: OBERLO/Statista

From Graph 2, in Europe, e-commerce sales will grow at a rate of 47%, in China by 15% and in the rest of the world the online sales are projected to increase by 52% (Graph 2) from just over $1 trillion in 2022 to $1.5 trillion in 2025 (OBERLO, 2023).

3. Growth of electronic trade in Serbia

Serbia is somewhere in the middle of the world list (assuming that there are 195 UN member countries and observers) regarding the level of e-commerce penetration, which is a result that is not so impressive, bearing in mind that many countries that are less developed than Serbia are in a higher position on this list.

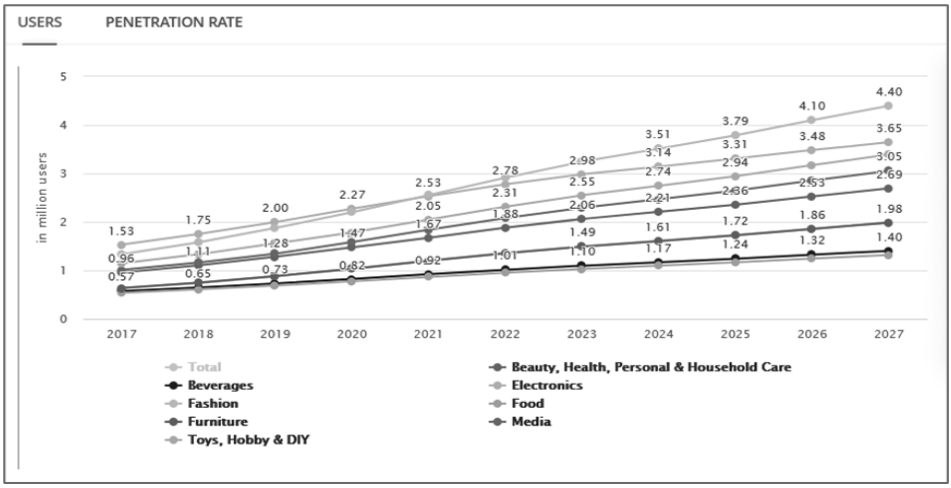
This can be explained by the fact that in Serbia a specific mentality is present (distrust of electronic commerce, trust in cash, trust in live purchases, and also, a large percentage of the elderly population that is skeptical of cards and the Internet), and the similar situation is also found in Japan which is highly developed, or in Italy, also a member of the G7). The result is below the level of development of Serbia, which is the 79th most developed country in the world in 2022 (IMF, 2022).

Thus, Serbia holds the 92nd place in the e-commerce market with a projected income of $955.7 million by 2023, putting it ahead of Haiti. The revenue is expected to show a compound annual growth rate (CAGR 2023-2027) of 14.6%, resulting in a projected market volume of US$ 1,650.7 million by 2027. With a projected increase of 34.5% in 2023, Serbian e-commerce market contributed to a global growth rate of 17.0% in 2023 (ECDB, 2023).

In the analyses, we can notice that five submarkets stand out the most within the Serbian global market through electronic commerce. Fashion (clothes, shoes, accessories) accounts for 30.6% of revenues from e-commerce in Serbia. This is followed by Food and Personal Care with 20.3%, Electronics and Media with 19.6%, Toys, Hobby and DIY with 18.3% and Furniture and Appliances with the remaining 11.2% (ECDB, 2023).

From Graph 3, provided by Statista, we can see a slightly different situation, i.e. it is clear that fashion, i.e. clothes and shoes, is the most important element of e-commerce in Serbia, overtaking electronics in 2021, but electronics, i.e. electronic devices, is in second place and beyond, and by 2027 gamers will not be threatened by electronics, although the gap is narrowing. Media and personal hygiene, beauty and household products follow in 4th and 5th place, followed by furniture, drinks and food in 6th, 7th and 8th place. All elements are experiencing slight growth, but it is far from the fact that physical stores shall become unnecessary in the foreseeable future.

Graph 3. The users (in millions) of certain branches in the electronic commerce market in Serbia



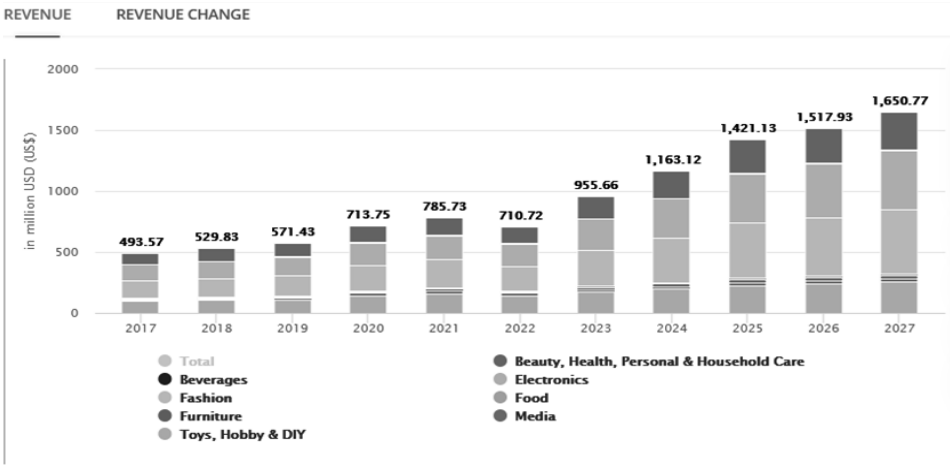
Source: Statista

At the very beginning of the Covid-19, online sales increased sharply. In 2020-2021, online food delivery increased by approximately 200%, textiles by almost 100%, and computers and technical devices by 50%. Compared to global online shopping preferences, where the majority of online consumers buy books, movies and video games (60%), in Serbia the most users buy clothing and sports products (52%) and in 2021, approximately 70% of the population bought at least one product online (Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia, 2022).

That number has increased, particularly due to previous social distancing measures, quarantines and other pandemic-specific factors. Serbia is still behind Western European countries, which have more than 90% of the population who bought at least one product per year via the Internet. Serbia is in a slightly better position and almost equals the position of Serbia in terms of the development of the economy and the e-market. Namely, according to their data from 2022, Serbia is the 81st largest market for e-commerce with revenue of 559 million dollars in 2021, which puts it ahead of Belarus and behind Tunisia (Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia, 2022).

In the Graph 4, we see that the revenue of certain branches in the electronic commerce market in Serbia has increased, from 2017 from 493.57 million USD in 2017 till 1650.77 million USD in 2027.

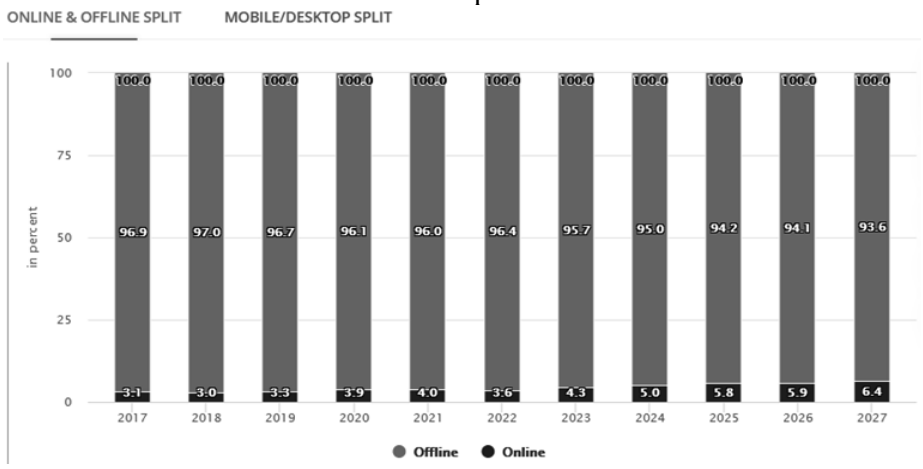
Graph 4. The revenue of certain branches in the electronic commerce market in Serbia



Source: Statista

From Graph 5, we see that the percentage of online purchases is slightly increasing in Serbia, but only by 0.5% to 0.8% per year, so no big shift is expected in the coming years unless Generation Z comes to a dominant position with a completely different buying habits and does not suddenly reverse the tendencies, which is very possible.

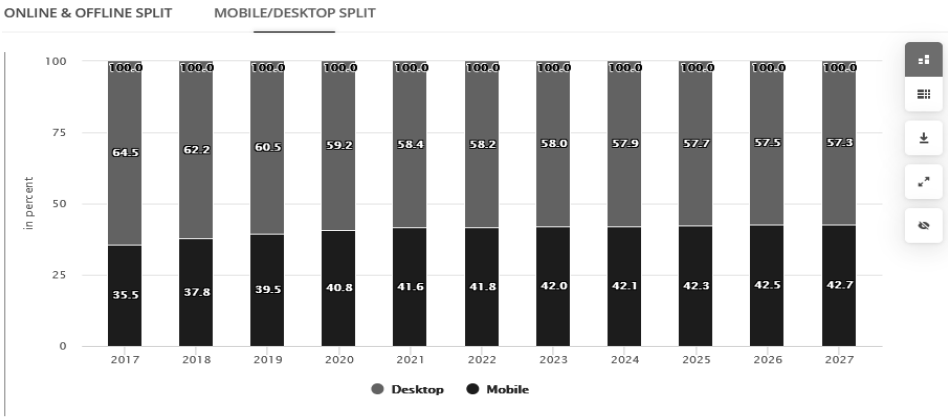
Graph 5. The ratio of online and offline shopping in Serbia from 2017 to 2022 with trends and predictions until 2027



Source: Statista

In Graph 6 it is shown how the purchases from mobile phones (laptops, tablets) and from computers is changing and we can also see a shift towards mobile devices, from 35.5% in 2017 till 42.7% in 2027.

Graph 6. The ratio of purchases from mobile phones (laptops, tablets) and from computers



Most recent update: Feb 2023

Source: Statista

Source: Statista

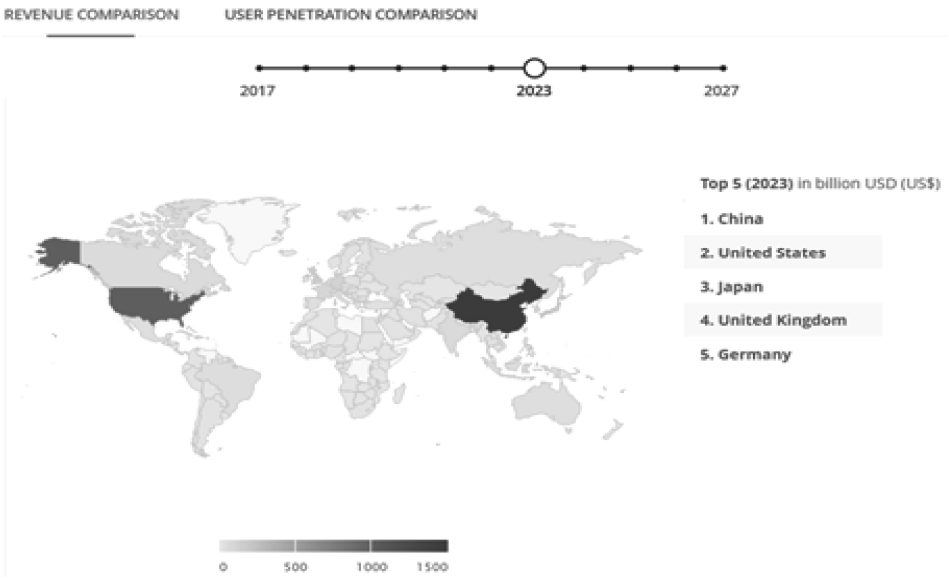
The most commonly used payment methods in Serbia are credit cards and PayPal (Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia, 2022).

During 2022, the e-commerce market revenue was forecast to reach USD 944.50 Mn in 2022 and is expected to show a CAGR (CAGR 2022-2025) of 21.19%, resulting in a projected market size of 1.6 million USD by the year 2025.

Population in China buy the most (Graph 7) in the e-commerce market and the number of users is expected to reach 4.2 million users by the year 2025. User penetration will be 56.6% in 2022 and is expected to reach 61.5% by the year 2025. Average revenue per user (ARPU) is expected to be $242.50.

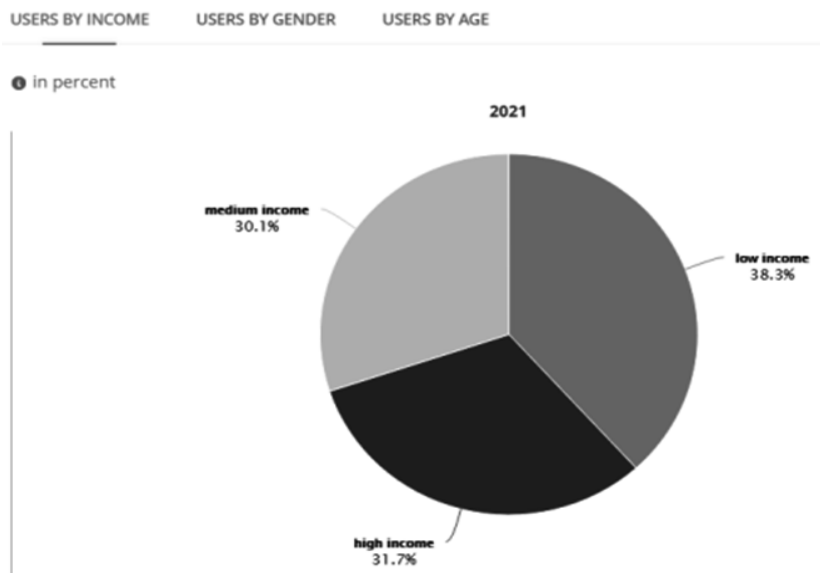
As for e-buyers by financial status, those with lower incomes, middle and higher incomes are almost equally divided into thirds, but those with lower incomes have a slightly higher predominance (Graph 8).

Graph 7. Revenue from e-commerce



Source: Statista

Graph 8. Distribution of e-customers in Serbia by financial status in 2023



Source: Statista, Statista Global Consumer Survey

The most popular online stores in Serbia are international e-stores such as Amazon, eBay and Alibaba, although domestic e-stores such as CT Retail (owner of ComTrade), Win Win and Tehnomanija also sell consumer electronics and appliances in large quantities (Welcome to Serbia, 2023). On the other hand, the competent ministry states that the largest player on the Serbian e-commerce market is Gigatron, and that its online store had revenue of $44 million in 2021, followed by Technomania with $40 million and Zara with $20 million. Together, the first three stores account for 20% of online revenue in Serbia (Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia, 2022).

4. Conclusion

The percentage of people involved in e-commerce is increasing year by year – which is a consequence of the increasing technical perfection of devices, the increase in Internet speed, but also the improvement of security protocols for payment, which were the greatest for users barrier to start using e-shopping. Worldwide e-commerce sales are expected to grow by 9.6% in 2024 and 8.9% in 2025. In 2026, online retail sales are predicted to grow by 8.2%.

It is very important to note that e-business enables the so-called micro-marketing, i.e. marketing that serves targeted market segments, i.e. niches. By not talking to all customers with a uniform voice, the marketers get a stronger customer response: namely, customer loyalty increases as customers are better supported and serviced after the purchase and a better connection is established with them – they feel that marketers are speaking to them. Personalization, which refers to the provision of personalized offers and marketing messages to consumers based on their previous activities on the site.

Thanks to the fact that smartphones and payment cards are no longer a sign of prestige but part of a mandatory tool used by almost every person, growth is very present in Serbia. In this sense, it is interesting that almost 40% of e-buyers in Serbia are from the lower income group. In the future, Serbia will have a significant growth in e-commerce, and customers buy by far the most from China, mostly clothes and shoes, as well as other elements that fall under the category of "fashion". This is in stark contrast to the situation in the world where most of the money is spent on books and music. In Serbia, it is expected that the number of users in the e-commerce market shall reach 4.2 million users by the year 2025.

Taking over the market from classic, physical stores is not expected. The take-up percentage is too small, unless there is some major shift in the coming years, i.e. unless Generation Z comes to a dominant position with completely different buying habits and suddenly reverses the tendencies, which is very possible.

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RAST ELEKTRONSKE TRGOVINE U REPUBLICI SRBIJI

APSTRAKT: E-trgovina ima sve veći značaj u svetu i svake godine se obim e-trgovine u svetu a i u svim pojedinačnim zemljama povećava, te ni Srbija u tom smislu nije izuzetak. Rezultat su sve unapređeniji uređaji (mobilni telefoni, pametni satovi, računari, tableti) koji su sve dostupniji, zatim sve brži internet, sve veća prisutnost platnih kartica i sve veća bezbednost onlajn plaćanja. Tokom pandemije i lokdauna kupovina je naglo postala elektronska, a rast je bio ogroman – firme su pritisnute da naprave brzu digitalizaciju i iako je postpandemijski trend takav da je rast e-trgovine smanjen, ona je ostala na visokom nivou i raste. I u Srbiji se trendovi kreću sličnim putanjama. Rast u Srbiji se poklapa sa trendovima povećanja onlajn trgovinskih transakcija, kao i povećanjem učešća mobilnih transakcija. S druge strane, srpsko tržište je specifično po tome što najveću nišu zauzima moda a ne knjige i muzika kao na Zapadu, a najveći dobavljač je Kina. Preuzimanje tržišta od klasičnih, fizičkih prodavnica se ne očekuje. Procenat preuzimanja je premali, osim ako se ne desi neko veliko pomeranje u narednim godinama, tj. ukoliko Generacija Z ne dođe na dominantnu poziciju sa potpuno drugačijim kupovnim navikama i naglo ne preokrene tendencije, što je veoma moguće.

Ključne reči: *e-trgovina, Srbija, digitalizacija, trendovi, e-tržište.*

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OBLIGATION TO UPDATE DIGITAL PRODUCTS IN DELIVERY AGREEMENTS

ABSTRACT: The aim of this paper is to analyze the legal obligations to update digital products within the context of contracts for the supply of digital content and digital services. Through a legal analysis of the provisions of the German Civil Code relevant to this obligation, the study explores the specificities that make this requirement distinctive for digital products. The research methodology includes a qualitative analysis of legal texts and relevant literature to identify key elements and challenges in the implementation of the obligation to update. The findings reveal that suppliers are legally obliged to provide updates for digital products even when such an obligation is not explicitly stipulated in the contract. This research contributes to a better understanding of the legal aspects of updating digital products and provides a foundation for future legislative initiatives and practical guidelines for suppliers.

Keywords*: delivery agreement, digital products, updating obligation, consumer, supplier*

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1. Introduction

Today's society cannot be imagined without digital products, which encompass both digital content and digital services. Digital content includes data produced and delivered in digital form, such as computer programs and applications, while digital services allow consumers to create, process, and store data in digital format, as well as interact with that data via online platforms and other tools (Article 3 of the Act on Certain Aspects of Contracts for the Supply of Digital Content and Digital Services of the Republic of Croatia, 2021). With the emergence of digital products, a new form of contract has also emerged, known as the contract for the supply of digital products. This contract obligates the supplier to deliver the digital product to the consumer, while the consumer agrees to pay the agreed price. Although it can be argued that there is no special type of contract such as the contract for the supply of digital products, and that digital content can be sold, rented, or given as a gift, while digital services are provided, hence they correspond to named contracts such as sales, lease, gift, or service contracts, the contract for the supply of digital products still has its unique legal nature. This contract, in addition to elements of named contracts, also has sui generis elements arising from the specifics of digital products as the subject of the supplier's obligation under that contract. One of these sui generis elements is the supplier's obligation to update, which has the potential to transform a one-time exchange between the supplier and the consumer into a long-term contractual relationship. The interest of the author of this paper focuses precisely on this supplier's obligation. The legal analysis of this obligation is based on the relevant provisions of the German Civil Code that regulate contracts for the supply of digital products (Articles 327 – 327u of the German Civil Code, 1896), which became part of that code by the adoption of Directive (EU) 2019/770. Given that the supplier's obligation to update can only be excluded under very strict conditions, such as the obligation to inform the consumer about any deviations of the digital product from objective requirements before concluding the contract (Article 327h of the German Civil Code, 1896), and the fact that the supplier is usually not the manufacturer of the digital product, but will have to ensure updates through contracts with suppliers or manufacturers, it becomes clear what challenges suppliers face due to this obligation (Lunk & Meurer, 2022, p. 393).

The analysis of the obligation to update digital products is crucial for identifying the legal and practical challenges suppliers face and contributes to the improvement of the legal framework and consumer protection in the digital age. Understanding the legal basis and specifics of this obligation contributes

to better regulation and market alignment of digital products, which in the long run increases consumer trust and market stability.

2. Theoretical Framework and Methodology

Following the introductory section that lays the foundation for understanding the obligation to update digital products, this chapter describes the research methods used in this study, as well as the materials that formed the basis for the narrative. The qualitative research methodology employed in this study encompasses several key steps, allowing for a deep understanding of the legal framework and practical implications of the obligation to update digital products.

Analysis of Legal Texts

The first phase of the research involved the analysis of legal texts, where the primary research method focused on analyzing relevant legal documents, with a particular emphasis on the provisions of the German Civil Code (BGB) that regulate the obligation to update digital products. Specifically, Articles 327 to 327u of the BGB, which became part of the Code through the implementation of Directive (EU) 2019/770, were used. This analysis provided a deep understanding of the legal framework governing the obligation to update digital products in Germany, laying the groundwork for further research and analysis.

Analysis Technique: A content analysis methodology was used to identify key provisions and their significance in the context of the updating obligation. The analysis included decomposing legal texts into their basic elements and evaluating each element in relation to the supplier's obligation to provide updates. Steps in the analysis included:

- Identification of relevant legal documents and articles within the German Civil Code.
- Decomposition of legal texts into individual provisions.
- Evaluation of legal provisions through comparison with EU practice and international standards.
- Synthesis of findings to formulate implications for suppliers and consumers.

Literature Review

The second phase of the research included a literature review, where the secondary method involved reviewing and analyzing existing literature

in the field of digital product law. In this phase, the works of legal experts and commentaries on legal provisions, such as the studies by Buchmann & Panfili (2022), Mayasilci (2022), and other authors who have written about the obligation to update digital products, were analyzed. This literature provided additional insights and perspectives that were crucial for forming a comprehensive understanding of the topic.

Materials Used for Forming the Narrative of the Study

The materials used for forming the narrative of the study include the following sources: legal texts, legal literature and commentaries, legislative documents and explanations, as well as practical examples and case studies. The main legal document used for analyzing the obligation to update digital products was the German Civil Code (BGB), with a special focus on Articles 327–327u which regulate this obligation. Additionally, a key source was Directive (EU) 2019/770, which deals with certain aspects of contracts for the supply of digital content and digital services, and which has been implemented in the BGB. The legal literature used in the study includes works such as Buchmann & Panfili (2022), which provide a detailed analysis of the new rules for digital products in the German Civil Code, and Mayasilci (2022), which focuses on the content and significance of the update obligation introduced into civil law. The works of authors like Klinik-Straub (2022), who examines the reform of obligation law in the context of contracts for digital products, were also utilized.

Additionally, legislative documents and explanations were used, including the "Rationale of the Draft Law for the Implementation of Directive (EU) 2019/770", which provides the rationale for the draft law implementing Directive (EU) 2019/770 into the German Civil Code. Finally, practical examples from the practice of digital product suppliers, including case studies illustrating the implementation of the update obligation, were essential for understanding how this obligation is carried out in the real world and what challenges the relevant actors face. In addition to the analyzed legal texts and legal literature, considerations were made regarding how the future legislative framework in Serbia might be shaped under the influence of European standards, with a special focus on regulating the obligations for updating digital products. It is expected that the adoption of such regulations could significantly enhance consumer protection and ensure legal certainty in Serbia's digital economy.

3. The Necessity of Software Updates

Software represents a special type of digital product that requires regular updates to remain functional and secure. Due to rapid technological development, software becomes obsolete within a few years if not updated. The main reasons for software updates are:

- Correction of errors and bugs that affect the functionality and stability of the software
- Improvement of performance and speed of the software
- Ensuring compatibility with new hardware and other software
- Fixing security vulnerabilities and protecting against cyber threats
- Adding new features and enhancing user experience

Software suppliers have a legal obligation to provide regular updates for their products within a certain period. However, in practice, they may stop providing support and updates after some time. The digital transformation of business models, including aspects such as updates and upgrades of digital products, is thoroughly analyzed in the work of Schallmo, Williams, and Boardman (2017).

The consequences of outdated, non-updated software can be serious, ranging from loss of functionality and inability to access data to compromising system security. Therefore, users must be aware of the importance of regular software updates and demand that manufacturers fulfill their legal obligations. In the future, regulations on the mandatory minimum support and updates that software manufacturers must provide will likely need to be tightened. This is necessary to protect the interests and rights of software users.

Regular software updates are imperative for maintaining its functionality and security. Just as a car owner expects the manufacturer to fix safety defects for free, even if the vehicle is new, software users have the right to receive updates that fix identified errors and omissions. Unfortunately, software code, as a product of human creation, can never reach perfection. Despite the utmost dedication, programming teams cannot foresee all potential problems. Therefore, the process of improving software is continuous and necessary. New security holes, interoperability issues, and opportunities for performance and user experience improvements are discovered daily. Updates provide remedies for these issues. If users ignore them, the software becomes increasingly insecure and less usable. Operating systems like Windows require regular installation of security patches. Failing to do so makes the computer vulnerable to hacking and data loss. Similarly, applications like Zoom or

Facebook require the latest versions to provide access to new features and maintain compatibility. Although every update carries the risk of regression, experts agree that the benefits far outweigh the risks. Updating or not is a false dilemma—it is an imperative for maintaining software functionality. Continuous software development is analogous to regular car maintenance. Without it, the system inevitably becomes unsafe and unusable. While software maintenance reduces the number of bugs, software will never be perfect, hence its constant maintenance is necessary (Pfleeger, & Atlee, 2010). Without regular maintenance, although the number of bugs initially decreases, software enters a phase of so-called software aging. Software aging refers to the situation when, despite maintenance, software becomes too complex and difficult to further improve. This occurs due to several factors:

- Accumulation of technical debt. Although developers continuously fix bugs, they often introduce new bugs or temporary patches that later become problematic. Over time, a growing mass of poor code is created, which is hard to maintain.
- Erosion of architecture. Over time, deviations from the original software design occur, introducing changes that compromise the integrity of the architecture. The software becomes an incoherent patched structure.
- Obsolescence of technology. Technologies used for the original software become legacy and harder to integrate with newer solutions. Old software becomes incompatible.
- Lack of documentation. Knowledge about how the software works fades over time. Programming teams change and lose the institutional knowledge needed to maintain the system.
- Increasing complexity. Larger and more complex software is harder to maintain and debug. Even small changes can cause unforeseen consequences.

To avoid software aging, sometimes it is necessary to redesign or rewrite the software from scratch on a new platform. This allows resetting errors and technical debt, restoring the architecture, and utilizing modern technologies. Of course, this is an expensive and risky endeavor but sometimes necessary to extend the lifespan of a valuable software system.

Strategies such as agile development, continuous integration, automated testing, and better documentation can slow down the process of software aging. But in the end, most software requires redesign if it is to survive the test of time. Software maintenance is a dynamic process of adaptation, not a one-time effort.

4. Provisions of the German Civil Code Relevant to the Obligation to Update

For a digital product to be in conformity with the contract (simply put, conforming or compliant), it must be delivered to the consumer without material and legal defects (Article 327d of the German Civil Code, amended in 2021, in accordance with Directive (EU) 2019/770). The provisions relevant to the obligation to update concern material defects. A digital product has no material defects if it meets the so-called subjective and objective requirements, as well as the requirements regarding integration, all three of which must be cumulatively fulfilled (Article 327e para.1 of the German Civil Code, amended in 2021, in accordance with Directive (EU) 2019/770). Of these requirements, the subjective and objective requirements are relevant for the obligation to update. Specifically, a digital product meets the subjective requirements if the supplier, among other things, makes updates available to the consumer for the period specified in the contract between the supplier and the consumer (Article 327e para.2 no. 3 of the German Civil Code, amended in 2021, in accordance with Directive (EU) 2019/770). Thus, it is an expressly agreed obligation of the supplier to make updates available to the consumer, the type, frequency, scope, and duration of which are determined by the supplier and the consumer (Buchmann & Panfili, 2022, p. 162; Mayasilci, 2022, p. 12). However, even if the obligation to update is not expressly agreed upon in the contract for the supply of the digital product between the supplier and the consumer, the supplier still has such an obligation. Specifically, a digital product meets the objective requirements if the supplier, among other things, makes updates available to the consumer and informs them about them in accordance with the rules of Article 327f of the German Civil Code (Article 327e para.3 no. 5 of the German Civil Code, amended in 2021, in accordance with Directive (EU) 2019/770), which thoroughly regulates the supplier's obligation to update.

Article 327f of the German Civil Code stipulates that the supplier must ensure that, during the relevant period, updates necessary to maintain the conformity of the digital product are made available to the consumer, and that the consumer is informed about these updates. Necessary updates include security updates. Regarding the relevant period for which updates must be available, a distinction is made between contracts for the continuous supply of a digital product and contracts that provide for a one-time supply of a digital product or a series of individual supplies of a digital product. In the case of contracts for the continuous supply of a digital product, the relevant period is the entire agreed period of supply, while in the case of a one-time supply

of a digital product or a series of individual supplies, it is the time interval that the consumer can expect, taking into account the type and purpose of the digital product, as well as the circumstances under which the contract was concluded, and the type of contract (Article 327f para. 1 of the German Civil Code, amended 2021, in accordance with Directive (EU) 2019/770). However, the installation of updates is not the obligation of the supplier but is left to the will of the consumer. Thus, the consumer may or may not install the updates, which will have certain consequences. Specifically, if the consumer fails to install the updates within a reasonable period, the supplier is released from liability for a material defect based solely on the missing update, provided that the supplier informed the consumer about the availability of the updates and the consequences of failing to install them, and that the reason the consumer did not install or did not properly install the updates was not due to incorrect installation instructions provided by the supplier (Article 327f para. 2 of the German Civil Code, amended 2021, in accordance with Directive (EU) 2019/770).

The provisions of the German Civil Code (Bürgerliches Gesetzbuch, BGB) that regulate the obligation to update digital products provide a significant legal framework for analyzing this obligation in the legislative context of the Republic of Serbia. Namely, Article 327e BGB stipulates that digital products must meet subjective and objective requirements, including the obligation of suppliers to provide updates necessary to maintain product conformity (Buchmann & Panfili, 2022, p. 162). The importance of intellectual property protection in the context of digital products is further emphasized in the works of Bently and Sherman, who provide a comprehensive overview of key aspects of intellectual property (Bently & Sherman, 2021). This principle is also relevant to Serbian legislation, where the need to regulate continuous support and updates of digital products is recognized to protect consumer rights and ensure the long-term functionality and security of software (Mayasilci, 2022, p. 12). Introducing similar legal provisions into Serbia's legal system could significantly contribute to legal certainty and better consumer protection in the digital environment, which is especially important given the increasing number of digital products and services on the market (Klinik-Straub, 2022, p. 6). Moreover, the relevance of German provisions lies in their detailed guidelines for suppliers about their obligations, which can serve as a model for formulating specific legal solutions in Serbia that will be in line with European standards and practices (Lunk & Meurer, 2022, p. 393).

In the context of the legislation of the Republic of Serbia, the relevant legal provisions currently do not comprehensively cover the obligation to

update digital products, but existing laws, such as the Law on Obligations and the Consumer Protection Law, provide a basis for further regulation. The Law on Obligations, in Article 478, stipulates the seller's liability for material defects in goods, which could be extended to digital products through a more precise definition of the suppliers' obligations regarding updates (Law on Obligations, 1978). Additionally, the Consumer Protection Law contains provisions that protect consumers from unfair business practices and ensure the right to information, which includes the obligation of suppliers to provide clear information about updates and their consequences (Consumer Protection Law, 2014). Implementing specific provisions on the obligation to update digital products in these laws would contribute to better consumer protection and alignment with European legal standards, especially given the growing importance of digital technologies in everyday life (Directive (EU) 2019/770, 2019). By introducing such legal solutions, Serbia would ensure that its legislation keeps pace with contemporary legal challenges and technological development.

5. Specification of the Obligation to Update

As mentioned in the introduction, the supplier often will not be the manufacturer of the digital product and therefore will not be able to produce the necessary updates themselves. However, this is not expected of them (Mayasilci, 2022, p. 10). The supplier is obligated to ensure that the necessary updates are available to the consumer. From this formulation, it follows that the supplier does not need to personally fulfill the obligation to update but can use assistants to fulfill this obligation (Mayasilci, 2022, p. 10), for example, by involving the manufacturer in the process of fulfilling this obligation.

A frequently asked question regarding the obligation to update is what exactly this obligation entails: does it only refer to so-called Updates, or does it also include Upgrades? According to one view in German literature, given that the supplier is only required to provide updates necessary to maintain the conformity of the digital product, this refers exclusively to Updates, which ensure the compatibility and security of the digital product, while Upgrades, or enhancements to the digital product, are not required to be provided by the supplier (Klinik-Straub, 2022, p. 6). Conversely, another view holds that the term update as a collective term encompasses both Updates and Upgrades, but the supplier is not obligated to provide improvements to the digital product beyond what is necessary to maintain its conformity (Lunk & Meurer, 2022, p. 393). The Rationale of the Draft Law for the Implementation

of Directive 2019/770 (hereinafter referred to as the Rationale of the Law) states that precisely distinguishing between the terms Update and Upgrade in this context is not necessary, and the term update is used as a superior term that encompasses both types of improvements or changes. The focus should be on the key feature of the obligation to update, which is to provide updates necessary to maintain the conformity of the digital product (Rationale of the Law, p. 58). However, some authors believe that the legislator's interpretation is incorrect and that the term update cannot encompass both Update and Upgrade. Namely, Directive 2019/770 clearly distinguishes between changes such as updates (Update) and improvements (Upgrade). Accordingly, Upgrade cannot be treated as a subtype of update but represents a synonym for the term improvement. Therefore, updates and improvements should be distinguished, as Upgrades involve changes to the digital product that are subject to the strict requirements of Article 327r of the German Civil Code. This article addresses the issue of changes to the digital product that go beyond what is necessary to maintain the product's conformity. During the duration of the contract for the supply of a digital product, the supplier may make such changes only if the possibility of changes and the serious reasons for the change are provided for in the contract, without additional costs to the consumer, and with clear and understandable consumer notification about the changes. Thus, the terms Update and Upgrade, which require interpretation anyway, should be abandoned, and the essence of the obligation to update should be emphasized, which is the maintenance of the conformity of the digital product (Buchmann & Panfili, 2022, p. 160).

The problem arises from the fact that precisely defining and distinguishing the terms Update and Upgrade is not always possible. In the Serbian language, the terms "ažuriranje" and "Update" are often used as synonyms and denote changes made within the existing version of the software, while "Upgrade" refers to an upgrade, i.e., transitioning from an old version to a new version of the software. However, in practice, all three terms are often used interchangeably. Accordingly, attempts to distinguish between them may seem unnecessary and ineffective for specifying the obligation to update. Therefore, to specify the obligation to update, one should rely on the legal text, according to which the supplier owes updates necessary to maintain the conformity of the digital product. This includes all updates necessary to maintain the functionality, compatibility, and security of the digital product. The functionality of the digital product refers to its ability to perform its functions according to its purpose, while compatibility refers to the ability to operate with appropriate hardware and software without the need for conversion (Article 327e para. 2

of the German Civil Code, amended 2021, in accordance with Directive (EU) 2019/770). The supplier must make security updates available to the consumer regardless of the fact that security defects, so-called software vulnerabilities, do not affect the functionality of the digital product. Security defects create the possibility for so-called cybercrime, and thus, security updates aim not only to prevent material damage but also to protect the consumer's personal rights (Mayasilci, 2022, p. 14). The importance of protecting user privacy in the context of digital products is highlighted in the research by Bourreau and Gaudin, which shows consumers' willingness to pay for privacy protection on mobile applications (Bourreau & Gaudin, 2018).

6. Duration and Timing of the Obligation to Update

As already mentioned, the period during which the supplier is legally obliged to ensure the availability of updates to maintain the conformity of the digital product in contracts for the supply of digital products that provide for continuous supply coincides with the entire agreed supply period. This is clear and does not require further explanation. The problematic cases are the remaining ones, such as contracts that provide for a series of individual deliveries or a one-time delivery of a digital product. In these cases, the period during which the supplier is obliged to provide updates depends on the type and purpose of the digital product, as well as the circumstances under which the contract was concluded. For contracts that are exhausted in a one-time exchange of performances, the supplier's obligation lasts for a certain period after the exchange (Lunk & Meurer, 2022, p. 394). A one-time exchange of performances takes on the character of a continuous contractual relationship (Buchmann & Panfili, 2022, p. 159). This imprecision and abstraction of the solution pose a difficult task for the supplier (Buchmann & Panfili, 2022, p. 163). The rationale of the law explains that this period is determined based on the justified expectations of the average consumer, considering the type and purpose of the digital product, as well as the circumstances of concluding the contract and the type of contract. For example, operating software for an internet-connected device can be expected to be provided with updates for a longer period than application software that does not require an internet connection. The regular release of new versions of the digital product by the supplier does not affect the justified expectations of the average consumer, unless the regular release is objectively necessary due to external factors, as is the case with tax advisory software. The rationale of the law also suggests considering criteria such as the resale of the digital product and the risks posed

without updates (Rationale of the Law, 2022, p. 59). Literature indicates that the justified expectations of the average consumer are higher for more expensive digital products than for more affordable alternatives (Buchmann & Panfili, 2022, p. 163).

An important issue that the law does not explicitly address is the timing when updates should be made available to the consumer. The rationale of the law states that, for the practical efficiency of the obligation to update, updates must be made available to the consumer within a reasonable timeframe after the digital product becomes non-conforming. However, the legal text does not refer to updates necessary to rectify non-conformity, but rather to updates necessary to maintain the conformity of the digital product. This suggests that updates should prevent the digital product from becoming non-conforming. Updates must be made available to the consumer at the time necessary to avoid the non-conformity of the digital product, i.e., disruptions in functionality, compatibility, or security of the digital product. The practical feasibility of this requirement remains unclear, but it is evident that the legislator did not consider this aspect. If updates are not made available to the consumer in a timely manner and there are disruptions in functionality, compatibility, or security of the digital product, the product has a material defect. In such a case, the consumer has the right to request the rectification of the defect, which may include repairing the product, providing the necessary updates to rectify the defect, or replacing the digital product (Articles 327i and 327l of the German Civil Code, 1896). However, the choice of the method of rectifying the defect does not belong to the consumer but to the supplier (Klinik-Straub, 2022, p. 6). This means that the supplier can decide to replace the digital product instead of providing the necessary updates, which further supports the thesis about the contradiction between the rationale of the law and the legal text (Buchmann & Panfili, 2022, p. 163).

The new European Union initiative called the Digital Product Passport (DPP) represents a significant step towards improving the tracking, identification, and transparency of digital products on the EU market (Worldfavor, 2023). The Digital Product Passport allows for detailed tracking of the entire life cycle of a product, from production to recycling, thereby increasing the accountability of manufacturers and suppliers. This initiative aims to enhance sustainability, reduce the ecological footprint, and improve consumer protection by providing clear information about the composition, origin, and environmental impact of products. The implementation of the DPP enables consumers to make informed decisions, while legislators and suppliers gain a tool for monitoring compliance with legal regulations.

Additionally, the Digital Product Passport encourages innovations in the field of the circular economy, as it facilitates the identification and reuse of materials. This initiative, which is part of the broader European Union strategy for digital transformation and sustainable development, can serve as a model for legislative reform in Serbia, particularly in the context of regulating the obligation to update digital products. Integrating similar solutions into Serbian legislation would contribute to improving legal certainty and consumer protection, as well as enhancing environmental standards at the national level. Within the DPP framework, there is also an obligation to update the information contained in the passport throughout the entire life cycle of the product. This means that manufacturers and suppliers must regularly provide updates that reflect changes in the product's composition, performance, safety features, and environmental impact. This obligation to update ensures that the information in the digital passport is always accurate and relevant, thereby further increasing transparency and consumer trust. The implementation of such obligations in Serbia could significantly contribute to better information management practices for digital products and ensure that consumers are adequately informed throughout the entire product life cycle.

7. Installing Updates

The German Civil Code (Bürgerliches Gesetzbuch, BGB) stipulates that the supplier is not liable for a material defect in the digital product if the consumer fails to install updates within a reasonable time, provided that the supplier has informed the consumer about the availability of the updates and the consequences of failing to install them, and that the failure to install or improper installation is not caused by incorrect instructions from the supplier (Article 327f para. 2 of the German Civil Code, amended 2021, in accordance with Directive (EU) 2019/770). The term "installing" refers to the measures the consumer must undertake, which include copying the content of the updates and executing other necessary steps specified by the supplier (Rationale of the Law, p. 60). The consumer should install the updates within a reasonable period, and the determination of this period is left to judicial practice. The rationale of the law provides guidelines for determining a reasonable period, taking into account the risks to the consumer's digital environment in case of non-installation (especially for security updates), the time required for installation, and the impact of updates on other hardware and software (Rationale of the Law, p. 60). The supplier is only obligated to ensure the availability of updates to the consumer. The decision to install updates lies

with the consumer. If the consumer decides not to install the available updates, they cannot expect the digital product to remain compliant, nor can they hold the supplier liable for a material defect (Buchmann & Panfili, 2022, p. 164).

The supplier is legally obligated to inform the consumer about the availability of a new update. However, this obligation does not end with this act. For each update, the supplier must clearly outline the consequences of failing to install the update. The more serious the consequences, the more clearly the consumer must be warned (Rationale of the Law, p. 60). Informing the consumer primarily relates to the consequences of missing the installation on the functionality and security of the digital product. The consumer must also be informed about the impact of their decision not to install updates on the supplier's liability for material defects (Buchmann & Panfili, 2022, p. 164). Thus, the consumer must be informed about the availability of updates as well as the actual and legal consequences of failing to install them. This enables the consumer to make an informed decision about installing updates (Buchmann & Panfili, 2022, p. 164).

8. Conclusion

The analysis of the supplier's obligation to update digital products, based on the provisions of the German Civil Code and applied in the context of Serbian legislation, leads to several key conclusions. Digital products, due to their specific nature, require continuous updates to maintain essential functionalities and security, which is crucial for consumer protection. This obligation arises from the need to maintain the compatibility and security of products, ensuring their long-term usability and user satisfaction. The legal basis for the obligation to update is not limited to explicitly agreed conditions, as the legal framework, particularly the German Civil Code, provides for it even when not expressly stated in the contract. This implicit obligation is significant for legal certainty and consumer protection, ensuring the responsibility of manufacturers and suppliers to maintain digital products. The provisions of the German Civil Code serve as a foundation for analysis, but their relevance to Serbian legislation is especially important in recognizing the need for similar legislative solutions. Tightening regulations on the mandatory minimum support and updates that software manufacturers must provide could significantly contribute to consumer protection and maintaining high-quality standards for digital products in the Serbian market. Suppliers face significant legal and practical challenges regarding the obligation to update. These challenges include coordinating with digital product manufacturers

and informing consumers about the availability and consequences of updates. Effective communication and transparency with consumers are key to successfully fulfilling these obligations and avoiding potential legal issues.

Further regulation and clear definition of the obligations to update digital products in Serbian legislation are necessary. Additional regulation would provide better consumer protection and ensure that digital products remain reliable and safe throughout their lifecycle. Suppliers should adopt proactive strategies to fulfill their obligations, thereby increasing consumer trust and the long-term value of digital products.

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OBAVEZA AŽURIRANJA IZ UGOVORA O ISPORUCI DIGITALNIH PROIZVODA

APSTRAKT: Cilj ovog rada je analiza pravne obaveze ažuriranja digitalnih proizvoda u kontekstu ugovora o isporuci digitalnih sadržaja i digitalnih usluga. Kroz pravnu analizu odredbi Nemačkog građanskog zakonika, koje su relevantne za ovu obavezu, istražuju se specifičnosti koje ovu obavezu čine karakterističnom za digitalne proizvode. Metodologija istraživanja uključuje kvalitativnu analizu zakonskih tekstova i relevantne literature kako bi se identifikovali ključni elementi i izazovi u implementaciji obaveze ažuriranja. Rezultati istraživanja pokazuju da trgovci imaju zakonsku obavezu da obezbede ažuriranja digitalnih proizvoda čak i kada takva obaveza nije izričito ugovorena. Ovo istraživanje doprinosi boljem razumevanju pravnih aspekata ažuriranja digitalnih proizvoda i pruža osnovu za buduće zakonodavne inicijative i praktične smernice za trgovce.

Ključne reči*: ugovor o isporuci digitalnih proizvoda, obaveza ažuriranja, trgovac, potrošač.*

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CRIMINAL OFFENSE OF INCITING NATIONAL, RACIAL, AND RELIGIOUS HATRED AND INTOLERANCE

ABSTRACT: In our region, multi-ethnicity, multi-confessionalism, and multilingualism are common phenomena, and therefore the challenges they face are not exceptions. With the emancipation and transition of countries in the region, accession to the European Union, states have brought new legislative frameworks in which they have recognized long-standing personal characteristics of their citizens, provided protection for these characteristics, and criminalized attacks based on these personal characteristics, as well as incitement of hatred and intolerance based on the same. This paper presents the criminal offense of inciting national, racial, and religious hatred and intolerance, within the framework of constitutional and particularly criminal law. Special attention is paid to the analysis of the legal framework and the provision of the offense in the legislation of the Republic of Serbia, the actions and methods of committing this criminal offense. Additionally, attention is given to the analysis of motives and reasons, as well as the consequences of committing this offense, questions of causality and possibilities of concurrence with other criminal offenses. Some important characteristics of this criminal offense are also discussed, such as: place, object, time, perpetrator, and form of guilt for the execution of the crime.

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1. Introduction

Taking into consideration the territory we inhabit, the series of events that happened in the 20th century, technological development, fluctuation and an easy access to information, it is beyond necessary to regulate and stipulate the prohibition of inciting national, racial and religious hatreds and intolerance, if not in criminal laws, then certainly in other ones. Such prohibition is a necessity, because there is a fine line between emotions, attitude or opinion of another, and hatred and intolerance towards the other. If an absolute freedom of speech existed, without any restrictions, such speech, as history has shown many times before, could very easily turn into hate speech, and hate speech into hate crime, thus, the repetition and multiplication of such criminal offences committed and motivated by hatred, may lead to war conflicts, crimes against humanity, war crimes and genocide.

Given its character, the criminal offence of "inciting ethnic, racial and religious intolerance" is generally classified in the group of criminal offences against the constitutional order and security, in many states, as well as in the Republic of Serbia. Furthermore, classifying this criminal offence in the group together with other criminal offences "against the state" says a lot about the significance the state and society assign to the protection of fundamental human rights and values, starting from their violation on the grounds of any type of difference among citizens (Joksić, 2011, p. 321).

A specific form of manifesting hate speech in the Serbian criminal legislation is stipulated in the Criminal Code, Chapter 28, entitled "Criminal Offences against the Constitutional Order and Security of the Republic of Serbia". Hence, a criminal offence of this type was systematised in Article 317 of the Criminal Code among the so-called "political" criminal offences, in fact the criminal offence of "Inciting ethnic, racial and religious hatred and intolerance". This was the way to provide for an enhanced criminal and legal protection of the constitutional principle of prohibition of inciting ethnic, racial and religious hatred or intolerance.

2.Stipulation of the criminal offence in regulations

Legal systems of modern democratic states stipulate prohibition to incite ethnic, racial and religious hatred and intolerance. In this region, the stipulation of prohibition has existed for decades, in criminal codes and other

regulations. Moreover, a special Law on the Prohibition of Inciting National, Racial and Religious Hatred and Discord was passed in 1946 (Law on the Prohibition of Inciting National, Racial and Religious Hatred and Discord, 1946). In that respect, nowadays even the Constitution of the Republic of Serbia principally stipulates the prohibition of inciting hatred and intolerance on any grounds related to personal feature, towards any person (Constitution of the Republic of Serbia, 2006). Pursuant to Article 49 of the Constitution, any inciting or encouraging of racial, ethnic, religious or other inequality, hatred or intolerance shall be prohibited and punishable. At the core of prohibited activities are inciting and encouraging, which could imply that this prohibition is violated by both the occurrence of the consequence, or developing the hatred and intolerance, as well as by performing the acts that could cause such consequences. The consequence of this constitutional prohibition does not need to be embodied only in the racial, ethnic and religious, but in any other inequality, hatred and intolerance as well (Đurić & Manojlović, 2007, p. 651). In the Republic of Serbia, however, inciting ethnic, racial and religious hatred and intolerance is stipulated, directly or indirectly, in several legal documents, in addition to the Constitution. In that respect, the Law on the Prohibition of Discrimination (Law on the Prohibition of Discrimination, 2009) and Law on the Prevention of Violence and Misbehaviour at Sport Events are of great importance (Law on the Prevention of Violence and Misbehaviour at Sport Events are of great importance, 2003).

The Criminal Code stipulated two criminal offences that sanction the violation of equality (Article 128 of the Criminal Code) and prohibition of inciting ethnic, racial and religious hatred and intolerance (Article 317 of the Criminal Code). On the one hand, while it is clear that the normative regulation of a criminal offence of violation of equality complies in all matters, with the constitutional requirements established under Article 49 and the systemic interpretation of the Constitution, in terms of the prohibition of inciting inequality, as it sanctions all forms of violation of equality according to the prohibited grounds of discrimination, it remains unclear whether encouraging such violation is criminally and legally sanctioned, unless the constitutional term "encouraging" is to be made equal with the criminal and legal term of "instigating". The criminal offence of prohibition of inciting ethnic, racial and religious hatred and intolerance under Article 317 of the CC, does not fully comply with the requirements under Article 49 of the Constitution, not only because it incriminates inciting and inflaming of only ethnic, racial and religious hatred and intolerance, and the Constitution expressly refers to other types of hatred and intolerance as well, but also because that criminal offence

is reduced only to the type of hatred and intolerance existing between the peoples and ethnic communities living in Serbia (Đurić & Manojlović, 2007, p. 656).

The Criminal Code of the Republic of Serbia (Criminal Code of the Republic of Serbia, 2005) in the chapter establishing the offences against the constitutional order and security of the Republic of Serbia, thus, stipulates, a separate criminal offence in Article 317, that of Inciting ethnic, racial and religious hatred and intolerance. The Criminal Code stipulates other criminal offences as well, which to a greater or lesser extent, address inciting and inflaming of hatred and intolerance, in fact, Article 344a stipulates the criminal offence of violent behaviour at sports events or public gatherings. Furthermore, Article 387 of the CC stipulates the criminal offence of Racial and Other Discrimination in the substance that also comprises Hate Speech.

In addition to the specified laws, the Law on Public Information and Media (Law on Public Information and Media, 2023), prohibits hate speech in Article 86, adding that ideas, opinions or information published in the media shall not encourage discrimination, hate or violence against an individual or a group of individuals on the grounds of their belonging or not belonging to particular race, religion or nationality. In the Law on Prohibition of Manifestations of Neo-Nazi and Fascist Organisations and Prohibition of the Use of Neo-Nazi and Fascist Symbols and Marks(Law on Prohibition of Manifestations of Neo-Nazi and Fascist Organisations and Prohibition of the Use of Neo-Nazi and Fascist Symbols and Marks, 2009), it is prohibited to produce, copy, store, present, praise or in any other way disseminate the propaganda material, symbols and marks that incite, encourage or spread hatred or intolerance towards free affiliations of citizens, racial, ethnic or religious hatred or intolerance. The Law on Public Assembly (Law on Public Assembly, 2016), stipulates in Article 8 that assembly shall not be permitted if the purposes of the assembly are directed, among other things, towards inciting or encouraging racial, ethnic, religious or other form of inequality, hatred and intolerance. Pursuant to the Law on Political Parties (Law on Political Parties, 2009) activities of a political party shall not be aimed, among other things, at incitement or encouragement of racial, ethnic or religious hatred.

3. Act of criminal offence

In the applicable Criminal Code of the Republic of Serbia, the act of committing an offence is stipulated alternatively, and may be performed mainly by commission. Accordingly, in the criminal legislation of the Republic

of Serbia, the act of criminal offence of Inciting ethnic, racial and religious hatred and intolerance, has been described as follows:

1) "Whoever incites and inflames national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.
2) If the offence referred to in Paragraph 1 of this Article is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons' goods, desecration of monuments, memorials or tombs, the offender shall be punished by imprisonment of one to eight years.
3) Whoever commits the offence referred to in Paragraph 1 and 2 of this Article by abuse of position or authority, or if these offences result in riots, violence or other serious consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence referred to in Paragraph 1 of this Article by imprisonment of one to eight years, and for the offence referred to in Paragraph 2 by imprisonment of two to ten years."

The criminal offence under Article 317 of the CC has a basic form (Paragraph 1) and two more serious forms (Para 2 and 3). The act of the basic form is defined alternatively, either as (1) inciting or (2) inflaming of ethnic, racial or religious hatred or intolerance. Inciting means any activity directed towards creation of ethnic, racial or religious hatred or intolerance, which means that before it was committed, there had been no hate or intolerance among the peoples or ethnic communities living in Serbia. On the other hand, inflaming refers to any activity of strengthening (intensifying, deepening) of hatred and/or intolerance, which means that hate or intolerance had existed among the peoples or ethnic communities living in Serbia before the act was committed, but as a sort of latent state or of a lower intensity (Atanacković, 1985, p. 19; Lazarević, 2006, p. 782). Therefore, the act consists of: a) inciting – creation, producing, causing, "inception" of hatred and intolerance where these phenomena had not existed before, or b) inflaming – increasing, deepening, strengthening, intensifying, inflating, developing, enhancing or broadening the already "incited, created" hatred and intolerance, where such phenomena had already existed to a lesser extent, hence adding fuel to them (Đorđević & Đorđević, 2020, p. 200). According to one school of thought, for a criminal offence to be completed, during the former act, it is not required that the actual creation of hatred or intolerance occurred, or during the latter act, that their strengthening/intensifying actually happened. What matters is

that such actions could produce such kind of consequences (Judgment by the Supreme Court of Cassation Kžm 88/2009 dated 08/06/2009). Hence, this criminal offence could be regarded as the criminal offence of abstract danger (Bavkon, Bele, Kobe & Pavčnik, 1988, p. 229). Another school of thought believes that creation or deepening of hatred or intolerance represents the consequence of this criminal offence (Lazarević, 1995, p. 65). If this other opinion is accepted, the completion of criminal offence would require the occurrence of the said consequence, which means that, in case such consequence does not occur, and the offender intended to cause it, it would be regarded as an attempt which would, under general rules, be punishable, due to the prescribed penalty. The first school of thought seems more justifiable. In fact, in Paragraph 1 of this Article, imperfective verb forms are used (incites, inflames), which means that these actions are directed towards a particular goal, towards creating or deepening hatred or intolerance. However, it does not arise from the formulation of the said provision, that it is required that hatred or intolerance actually occurred. If the legislator chose the perfective verb forms (incited, inflamed), it would be clearly the consequence of the criminal offence. Therefore, it may be concluded that, in the basic form of this criminal offence, there are actions (inciting or instigating) which are in their nature, directed towards a particular goal – i.e. the creation or strengthening of hatred or intolerance among peoples and ethnic communities living in Serbia (Ćorović, et al, 2020, p. 95). The action in the first form of criminal offence is defined as inciting of hatred – creation of the previously non-existing hatred, or instigating it – developing and deepening the already existing feelings, which may be achieved by insulting, mocking or derogating ethnic, racial or religious feelings, exposing symbols to derision, disrespecting historical, cultural and other values (Lazarević, 2006, p. 782). The criminal offence exists only if the listed activities are directed towards ethnic, religious or racial affiliation, bearing in mind that the number of persons against whom the actions are taken is not relevant – the offence will exist even if it is committed against only one person. The text of the law does not contain the ways of inciting or instigating hatred or intolerance. Most frequently they refers to relevant verbal or propaganda activities (Miladinović-Stefanović, 2015, p. 447). “In addition to verbal actions, i.e. spoken or written words, there are other possibilities as well, such as various images, caricatures graffiti, concludent actions and so on. Concrete examples of activities of inciting or instigating hatred or intolerance may take the form of insulting, mocking or derogating persons belonging to protected groups and/or their ethnic, racial or religious feelings, as well as exposing their symbols to derision. Considering

the fact that the legal provision uses imperfective verb forms, the criminal offence has been committed, pursuant to Article 112 Paragraph 30 of the CC, if the act was committed either once or more than once. The prescribed acts of commission should primarily affect emotions, as well as the intellect of persons belonging to particular nationality or ethnic group, in relation to which there is an attempt to create or strengthen (deepen, intensify) hatred and/or intolerance. Acts of commission in this case, are taken in relation to: a) hatred which is understood in different ways in the legal theory. Thus, hatred is considered a hostile feeling towards someone. It is a psychological basis for creating conflict situations and taking certain actions that may cause major disturbances in relations among citizens, depending on their nationality, race or confession, frequently followed by other grave consequences (Lazarević, 1993, p. 34). Additionally, the acts of commission in this case, are also take in relation to: b) intolerance which is also defined differently in the legal theory. Intolerance is, to a certain degree, a less severe form of relations among citizens, denoting the state of distrust, sense of bigotry and repulsion (Lazarević, 1993, p. 34). Also, in its negative potential, intolerance is of a lower intensity than hatred, but it could also lead to taking certain activities which express intolerance and which may contain elements of certain criminal offences. It is manifested as a lack of tolerance (all the way to repulsion). It is disputable whether scorn (a negative attitude) for a particular nationality or ethnic community could have a character of intolerance (Stojanović & Delić, 2013, p. 270). Intolerance denotes "a state of distrust, sense of bigotry and repulsion" (Lazarević, 1999, p. 288) and "in its negative potential, it is of a lower intensity that hatred". The act is, thus, completed at the very moment of taking a legally prescribed action, irrespective of whether hatred or intolerance had actually been incited or increased in that particular case. Our legislator does not require the prescribed actions of the basic form be taken publicly (contrary to that, the criminal codes of Montenegro and Bosnia and Herzegovina require that the action be taken publicly).

In addition to the basic form of manifestation, the criminal offence under Article 317 of the Criminal Code of Serbia may take two more severe, qualified forms of manifestation. The first more severe form of offence (Paragraph 2), for which imprisonment of one to eight years is stipulated, exists if the act of commission was taken in a specific way, where the very method of committing the offence, is a qualifying circumstance. This offence exists if the act of commission – inciting or inflaming hatred or intolerance – was committed by: a) coercion – use of force (absolute or compulsive, direct or indirect coercion in terms of pressuring the will of other person) or threat (direct or indirect

possibility of occurrence, announcement – verbal, written or symbolic, use of force against other person, b) abuse – acting in relation to another person's body by inflicting pain, suffering, fear or discomfort, either physical or mental, c) compromising security – causing fear for another person's personal or property security, d) exposure to derision of national, ethnic or religious symbols – by violating the reputation of those symbols, d) causing damage to other person's goods and d) desecration of monuments, memorials or tombs. Eventually, the most severe form of this criminal offence (Paragraph 3) is qualified by the following two circumstances: a) the method of committing the offence – by abuse of position or power and b) the type, extent and intensity of the caused consequence–the occurrence of riots, violence or other severe consequences affecting the co-existence of peoples, national minorities or ethnic groups living in Serbia. If the basic form of offence is qualified according to the specified circumstances or consequence, the punishment prescribed for offenders shall be imprisonment of one to eight years. On the other hand, if the first more severe form of offence is committed in a legally prescribed way or if it caused the more severe consequence specified, as a result of the act of commission in the manner stipulated, the offender shall be punished by imprisonment of two to ten years. This form exists if the basic form of offence is committed in one of the ways, or if relevant consequences have been caused, stipulated in the provision of Paragraph 2 Article 317 of the Criminal Code. The legislator will use the so-called "referring provision" ("if the offence under Paragraph 1"), hence, all that is specified for the previous, basic form, except the qualifying circumstances, also applies to the more severe form. It is evident that qualifying circumstances in their very title, indicate other criminal offences, thus they should be construed in accordance with their substances, which refers to the fact that there is no joinder of offences (Stojanović, 2009, p. 696).

The constitutional term of encouraging could not be made equal to the criminal and legal term of instigating, because according to the criminal and legal term, instigating is always conducted in relation to a particular criminal offence, and the instigator has to be aware of the causal relation between the act of instigating and decision to commit a criminal offence, as well as of all relevant features of that offence (Stojanović, 2006, p. 245). The constitutional term of encouraging could perhaps be associated with the term of propaganda. The propaganda comprises stating or spreading certain facts (either false or true) or ideas for the purpose of making an impact on other persons to accept those ideas as well, and possibly, take certain actions that may be required for the purpose of achieving the propaganda goals, which, in their character,

may also constitute criminal offences. If the propaganda contains agitation (pushing for) to commit criminal offences, then it closely resembles the criminal and legal term of instigating. However, it differs from it in the way that instigating is, therefore, directed towards a particular criminal offence, which is not the case with the propaganda (Jovičić, 2007, p. 228). Obviously, there is a clear distinction in this context as well, that hatred and intolerance alone, do not constitute criminal offences (Lazarević, 2006, p. 783). The term "inciting" either, was not left devoid of certain dilemmas in the criminal and legal literature, in particular when it comes to the issue whether inciting could indirectly be carried out by "manifesting" (Ćirić, 2008, p. 153).

4. Motive, cause and consequences of comitting a criminal offence

The most common motives, or grounds encountered in the practice of committing the criminal offence of grave desecration include: hatred (the OSCE; 2011, p. 8.) toward particular ethnic and/or religious community, anti-Semitic and extremist, ideological-political motives, spread of fear, vandalism etc. In this criminal offence, hatred, aversion, stereotypes, prejudices and ignorance are certainly a type of motive, or grounds for its commission.

Causes of committing this criminal offence largely depend on education, historical background, general atmosphere in the society, but also on impunity for the harsh rhetoric and on the very messages –conveyed by politicians, as well as other segments of the society, which give rise to attitudes that encourage incitement and occurrence of hate speech, promoting the already existing stereotypes. Causes that may lead to hate crimes include poor economic situation of perpetrators and the society in general (Iganski, 2014, p. 164.), presence and promotion of stereotypes concerning a particular group in movies and on TV, political campaigns spreading hatred and prejudices, unpleasant experience perpetrators have in company of persons belonging to the same group as the victim and tensions among neighbouring countries, particularly the post-conflict countries. Causes may be found in the influence of the family and immediate surrounding (Kovačević, 2009, p. 97), the acquired "permissibility" of hatred and intolerance that later produces intolerance, exclusion, verbal expressions of hatred in the public and private life, as well as in the acts of open violence and aggression. "The permitted" hatred, therefore, originates as an educational and psychological phenomenon, but its fruits may well outgrow the age of children and one's personal psychology, becoming present as a social phenomenon, publicly manifested through the

hate speech. The reasons for the occurrence of these phenomena may be found in the deeply rooted opinion existing in a particular community that persons belonging to certain minority groups do not deserve to be treated as equal, as well as in the authorities refusing to actually provide equal protection and rights to all citizens in the society.

The consequence of this criminal offence includes the violation of ethnic, racial or religious feelings of people belonging to those groups, as well as creation or deepening of hatred or intolerance among communities, either majority or minority ones. The offence has an impact on people – which may be either psychological or emotional, leaving consequences on the identity and self-esteem of the victim. It also intensifies the level of violence and hatred. A direct (immediate) victim may experience a severe psychological violation and an increased feeling of threat, because he or she is unable to change the feature that made him or her the victim. Criminal offences committed out of hatred have a much more profound psychological effect on their victims, resulting in feelings of depression and anxiety. The commission of a criminal offence produces the effect on the target groups. The community that shares the same feature with the victim could also experience fear and intimidation. Other persons belonging to the target group could not only feel at risk of any future assault, but could also experience the assault on the victim as they were victims themselves. These effects could be multiply increased if experienced by the community that has been the victim of discrimination throughout its history. The offence has an impact on other vulnerable groups, in particular those that identify with the target groups, especially when hatred is based on certain ideology which is simultaneously directed against several groups. This type of criminal offences undermine the ideal of equality among people belonging to a society, causing harm to the fundamental principle of human rights and freedoms.

5. Levels of culpability of a criminal offence

When speaking about the level of culpability, this criminal offence can only be committed with intent, which means that the perpetrator is certainly aware of the fact that their actions/lack of actions incite/inflame hatred/intolerance, that they are doing it specifically on a religious, ethnic or racial basis, and that it is exactly what they want, that is, agree to do. The widely held view, both in theory and in practice, is that it could be a matter of both direct as well as potential intent, bearing in mind that the perpetrator must be highly aware of the fact that their actions undertaken may incite or inflame ethnic, racial or religious hatred (verdict of the Court of Appeal in Kragujevac, Kž

1 829/2014(2) from 19 August, 2014). In addition to this, in order to have an offence, it is not necessary to have the intention of the perpetrator to cause or incite hatred towards peoples or ethnic communities (Čejović, 2008, p. 795).[1] However, there are opinions (which represent the minority) that this criminal offence can only be committed with direct intent and that, regardless of the fact that the law does not explicitly require any "specific intention", it arises from the nature of the offence itself and the actual entry under which this criminal offence was classified (the chapter or group`s object of protection) (Bavkon, et al. 1988, p. 229). If the substance of this criminal offence is analysed, the intention was not really given in its description, which indicates the propriety of the first mentioned view (that no intention is required). However, the action of this criminal offence is determined so that it is directed towards a specific objective, which indicates "increased culpability, i.e. awareness and will" in the perpetrator. In other words, it alludes to direct intent. Still, potential intent should not be excluded as a level of culpability in this criminal offence since it is possible that a person is aware of the fact that their actions could incite hatred (objective) and thus agrees to it. Therefore, it may be concluded that the existence of a possible intent is sufficient enough.

6. Subject and object of the criminal offence

With regard to the perpetrator of the criminal offence, the active subject of the criminal offence, it is clear that it can only be committed by a human being (any person), one or more of them in some form of complicity. No special characteristic is required for the perpetrator, so the perpetrator can be any criminally responsible person. However, if the perpetrator is a person who abuses authority and position, the possibility of stricter punishment shall be envisaged (Article 317, Paragraph 3). In practice, cases including actions of vandals, chauvinists, extremists, members of sects, hooligans, politicians, journalists, fans and others were recorded. Therefore, in principle, any person, whether a domestic citizen or a foreigner, may be a perpetrator. However, some questions can be raised here. Firstly, if there are members

[1] In this sense, see the decision of the former Supreme Court of Croatia Kž. No. 896/52 from 27 June, 1952 which reads: "With regard to the subjective aspect of the criminal offence of inciting ethnic hatred or intolerance, the first instance court, as it arises from the challenged verdict, improperly considers that the existence of this criminal offence requires that the perpetrator has the intention to incite or inflame ethnic hatred or intolerance. According to the law, such an intention is not required for the commission of this criminal offence, but it is sufficient for the perpetrator to have an intent."

of different confessions within the same nation, that is, national minority or ethnic community, can they commit this criminal offence against one another based on religion? The law, among other things, covers religious hatred and intolerance, but it does not recognise religious groups as passive subjects, as it does with other criminal offences (Articles 174, 370, 387 of the Criminal Code). This is probably a consequence of earlier legislation, when the difference between belonging to a certain people or national/ethnic group and belonging to a certain religion was not taken into account. Today, it is necessary to make a distinction between belonging to a nation (ethnos), on the one hand, and belonging to certain religious communities, on the other hand. Therefore, it would be necessary to specify Article 317 of the Criminal Code, in such manner as to clearly define the protected groups. Another question referring to the active subject of this criminal offence is whether it is necessary for its substance that the perpetrator and the passive subject belong to different national or ethnic communities? This would be an atypical situation, but it is conceivable that a member of a nation or ethnic group incites or inflames hatred/intolerance towards their own group. In this case, a single person incites or inflames hatred or intolerance towards their own community by their actions, but in such manner that there is an attempt to create hatred or intolerance one feels towards that (their) group, among other peoples, national minorities or ethnic communities. It seems that in this situation, the existence of this criminal offence would not be excluded, considering its object of protection (Ćorović et al., 2020, p. 95).

A passive subject is an entity (natural/legal entity) that is the subject of a criminal offence by becoming a victim. Actions, that is, acts that form an integral part of the substance of this criminal offence, may be undertaken by the perpetrators against one or more persons, but it is important that those are carried out depending on their ethnic, racial or religious affiliation. Therefore, it is important for the existence of this offence that ethnic, racial or religious hatred or intolerance occurs or spreads among peoples or ethnic communities living in the territory of Serbia and not in some other countries. This indicates that the feature of the passive subject is a constitutive element of this offence. The passive subject in this criminal offence are the peoples and ethnic communities living in the Republic of Serbia. If peoples and ethnic communities do not live in our country, this criminal offence will not exist. However, a national minority, as part of the people who do not live in their home country, should also be included here. We note this since, most likely, there was an omission to include the term “national minorities” in Paragraph 1, as was done in Paragraph 3. Therefore, there is a noticeable inconsistency

in the use of the terms in Article 317, since Paragraph 1 speaks about peoples and ethnic communities while Paragraph 3 speaks about peoples, national minorities and ethnic groups. Anyway, it should be borne in mind that the passive subject in this criminal offence are the peoples, national minorities and ethnic communities living in Serbia (Stojanović, 2009, p. 696). The term "peoples" refers to citizens of the Serbian nationality, as the majority population in the Republic of Serbia, while the term "national minorities and ethnic communities" refers to citizens of the Republic of Serbia who live in its territory and do not belong to the majority nation. The commission of these actions against national or ethnic groups that do not live in the territory of the Republic of Serbia cannot be considered this criminal offence, but possibly another (e.g. some form of criminal offence referred to in Article 387 of the CC). Migrant national/ethnic groups cannot fall under the notion of national minority. Therefore, regardless of the linguistic meaning of these terms, the aforementioned migrant groups cannot be passive subjects of the criminal offence referred to in Article 317 of the Criminal Code, i.e. national and ethnic communities (minorities, groups) living in the territory of Serbia. In order to be the subject of protection under this incrimination, they must be citizens of the Republic of Serbia. This is because the given criminal offence is included in the group of criminal offences against the constitutional order and security of Serbia. According to the case law, this criminal offence may also be committed against one person, provided that the action taken may incite national hatred between "members of the ethnic group of the victim and the ethnic group of the perpetrator" (verdict of the Supreme Court of Serbia, Kž I-518/85 from 10 September, 1985). The same would apply to the act of inflaming. This view is acceptable since taking action against an individual person may lead to the generation of hatred, that is, the strengthening of intolerance against the corresponding national/ethnic group. However, this criminal offence will be non-existent if the perpetrator was not aiming to achieve this goal (verdicts of the Higher Court in Belgrade, K 794/2013 from 13 November, 2013 and the Court of Appeal in Kragujevac Kž 1 829/2014(1) from 19 August, 2014).

With regard to the object of the criminal offence, that is, general and individual goods and values that are violated or threatened by the commission of this criminal offence, it could be said that this offence violates parity, equality, the sense of belonging, safety and security (Đurić & Manojlović, 2007, p. 651). In this case, the constitutional principle (notion) of the prohibition of ethnic, racial or religious discrimination emerges as an object of protection (Turković, et al., 2013, p. 400). In other words, it is the tranquillity (feeling) of citizens regardless of their differences due to national, racial, religious or ethnic affiliation.

7. Time and place of commission of the criminal offence

With regard to the place of commission of this criminal offence, it can be anywhere, both in the place of the action taken and the place of the consequences. However, in the case of this criminal offence, the action was often taken in one place and the consequences occurred in another, thus this criminal offence falls under the category of distance criminal offences and it could be said that in this case, the theory of unity applies (the place of commission/omission and the occurrence of the consequence). Given that this criminal offence may be committed as an extended criminal offence, the place of execution is then considered to be any place where the perpetrator committed the criminal offence and any place where the consequences occurred.

What is very common and frequent with the development of information technologies is the so-called cyber crime. Among others, the articles of the Criminal Code referring to cybercrime include Article 317, i.e. the criminal offence of Inciting ethnic, racial and religious hatred and intolerance. Therefore, this offence is increasingly being committed via the Internet (social networks), media (electronic and written), but also "live" at political rallies, sports events, at and in the vicinity of religious buildings, cemeteries, meetings of (extremist) organisations and other places. Abuse of the Internet is a very convenient tool for inciting ethnic, racial and religious hatred. Perpetrators of this offence may, at a small cost, create a website or a blog, free of charge, where, without any limitation, they express racist attitudes, insult or ridicule other peoples and ethnic communities, which may result in inciting or inflaming hatred. Through the Internet, such views may reach an unlimited number of people, which makes their actions particularly dangerous. The offence could be committed by just one person, but today it is mainly committed by various associations and organisations, the aim of which is to create ethnic, racial and religious hatred and intolerance. When defining such categories, one must also be very careful because there are thin and porous lines between the freedom to express one's own opinion and hate speech (Ivanović & Čudan, 2019, p. 127). Therefore, it may be concluded that the Internet and social networks are a very suitable tool for inciting ethnic, racial and religious hatred. Insulting, mocking, underestimating ethnic, racial or religious feelings and other forms of hate speech on websites/blogs are conveyed to an unlimited number of people, which contributes to inciting or inflaming hatred. The Criminal Code of the Republic of Serbia does not stipulate hate speech on the Internet and social networks as a separate criminal offence.

As for the time of the commission of this criminal offence, it is not a constitutive element of this criminal offence. This criminal offence can be committed at any time. It is characterised by the fact that the time of taking the action does not always coincide with the time of the occurrence of the consequences, so this offence is the so-called temporal criminal offence (temporal crime). In our criminal legislation, the so-called Action Theory is accepted regarding the determination of the time of commission of the offence (the time when the perpetrator was acting or was obliged to act, regardless of the time the consequence of the offence occurred). This criminal offence can also be characterised as a permanent criminal offence. When determining the motive and the perpetrators of the criminal offence themselves, it is helpful to determine the circumstances related to the time of the commission of the criminal offence, e.g. the offence was committed during a national or religious holiday, i.e. a date that is important for a certain social group (Dečković, 2021, p. 186). The commission of this criminal offence does not have a clear specific time dimension, so it may occur both in wartime and peacetime conditions. What is noticeable in practice in this area is the increased intensity of the commission of this criminal offence in the period immediately after the end of the war, most often by the desecration of graves, especially in the territory of Bosnia and Herzegovina, the Republic of Croatia and the territory of Kosovo and Metohija.

8. Conclusion

With the criminal offence of inciting ethnic, racial and religious hatred and intolerance, one can observe its constant presence in our society, as well as fluctuations in intensity, scope, consumption, joinder and absorption with other criminal offences, but also the far-reaching and serious consequences it can lead to. This offence is also an act of high-tech criminality, which can be carried out in many ways, in various places (physical and virtual) by various actors, against one or an unlimited number and circle of people. The commission of this offence is the result of the existence of an already suitable social environment, discourse, narrative, education, lack of punishment, difficulty in proving hatred/intolerance and other reasons. It may be a consequence of war events, and it can also be the cause of them. Therefore, it is an epilogue, but it can also be a prelude to hate crimes. In terms of possible strategies for prevention, it was observed that important criminogenic factors represent the low level of education of the majority of perpetrators and their unfavourable socioeconomic status, which gives the basis for the assumption

that with timely educational work and provision of conditions for improving material status, significant results could be achieved in the domain of both general and special prevention, especially in terms of the observed most risky categories of potential perpetrators (recidivists, illiterate persons, persons without primary education and persons in a state of severe social vulnerability) (Matković, 2021, p. 76).

If we are looking for an answer regarding the manner of prevention of the commission of this offence, naturally prevention would be most suitable, and to have a more expedient restorative approach of criminal reaction instead of a retributive approach. The entire society, both the state and individuals, should build and promote the spirit of community, mutual respect, familiarisation and coexistence of all citizens living in the same area. Such values should be instilled in every individual from birth as a way of thinking and acting. It is undeniable that a stable economic standard also attributes to such an idea of well-being. However, history teaches us that even in economically developed countries, these offences indeed existed. Also, we ourselves have witnessed the destruction and suffering that the act of inciting ethnic, racial and religious hatred and intolerance may lead to. Therefore, this offence should be approached extremely seriously and comprehensively, without delay, for it may lead to far-reaching social disturbances and devastating consequences.

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KRIVIČNO DELO IZAZIVANJE NACIONALNE, RASNE I VERSKE MRŽNJE I NETRPELJIVOSTI

APSTRAKT: U našem regionu multietničnost, multikonfesionalnost i višejezičnost, predstavljaju uobičajene pojave, te stoga i izazovi sa kojima se one susreću nisu izuzeci. Samom emancipacijom i tranzicijom zemalja u regionu, pristupanjem Evropskoj uniji, države su donele nove zakonodavne okvire u kojima su prepoznale davno postojeća lična svojstva svojih državljana, pružale su zaštitu tim svojstvima i inkriminisale napade zbog

tih ličnih svojstava, ali i izazivanje mržnje i netrpeljivosti zbog istih. U ovom radu prikazano je krivično delo izazivanje nacionalne, rasne i verske mržnje i netrpeljivosti, u delu ustavnog, a posebno krivičnog prava. Posebna pažnja je posvećena analizi pravnog okvira i predviđenosti dela u propisima Republike Srbije, radnji i načinima izvršenja ovog krivičnog dela. Takođe, pažnja je posvećena i tome šta je pobuda, koji je uzrok izvršenja ovih dela, šta je posledica, da li postoji povezanost i sticaj sa drugim krivičnim delima. Kao bitno obeležnje ovog krivičnih dela obrađeno je pitanje mesta, objekta, vremena, učinioca i oblika krivice za izvršavanje dela.

Ključne reči: *mržnja, Republika Srbija, netrpeljivost, krivično zakonodavstvo, krivično delo.*

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Book Review
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MARIJA MIJATOVIĆ, SOFT LAW IN INTERNATIONAL COMMERCIAL LAW, FACULTY OF LAW AND BUSINESS STUDIES DR LAZAR VRKATIĆ, NOVI SAD, 2024 (368 P.)

In her first book, the author Marija Mijatović, uncompromisingly, boldly and courageously, at the beginning phase of her scientific and research career, launched on revealing one of the most complex legal phenomena nowadays - soft law regulations and its relations to traditional, in this context, "hard law" sources, giving a special review of the international commercial law field. Voluminous monography before us, created from her doctoral dissertation whiteness her success. With this monography, the author has clearly traced her future academic path in the course of researching international trade law regulation and the process of harmonization in the economic area, that accompanies the inevitable process of global market law transformation, with the aim to facilitate the modern society solutions for numerous problems and challenges.

The serious study is based on an exhaustive comparative legal presentation of various theoretical positions that are undergo to a critical questioning of the subject matter. The historical method has determined the path of developing and shaping of the *soft law* institute in international law. Normative analysis reveals the content, i.e. the meaning of particular legal rules, and also explores fundamental intentions of soft law creators. In a broader social context, the author is seeking the basic reasons for the implementation of these instruments,

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by states and international organizations, and also by businessmen. To the quality of work adds the analysis of significant number of decisions, both court and arbitration, that contribute to the clearance and comprehensiveness to perception of this law phenomena, that is still insufficiently researched.

Using mature and receptive style of presentation, using excellent arguments, in a comprehensive way, soft law is observed as a product of new times and new needs in a study which surely will be noticed not only in the domain of commercial law science, but widely - in legal theory in general, by creators of soft normative instruments, and also by those applying them in their business circles.

The monography in front of us is a proof of tectonic changes of world legal scene lasting for several decades, that lead to emergence of fundamentally different legal instruments bringing dynamism and flexibility to normative flows, as well as the opportunity for *ad hoc* interventions. At the same time, at the European Union level, there is a redefinition of the traditional division of sources of law into primary and secondary, having a tendency for soft law regulation to make a new, tertiary group. The author underlines that it performs pre-legal, post-legal and para-legal functions, and the scope of these will become clearer in the following years. At the same time, the positions denying soft law instruments the feature of rights were overcome by those who see in them a crucially permissive form of regulatory action of non-binding force. Believing soft law's power, possibilities and potential, the author highlight that these are instruments remaining "outside the established boundaries of international law, but are subject to the opus of legal thought and deserve her attention".

There is not a single complete or similar complementary study, neither in the domestic nor international scientific frameworks. Related to that, it was pointed out firstly that these are written instruments containing rules of conduct. Formally, they are of a non-binding nature, so there is no judicial protection in case of non-compliance. Nonetheless, *soft law* represents legal sources producing de facto, not de jure, effects predicted by their creators. There are different degrees of obligingness of such acts, depending on the quality of legal solutions, authority and impact of their makers. Afterwards, it is stated that soft sources of law are characterized by a non-traditional procedure for passing, excluded from usual legislative procedure. Regardless of the fact that they are formed by the factual situation generally, soft law sources still keep their normative component in terms of, before all, nomotechnical structures. The author also indicates the fact that it is a legal phenomenon with an exceptionally heterogeneous composition, in terms of the instruments that

fall within its volume. They are connected to the international community, the most developed within the EU, and from there it spreads to the national legislation level, in coexistence with traditional legal instruments with its harmonization, unification and globalization role. *Soft law* completes all the regulation needs of modern and unforeseeable relations in nowadays society in dynamic and flexible manner.

Due to all these characteristics the author bravely sees *soft law* regulation as a completely "new wave of experimentation" that is gradually transforming the international (European) legal order, examining the ideal of hard legislation that is centuries old and introducing "essentially new, different levels of normative intensity."

Structurally, with the introduction, the Monography is composed of two comprehensive parts, that are formed from several shorter chapters. Within the first one, bearing the title *soft law - part of the new legislative culture*, there is the analysis of the complexity of international law and the tendency of the development of legal sources in the context of the influence made by *soft law* acts. In order to perform the analysis of this term, a previous position was taken with regard to the binary theory of law (according to that theory soft law is logically impossible) and the continuum of the theory of law (which allows the legal foundation of this phenomenon), in order to approach the overview of the possibilities manifested by the hybrid theory that is dedicated to the way of soft instruments usage. Likewise, there is the insight made into the adequacy of re-examining the context of modern legal pluralism, the principle of legality and the criticism of the theoretical analysis of *soft law* justification. Afterwards, it is underlined that understanding of the international normative order depends on the analysis of the diversity of techniques used in creating the international law, emphasizing the new role of the comparative method in that process. Related to that, the author examines the sources of international law in the context of the traditional classification provided by Article 38 of the International Court of Justice. Then, there is presented assessment of the influence of international organizations and other international entities, globalization process, Americanization and Europeanization of law, as factors influencing the forming of the international legislative system.

The end of the first chapter of the first part, is the author's presentation of critical view of the legal harmonization contemporary process, with suggestions for reaffirming this process in contemporary conditions. The second chapter of the first part of the Monography, with the title "Defining the term soft law", discusses the problem of its terminological determination and points at diversity of defining and determining the legal nature of

this phenomenon, followed by an overview of existing legal thought and numerous theoretical positions regarding *soft law*. The following pages include an overview of the concept of *soft law* historical development, with a comparison of the positions of neo medieval thought and social genealogy in determination of its origin and value. Then, there is analysis of the functions performed by *soft law* regulations (such as pre-law, additional law, para-law, i.e. the role of model legislation, i.e. applicable contract law), which have the harmonization of law as their ultimate goal. This part accentuates the diversity of forms in which soft law instruments appear, and also the problems in determining final classification of them. Thereafter, the author examines the peculiarity of the soft law phenomenon and explains why it is considered to be a new, tertiary group of law sources within the European Union. The special review is given to explain the role of *soft law* sources during COVID -19 pandemic, when their hyperproduction happened. A large number of general and technical recommendations, proceedings, directives, circulars, pandemic plans, administrative guides, codes of conduct and so on, have caused incoherence and over-norming, constitutional violations, and made confusion in the general public. These circumstances created the need for usage of all the acquired experience for reform and the creation of a clearer and better arranged framework for the understanding and application of soft law regulations in the post-pandemic period. At the very end of the second part, the author makes comparison of hard law and soft law sources - primarily with regard to international conventions. Thus, in order to make the picture that would be fully objective, there is an analytic overview of all advantages and disadvantages of soft legal instruments.

In the Monography's second part, with the title *"The role of soft law as an instrument of harmonization in international trade law"*, the author primarily analysed the justification of the need for harmonization, through the various methods by which it is performed, as well as the priorities of equalisation in the domain of contractual trade law. Afterwards, there are peculiarities of the legal and political factors of the commercial and contract law harmonization in the European Union. Chapters three and four present the methodological aspects of the so-called bottom-up approach of harmonization, the role and forms of cooperation of certain international organizations in the capacity of formulating agencies, and, at the end, the use of *soft law* sources. After that, there is an account of *soft law* instruments in international trade law, which are considered to be a type of modern *lex mercatoria*.

The sixth chapter of the second part, lists the specifics and advantages of the application of soft instruments, as well as certain types of harmonization

functions of soft law in international trade law, namely: the function of soft law as a model law, applicable contract law, rights in arbitrations and on courts, means for interpretation and filling legal gaps in international uniform and national rights. The last chapter of second part analysis the most important *soft law* sources in international trade law. On the bases of the criteria of success, the following are presented: Principles of European Contract Law, UNIDROIT Principles for International Commercial Contracts, Common Framework for Contract Law, Draft Common Reference Framework for European Private Law and Principles of European Contract Insurance Law and Principles of Reinsurance Contractual Law. For each individual act there is analysis of reasons and conditions of origins, usage possibilities, significance and further legal perspective.

In whole, the Monography provides a comprehensive, objective view of *soft law*, with evaluation of its potential as a means of harmonizing international trade law, which still does not have a wider application in Serbian law. The fact that it is a highly useful harmonization instrument, that may also be an introduction to *hard law* as an alternative legal remedy. These facts gradually redefine up to date international normative activities, showing a tendency for this to happen equally within national frameworks. Soft acts as model law, affect the creation of "world merchant law", and as the author notes, "successfully denationalize the legal regime of cross-border transactions".

The Monography notices that the usefulness of *soft law* is placed in its readiness to satisfy the needs for transitional solutions, when some issues are not mature to be regulated by classic legal instruments in the adequate manner. Therefore, soft law is a salvation from discord and a way of filling legal gaps regarding some issues. Sometimes, an individual issue can be regulated in a better and more detailed way using the soft law, in comparison to what could be achieved by classical regulation which is based on, as it was emphasized, "the most general common denominator of the negotiator's current possibilities". Fast enactment of laws, and also changes in case of inadequacy, adaptability and flexibility, involving the opportunity for the parties to find the most suitable normative options in accordance to their autonomy of will, are the most important advantages of *soft law*. Hence, *soft law* often provides a more ambitious and far-reaching step forward in international legislative flows, in accordance to new needs, conditions and time.

In general, the Monography in front of us fills a significant gap in legal theory, using a thorough and systematic existing knowledge review, analysing the effects of previous judicial practice, and giving a detailed review of all the

advantages and disadvantages of soft law, which comprehensively provides a new perspective on this legal phenomenon.

Through the analysis, the author bravely destroys the stereotypes of the conservative understanding of the sources of law, underlining the need for their re-evaluation and expansion, observing the soft-hard law instruments relation. Their skilful combination is the key to regulating international trade, by reintegrating a hybrid legal framework. Following this approach will totally eliminate any existing vagueness related to the roles and functions of *soft law.*

The extensive study that is available to us, also made an important popularization of soft law instruments, with the necessity to involve knowledge from this field in the curricula of education subjects relating the sources of EU law, empowering the idea of a common core of European contract and private law in general. Finally, it is certain that we have in our hands an extraordinary, complete and comprehensive piece, which skilfully pushes the boundaries of the fundamental theoretical knowledge about the contract law sources. It may be considered to be a kind of guide for introduction of all the potentials of specific *soft law* instruments, which sets the way for further research, adjusted to the transformation processes of basic legal institutes in the spirit of new times, challenges and needs of modern society.

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Marija Mijatović, Soft law u međunarodnom trgovinskom pravu, Fakultet za pravne i poslovne studije dr Lazar Vrkatić, Novi Sad, 2024. (368 str.)

INSTRUCTIONS TO AUTHORS

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The editorial board of the journal "Law - Theory and Practice" requests that authors submit their texts for publication in accordance with the following instructions.

The journal publishes texts in the fields of law, economics, and social sciences. The journal accepts scientific articles, reviews, critical analyses, regulatory analyses, commentaries on court decisions, student papers, and other contributions. Texts should be submitted in both English and Serbian via the online OJS platform.

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The submitted text must be written in Microsoft Word, using the Times New Roman font, size 12 pt, in Latin script, with 1.5 line spacing. Use 25 mm for all margins. The text length should not exceed 12 A4 pages, including text, tables, images, graphs/charts, references, and other attachments.

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Keywords should be listed after one line of spacing below the abstract, in English, followed by the keywords in Serbian. There should be a maximum of five keywords, size 12 pt, Italic. Then leave a space of two lines before the main text of the paper begins.

Texts should be concise, written in a clear style, and follow a logical sequence that typically includes: an introduction, main body of the paper, and conclusion. The font size for the main text is 12 pt. Headings and subheadings in the text should be 12 pt, Bold.

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If the author wishes to include acknowledgments or references to project(s) under which the text was written, they should do so in a separate section titled "Acknowledgments", following the Conclusion in sequence and preceding the author's affiliation and the abstract in Serbian.

For writing references, use the APA (Publication Manual of the American Psychological Association) international standard for writing references. Notes or footnotes may contain additional explanations or comments related to the text. Footnotes should be written in Times New Roman font, size 10 pt.

In APA style, the source being cited is mentioned **within the text**, with the elements (author, year of publication, page number of the quoted section) enclosed in parentheses immediately before the period and separated by commas.

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When citing a source written by a single author:

If the author's name appears in the sentence, the year of publication of the cited text is placed in parentheses immediately after the author's name, and the page number is provided at the end of the sentence:

Example:

As Besermenji (2007) highlights, "air pollution is a particularly prevalent issue, primarily due to an exceptionally low level of environmental awareness and a lack of professional education in the field of environmental protection" (p. 496).

If the author's name does not appear in the sentence, the author's last name, year of publication, and page number are placed in parentheses at the end of the sentence:

Example:

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

Note: If the citation is a paraphrase or summary, the page number is not necessary.

Example:

The environment encompasses everything that surrounds us, or everything that is directly or indirectly connected to human life and production activities (Hamidović, 2012).

When citing a source written by two authors:

Use "and" or "&" between the authors' last names, depending on whether the authors are mentioned in the sentence.

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).

When citing a source written by 3-5 authors:

For the first-time citation, list all authors:

Example:

(Cvijanović, Matijašević Obradović, & Škorić, 2017)

For subsequent citations, list only the first author followed by "et al.":

Example:
(Cvijanović et al., 2017)

When citing a source written by 6 or more authors:

For both the first and subsequent citations, list only the first author followed by "et al.":

Example:
(Savić et al., 2010)

When citing a text authored by an organization:

If the author of a paper is an organization, include the organization's name in parentheses as the author. If the organization has a known abbreviation, provide the abbreviation in square brackets after the full name in the first citation, and use only the abbreviation in all subsequent citations.

Example:
First citation: (Serbian Academy of Sciences and Arts [SASA], 2014)
Subsequent citations: (SASA, 2014)

When citing texts by authors with the same surname:

Use the authors' initials to avoid confusion.

Example:
The viewpoint expressed by D. Savić (2017) has been presented...

When citing multiple references by the same author from the same year:

If there are two or more references from the same author in the same year, add letter designations "a", "b", etc., after the year.

Example:
(Dragojlović, 2018a)
(Dragojlović, 2018b)

When citing two or more texts in one citation:

List the authors' last names in the order of publication and separate them with a semicolon.

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

When citing a newspaper article with a specified author:

Example:

It was reported in *NS uživo* (Dragojlović, 2021) that...

In the reference list, format this reference as follows:

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.

When citing a newspaper article without a specified author:

Example:

As published in *Politika* (2012)

In the reference list, format this reference as follows:

Politika. (2012). Straževica gotova za dva meseca [Straževica finished in two months]. February 1.

When citing personal correspondence:

Example:

According to Nikolić (2020),

In the reference list, format this reference as follows:

Nikolić, A. (2020). Pismo autoru [Letter to the author], November 21

When citing a text in press:

At the end of the reference, before the period, add "in press."

When citing court decisions, the practice of the European Court of Human Rights, and other sources from domestic and international judicial practice:

The reference should contain as complete information as possible: type and number of the decision, date when the decision was brought, publication in which it was published.

Example in text:

(Decision of the High Court in Belgrade – Special Department K.Po1 no. 276/10 dated January 26, 2012)

Example in text: (Borodin v Russia, par. 166.)

Note:

Sources from judicial practice **should not be listed** in the reference list. The full reference **should be provided** in a footnote. When citing the practice of the European Court of Human Rights, the application number should also be included.

Example for reference in a footnote:

As stated in the Decision of the High Court in Belgrade – Special Department K.Po1 no. 276/10 from January 26, 2012. Intermex (2012). Bilten Višeg suda u Beogradu [Bulletin of the High Court in Belgrade], 87, p. 47.

Borodin v Russia, application no. 41867/04, ECHR judgment, February 6, 2013, par. 166.

When citing laws and other regulations:

When citing a legal text or other regulation, mention the full name of the law or regulation and the year it came into force.

Example:

(Criminal Procedure Code, 2011)

(Regulation on the Content of the Decision on the Implementation of Public Procurement Procedure by Multiple Clients, 2015)

This rule also applies to laws or other regulations that are no longer in force.

Example:

(Criminal Code of the Republic of Serbia, 1977)

When citing international regulations, it is sufficient to mention the abbreviated name of the document along with its number and the year it was adopted.

Example:

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

When citing a text with an unknown publication date or author:

For works with an unknown date, use "n.d." (non-dated) in place of the year.

Example:

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

If the paper uses a reference to a paper by an unknown author, cite the title of the paper and include the year if known.

Example:

All that has been confirmed by a mixed, objective-subjective theory (Elements of a criminal offense, 1986, p. 13).

Important Note:

Cited sources (regardless of the language in which they are written) should not be translated into English, except for the titles of papers (publications, legal acts) which should be translated and written in square brackets.

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*, br. 102/10.
4. Zakon o turizmu [The Law on Tourism]. *Službeni glasnik RS*, br. 17/19.

References Section:

At the end of each manuscript, include a **"References"** section listing all the cited sources in alphabetical order. Titles in foreign languages that begin with definite or indefinite articles ("a", "the", "Die", etc.) should be listed as if the article does not exist. The list of references should include only works that are published or accepted for publication.

The editorial board emphasizes the usage of recent references whenever possible, which will be a key criterion when selecting manuscripts for publication. Each reference must include a DOI number if available. If the cited reference does not have a DOI number, the author may include a URL.

Example of referencing 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: 10.18690/978-961-286174-2

Example of referencing with a URL:

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. (Ed.), *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.

Examples of references to be listed at the end of the manuscript:

References

1. Agencija za privredne registre. Privredna društva [Companies]. Downloaded 2020, January 10 from https://www.apr.gov.rs/o-agenciji.1902.html
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.
6. Gopalsamy, N. (2016). *A Guide to Corporate Governance.* New Delhi: New Age International.
7. Jesover, F., & Kirkpatrick, G. (2005). The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries. *Corporate Governance: An International Review*, *13* (2), pp. 127-136. DOI: 10.1111/j.14678683.2005.00412.x
8. 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/wpcontent/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf
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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.

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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*, br. 72/11, 101/11, 121/12, 32/2013, 45/13, 55/14 i 35/19.

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