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ALGORITHMIC CONTRACTS IN MODERN CONTRACT LAW – CONCEPT, LEGAL NATURE, AND FUNDAMENTAL LEGAL ISSUES

ABSTRACT: The development of digital technologies has led to noticeable changes in the manner in which contracts are concluded and performed. Within this framework, algorithmic contracts have emerged as one of the forms of contemporary contracting. The subject matter of this paper is the analysis of algorithmic contracts in modern contract law, with particular emphasis on their concept, legal nature, and relationship to the traditional contract, the electronic contract, and the smart contract. The aim of the paper is to determine whether algorithmic contracts constitute a new legal institution or merely a specific form of contemporary contracting based on the application of digital technology, as well as to identify the fundamental legal issues arising in connection with their conclusion and performance. The paper is theoretical in nature and is based on the normative and comparative legal methods, along with an analysis of relevant domestic and foreign literature and legal sources. The main hypothesis of the paper is that algorithmic contracts do not constitute a separate and autonomous legal institution, but rather a specific form of contemporary contracting in which the existing rules of contract law continue to apply, subject to certain

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particularities arising from the use of digital technology and automation. The analysis shows that algorithmic contracts do not fall outside the framework of the general rules of contract law, but that there are certain distinctions of a qualitatively legal nature relating to issues of consent, attribution of decision-making, control over performance, and liability for the outcome of the automated process. Their significance, therefore, does not lie in the creation of a new branch of contract law, but in the fact that they clearly reveal the limits of the existing one.

Keywords: *algorithmic contracts, contract law, digital society, electronic contract, smart contract, automation of contracting.*

1. Introduction

The development of digital technologies has had a profound impact on nearly all segments of modern society. Changes in communication, data exchange, market relations, and economic activity have also brought changes in the way contracts are concluded, performed, and monitored. A contract no longer appears solely as a textually formulated agreement concluded through the direct contact of the contracting parties. Increasingly, it is a legal relationship that relies, to a greater or lesser extent, on digital infrastructure, pre-set rules, and automated processes. In this sense, contract law has not remained outside the broader transformation of digital society (Scholz, 2017). Domestic literature further confirms that digitalization affects not only the external form of business activity but also the very way in which the contracting process is understood. Stojšić Dabetić and Mirković (2022) proceed from the view that the digital economy and digital society are changing contract law and contracting practice, with digital technology becoming an integral part of the modern contractual cycle. For that reason, the issue of contracting in the digital society is not merely a question of technical medium, but also one of the transformation of legal thinking about contract.

Within these developments, the issue of algorithmic contracts stands out in particular. The topic is both contemporary and methodologically demanding. At the level of terminology alone, it is clear that complete stability does not exist. Specifically, the literature uses the expressions “algorithmic contracts,” “smart contracts,” “smart legal contracts,” “automated contracting,” and “AI in contracting.” This is not merely a question of language, but has a much broader dimension. Behind the different terms lie different theoretical starting

points. Precisely for that reason, a serious legal analysis must first clarify what is meant by an algorithmic contract and how it differs from other related forms of digital contracting (Scholz, 2017; European Bank for Reconstruction and Development [EBRD], 2018; Wendehorst, 2024).

The importance of the topic does not arise solely from technological novelty, however unquestionable that novelty may be. It is legally significant because it opens up classical questions of contract law under new conditions. This applies in particular to consent, attribution of decisions, contract performance under conditions of automation, legal certainty, and the liability of the contracting parties. In other words, algorithmic contracts attract attention not because they would automatically create new law, but because they put the fundamental assumptions of existing contract law to the test. That is where their true significance lies (Oliver, 2021; Wendehorst, 2024).

The subject matter of this paper is the analysis of algorithmic contracts in modern contract law, with particular emphasis on their concept, legal nature, and relationship to the traditional contract, the electronic contract, and the smart contract. The aim of the paper is to determine whether algorithmic contracts constitute a new legal institution or merely a specific form of contemporary contracting based on the application of digital technology, as well as to identify the fundamental legal issues arising in connection with their conclusion and performance. The main hypothesis of the paper is that algorithmic contracts do not constitute a separate and autonomous legal institution, but rather a specific form of contemporary contracting in which the existing rules of contract law continue to apply, subject to certain particularities arising from the use of digital technology and automation.

The research is theoretical in nature and is based on the normative and comparative legal methods, along with an analysis of relevant domestic and foreign literature. The paper first examines the concept of algorithmic contracts and their emergence in modern digital society, then their legal nature and the fundamental legal issues arising from them. A separate part of the paper is devoted to the domestic legal framework and to contemporary comparative developments in a borderline sense, in order to show that algorithmic contracts are not merely a theoretical possibility, but a topic that is already entering the sphere of positive law and regulatory attention (United Nations Commission on International Trade Law [UNCITRAL], 2024; Regulation (EU) 2023/2854).

2.The Concept of Algorithmic Contracts and Their Emergence in Modern Digital Society

The conceptual definition of algorithmic contracts is not simple, and the reason for this is not merely the novelty of the topic or the term itself. The problem also lies in the fact that the literature neither uses precisely the same language nor proceeds from identical assumptions. The most useful point of departure is nevertheless offered by Scholz (2017), according to whom algorithmic contracts are contracts in which an algorithm determines the obligations of one party, either before the conclusion of the contract or after its conclusion, when it serves as a mechanism for the further determination of the content of the relationship. Such a definition is important because it does not reduce the topic solely to the stage of performance, but also encompasses those situations in which the algorithm influences the selection of terms, negotiations, or the subsequent shaping of the contractual relationship.

Domestic literature further illuminates this topic through the idea of the algorithmization of contracts. Stojšić Dabetić and Mirković (2022) state that the algorithmization of contracts is a specific technical procedure that constitutes a precondition for the use and creation of electronic contracts and that may be designated as the algorithmic conversion of contracts. In their view, this procedure entails the technical process of encoding the text of the contract, that is, translating contractual clauses into computer code. This approach is significant because it shows that algorithmic contracts need not be reduced solely to smart contracts, but may be understood more broadly as the result of transforming contractual content into a technically structured form. On that basis, one point should immediately be clarified: an algorithmic contract is not necessarily a contract without human participation. Nor is it necessarily a contract that must be based on blockchain technology. Its distinctiveness does not lie in the complete removal of the human element, but in the fact that algorithmic rules acquire a legally relevant role in the formation or performance of the contractual relationship. It is precisely here that the difference from the classical conception of contract begins, as well as the reason why this topic should not be reduced to a mere technical innovation (Scholz, 2017; Cvetković, 2021).

The relationship between the algorithmic contract and the electronic contract is relatively clear. An electronic contract is a broader concept and refers to a contract concluded electronically, regardless of the degree of automation. By contrast, an algorithmic contract presupposes a higher level of technological involvement, since it includes the use of an algorithm as a

means that affects the formation or realization of the contractual relationship. Thus, every algorithmic contract is, as a rule, part of the broader field of electronic contracting, but not every electronic contract is at the same time an algorithmic contract (Scholz, 2017).

The relationship between the algorithmic contract and the smart contract is considerably more complex. EBRD (2018) makes a useful distinction between smart contract code and a smart legal contract, thereby showing that software code and a legal contract are not the same thing, even when they are functionally connected. Durovic and Lech (2019) further point out that the enforceability of smart contracts depends on the relationship between the formal language of code and the traditional language of contract. This means that the smart contract is a technologically narrower and more specifically defined concept, whereas the algorithmic contract is a broader analytical framework. The smart contract may therefore be viewed as a distinct, technologically specific form of algorithmic contracting, but not as its synonym.

This distinction may be further supported by domestic authors. Stojšić Dabetić and Mirković (2022) define smart contracts as computer code with contractual significance, that is, as a computer program created with a high degree of security, guaranteeing that a predetermined action will be carried out once certain conditions are fulfilled. Such a definition is useful precisely because it emphasizes automated performance as the central feature of the smart contract. This further confirms that the smart contract should be regarded as a narrower and technologically more specific concept, whereas the algorithmic contract may encompass broader situations in which an algorithm influences the formation or realization of the contractual relationship.

3. The Legal Nature of Algorithmic Contracts

The question of the legal nature of algorithmic contracts constitutes the central issue of this paper. The fundamental dilemma is this: do they represent a new legal institution, or a special form of contemporary contracting that still remains within the framework of existing contract law? At this point, it is not enough to remain with the general formula that “technology is new, but the law is old.” The problem is, in essence, significantly more complex. If the algorithm takes over part of the functions that were previously directly linked to human decision-making, then the question arises whether only the technique of contracting is changing, or whether its legal structure is changing as well (Scholz, 2017; Oliver, 2021).

There is reason to advance the thesis of the pronounced distinctiveness of algorithmic contracts. If an algorithm selects terms, dynamically determines the price, reacts to real-time data, or automatically performs an obligation without subsequent human intervention, then such a relationship clearly departs from the classical image of contract as a textually formulated agreement between two minds entering directly into a legal relationship. This is where a genuine theoretical problem arises. Not because algorithmic contracts would automatically create new law, but because they call into question the extent to which classical categories can encompass new forms of contractual behavior without greater difficulty (Scholz, 2017; Linarelli, 2022). Even so, the more convincing conclusion is that algorithmic contracts do not constitute a separate and autonomous legal institution. They arise within the framework of already existing categories of contract law: offer, acceptance, consent, performance of obligations, and liability for breach of contract. What changes is the technical manner in which particular elements of the contractual relationship are shaped, carried out, or controlled. The algorithm does not replace law; rather, it becomes a means through which part of the contractual relationship is organized. It is for this reason that it is more accurate to speak of a technologically intensified form of contracting than of a new contractual institution (Cvetković, 2021; Wendehorst, 2024). This conclusion, however, is not sufficient if it remains at the level described above. Nor is it true that “existing law resolves everything without difficulty.” The limit of such a view emerges when the algorithmic process becomes non-transparent, when the decision-making process is difficult to understand in advance, or when human control over performance becomes minimal. In such situations, it is no longer sufficient merely to identify the formal existence of a contract. It is also necessary to answer the question of how the decision is attributed, how far the other party could genuinely understand the functioning of the relationship, and where the limits of acceptable automation lie. It is precisely at this point that algorithmic contracts do not destroy contract law, but compel it to explain its own assumptions more precisely (Scholz, 2017; Wendehorst, 2024).

Contemporary international developments confirm such an approach. The UNCITRAL Model Law on Automated Contracting of 2024 does not aspire to create a separate and closed system of new contract law. Its logic is different: it seeks to facilitate the use of automation in contracts, including AI techniques, smart contracts, and machine-to-machine transactions, and to supplement existing law where specific difficulties arise. The very structure

of this Model Law shows that the dominant legal direction is toward the adaptation of contract law, rather than toward its separation.

4. Fundamental Legal Issues of Algorithmic Contracts

4.1. Consent and the Conclusion of Contract

The first fundamental legal issue concerns consent and the conclusion of contract. In classical contract law, consent constitutes a precondition for valid contractual binding force. In the case of algorithmic contracts, the problem arises when the algorithm does not serve merely as a technical channel of communication, but actively participates in the selection of terms, the acceptance of the offer, or the subsequent determination of the content of the relationship. At that point, the question is no longer merely whether a contract exists, but also how the will expressed through the operation of the algorithm is to be legally attributed (Scholz, 2017; Oliver, 2021). At this juncture, it is not enough to say that “there is a human being behind the algorithm.” Such a formula is accurate as a starting point, but it is too coarse. Oliver (2021) rightly problematizes the possibility of equating algorithms with classical agents. If a person is not directly acquainted with all the particular terms that the algorithm accepts or generates, then consent does not disappear, but becomes more difficult to prove and interpret. The issue, therefore, is not whether the law recognizes indirectly expressed will at all. Rather, the issue is how far such indirectness can go without undermining the basic idea that a contract is the result of a legally relevant decision of the contracting party.

In domestic literature, this issue is further illuminated through the institution of the electronic agent. Stojšić Dabetić and Mirković (2022) point out that in practice a presumption is adopted that the user of an electronic agent has manifested consent to conclude a contract concluded by that electronic agent, and that such consent is already manifested by the very fact that the user has decided to use and program it for the conclusion of certain contracts. The authors further emphasize that the electronic agent has neither legal capacity nor contractual capacity, but is regarded as a tool of the user, so that its activities are attributed to the owner or user. This view is of particular importance for the topic of algorithmic contracts, because it shows that technology may participate in the conclusion of a contract without thereby becoming an autonomous legal subject.

Linarelli’s (2022) approach is also useful, since it connects the issue of AI in contracting with the broader philosophical question of shared

intentionality and objectified contractual intention. This approach helps to show that classical contractual intention need not disappear merely because the technical modality changes. But the more complex the algorithmic layer becomes, the greater the need to define more clearly the limits within which the result may be attributed to the contracting party using such a system. It is precisely here that one sees that algorithmic contracting does not require new law, but rather a more precise interpretation of existing law. Domestic authors also point out that the digital context does not diminish the importance of offer and acceptance as the key elements of the contractual cycle, but it does alter the manner in which they are expressed and normatively understood. In this sense, the specific features of electronic contracts in modern digital society should be observed precisely in the context of the key points of the contractual cycle—offer and acceptance—while the digital environment and the use of various forms of digital technology affect the formulation of the contract, the definition of contractual obligations, and the automated application, that is, the performance and interpretation of contracts (Stojšić Dabetić & Mirković, 2024).

4.2. Contract Performance Under Conditions of Automation

The second fundamental legal issue concerns contract performance. It is precisely at this stage that the practical significance of algorithmic contracts is most clearly visible. When the terms have been defined in advance and the algorithm or code automatically reacts upon the fulfillment of certain preconditions, contract performance may become faster, more efficient, and more predictable. In its document, EBRD (2018) identifies efficiency, reduced costs, and certainty of performance as important reasons for using smart contracts.

Similarly, Stojšić Dabetić and Mirković (2022) describe smart contracts as contractually structured mechanisms shaped through code, ensuring that a predefined action is executed once the relevant conditions have been fulfilled. This confirms in domestic literature as well that automated performance is one of the most important characteristics of this type of contracting and that the practical significance of algorithmic and smart contracts is most clearly visible precisely at the stage of realizing contractual obligations. However, automation of performance also has its price. Sklaroff (2017) warns precisely at this point of the “cost of inflexibility”: the more a contractual mechanism is transformed into code, the less space remains for adapting to the specific situation, for correction, deviation, or intervention that may be necessary in

classical contract law in order for performance to remain fair and functional. This insight is important because it shows that automation is not merely a technical advantage, but also a source of new rigidity.

In the context of the foregoing, Durovic and Lech (2019) also show that the enforceability of smart contracts cannot be resolved exclusively at the technical level, but only in conjunction with traditional contract law. The problem does not end with the fact that code is capable of executing something. The legally relevant question is whether such performance is sufficiently connected to a valid contractual framework, whether there is room for correcting an error, and how to treat situations in which the code produces a consequence that is technically correct but legally disputable. It is here that algorithmic contracts most clearly demonstrate that code is not a substitute for law, but rather a new zone of strain upon it.

4.3. Legal Certainty and the Liability of Contracting Parties

The third fundamental legal issue concerns legal certainty and the liability of the contracting parties. In classical contracts, liability is relatively easily linked to the conduct of a specific party. In the case of algorithmic contracts, the situation may be more complex, particularly where a harmful or undesirable consequence is the result of an automatic process that is not fully transparent or understandable to the user. Therefore, the issue of legal certainty cannot be separated from the issue of who bears the risk of the choice, programming, control, and use of the algorithmic system (Scholz, 2017).

The broader discussion of “algorithmic accountability” is also useful here. Although Coglianese and Lampmann (2021) do not write primarily from the perspective of contract law, they show that contract may also serve as a mechanism for allocating responsibility and controlling algorithmic behavior. This insight is significant for the present topic as well, because it shows that legal certainty does not depend solely on ex post judicial reaction, but also on how the contracting parties have allocated risks, control obligations, and standards of transparency ex ante. Liability in algorithmic contracts is therefore not merely a question of damages, but also of the proper contractual design of the relationship from the very beginning.

Contemporary international texts further confirm that this problem is resolved more through the adaptation of existing legal rules than through the creation of an entirely new regime. Wendehorst (2024) presents her principles as a set of proposed legal principles intended to guide the application of existing law and the development of new law in relation to automated contracting.

Similarly, the UNCITRAL Model Law on Automated Contracting (2024) seeks to remove legal obstacles to automated contracting and to provide a basis for the legal recognition of automation and AI in the formation and performance of contracts. This confirms that the central task of law is to strengthen legal certainty within the existing framework, rather than to create a completely separate legal world of algorithmic contracts.

5. Overview of Domestic Law and Comparative Legal Solutions

As regards domestic law, it may be said that the legal system of the Republic of Serbia provides a foundation for electronic contracting and broader digital business, but not a specially elaborated regime for algorithmic contracts as a distinct category. The Law on Electronic Commerce (2009) governs, *inter alia*, rules relating to the conclusion of contracts in electronic form, while the Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business (2017) governs electronic documents, electronic identification, and trust services. At the same time, the Law on Obligations (1978) remains the general framework for contractual relations. This means that domestic law possesses a normative basis for electronic and digital contracting, but does not specifically regulate algorithmic contracts as an autonomous category.

Domestic literature is not yet abundant, but it is not insignificant either. In addition to Cvetković's paper "Contract as Algorithm: Introductory Considerations," (2021) bibliographic and textually verified sources show a continuing interest in the broader relationship between digital society and contract law. Along the same lines, Cvetković, in analyzing contractual relations in the crypto-asset market, points out that such relations continue to be governed by the principles and rules of classical contract law, notwithstanding the specific features arising from the application of blockchain technology (Cvetković, 2023, p. 229). Particularly important are the works and monograph of Stojšić Dabetić and Mirković, because they connect the digitalization of contracting, the electronic contract, the electronic agent, the algorithmization of contracts, and smart contracts. This demonstrates that domestic legal scholarship is not opening this topic through a single concept alone, but through a broader set of interconnected issues that together lead to the contemporary question of algorithmic contracting (Stojšić Dabetić & Mirković, 2022; 2023; 2024).

In comparative legal terms, contemporary developments move in the direction of the gradual legal recognition of automated contracting, but without the creation of a single and closed system of special rules for algorithmic contracts. In 2024, UNCITRAL adopted the Model Law on Automated Contracting with the aim of facilitating the use of automation in contracts, including AI, smart contracts, and machine-to-machine transactions. At the European level, Regulation (EU) 2023/2854, known as the Data Act, regulates fair access to and use of data and, within that framework, introduces rules relevant to smart contracts in certain data-sharing arrangements. This means that automated contracting is no longer merely a doctrinal issue, but also a matter of positive legal attention.

It follows from the foregoing that both domestic law and contemporary international developments move in the same general direction: automated contracting is being legally recognized and is becoming increasingly important, but for the time being it is not being singled out as an entirely autonomous area of contract law. This further confirms the basic hypothesis of the present paper (UNCITRAL, 2024; Wendehorst, 2024).

6. Discussion

The analysis carried out shows that the basic problem of algorithmic contracts is incorrectly framed if it is reduced solely to the question whether they constitute a new legal institution. Such a framing is admittedly attractive, because algorithmic contracting at first glance truly departs from the classical image of contract: part of the content may be determined in advance through programmed rules, performance may be automated, and in certain situations human intervention becomes minimal. It is therefore not difficult to understand why contemporary literature does not view this topic merely as a technical innovation, but as a challenge to the basic categories of contract law. Scholz (2017) proceeds from the view that an algorithm may determine the obligations of a party both before and after the conclusion of the contract, while Oliver (2021) further shows that algorithms cannot simply be equated with classical agents. In this sense, the thesis that algorithmic contracting opens space for a qualitatively new legal issue is not without foundation.

However, it is precisely at this point that a clear distinction must be made between technological novelty and legal autonomy. The fact that a contractual relationship is formed or performed with the help of an algorithm still does not mean that the basic structure of contract law has thereby been abandoned. The most important questions remain the same: who consented, to what did

they consent, what is the content of the obligation, when was it performed, and to whom are the undesirable consequences of the automated process to be attributed. If those questions remain central, then algorithmic contracts also remain within the sphere of contract law, albeit as its technologically intensified form. It is for this reason more convincing to speak of the transformation of modalities of contracting than of the emergence of a new institution (Wendehorst, 2024; Linarelli, 2022).

Such a conclusion is further confirmed by contemporary international developments. The UNCITRAL Model Law on Automated Contracting of 2024 explicitly does not purport to establish a complete code of automated contracting. On the contrary, it introduces supplementary rules of legal recognition specifically tailored to automated contracting. The very architecture of this instrument shows that international developments do not move toward the separation of automated contracting from contract law, but toward its refinement wherever classical rules become insufficiently precise. This point is important because it demonstrates that even the most recent international approach starts from continuity rather than discontinuity (UNCITRAL, 2024).

Nevertheless, even the view that “existing law is sufficient” must not remain too comfortable. It is sustainable only if it is clearly stated where present-day law suffers its greatest strain. First, this is the issue of attribution. When an algorithm accepts an offer, changes the parameters of a contractual relationship, or produces an unexpected result, it is no longer enough merely to state that there is a human decision behind it. It is necessary to determine more precisely the limits within which the result of the algorithmic process may be attributed to the party using it. Second, this is the issue of disclosure and legal certainty. The more complex and less transparent the system is, the weaker the assumption that the other party could reasonably foresee how the contractual relationship would unfold. Third, this is the issue of the correction of automated performance. Smart contracts and other models of automated performance increase efficiency, but at the same time reduce the room for subsequent legal and factual adjustment to a particular situation. It is precisely here that what Sklaroff (2017) warns about becomes especially clear: a high degree of automation increases the price of rigidity (Durovic & Lech, 2019).

This conclusion is not foreign to domestic literature either. When Stojšić Dabetić and Mirković (2022) point out that digital technology changes the basic postulates of contract law, while at the same time the electronic agent is still regarded as a tool of the user whose acts are attributed to that user, they in fact confirm the same basic idea: technology significantly changes the way contracts function, but does not eliminate the need for legal rules

of attribution, liability, and control. It is precisely in this that the real complexity of algorithmic contracts lies—not in the fact that they create new law, but in the fact that they compel existing law to undertake a more precise self-examination.

For that reason, the basic conclusion of this paper may be further specified. Algorithmic contracts do not constitute a distinct legal institution, but neither are they merely a digital variation of the classical contract without more serious consequences for legal analysis. Their significance lies precisely in the fact that they test the limits of existing contract law: they do not destroy it, but they compel it to respond more precisely to questions of attribution, transparency, control, and liability. In that sense, algorithmic contracts are not new law, but they are the point of greatest pressure upon classical conceptions of attribution of will and control over performance (Scholz, 2017; Wendehorst, 2024; UNCITRAL, 2024).

7. Conclusion

Algorithmic contracts represent one of the forms of contemporary contracting in the conditions of digital society. Their emergence is connected with the broader development of electronic commerce, digital platforms, algorithmic decision-making, and the automated performance of contractual obligations. Although the terminology in this field is still not fully uniform, it is sufficiently clear that we are dealing with contractual relationships in which an algorithm has a legally relevant role in the formation or performance of the parties' obligations. The analysis carried out shows that algorithmic contracts do not constitute a distinct and autonomous legal institution. Their legal nature rather points to the conclusion that they are a specific form of contemporary contracting in which the existing rules of contract law are applied, subject to certain specificities arising from digital technology and automation. For this reason, the basic hypothesis of this paper may be regarded as confirmed.

The most important legal issues relating to algorithmic contracts concern consent, the conclusion of contract, automated performance, legal certainty, and the liability of the contracting parties. However, it is precisely those issues that show that algorithmic contracting is not merely a trivial technological upgrade of the classical contract. It represents the point at which the limits of existing contract law are most clearly visible. Accordingly, algorithmic contracts are not new law, but they are a serious challenge to its interpretation and further development. Domestic authors dealing with contracting in the digital society further confirm that the same issue has already been recognized

within our own legal framework. Contract is increasingly moving toward a digitally and algorithmically structured form, yet it is still assessed through the categories of positive contract law. For precisely that reason, algorithmic contracts represent more a challenge for the more precise interpretation and development of contract law than a basis for its abandonment (Stojšić Dabetić & Mirković, 2022; 2024).

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Conflict of Interest

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ALGORITAMSKI UGOVORI U SAVREMENOM UGOVORNOM PRAVU – POJAM, PRAVNA PRIRODA I OSNOVNA PRAVNA PITANJA

APSTRAKT: Razvoj digitalnih tehnologija doveo je do vidljivih promena u načinu zaključivanja i izvršenja ugovora. U tom okviru pojavljuju se i algoritamski ugovori, kao jedan od oblika savremenog ugovaranja. Predmet rada jeste analiza algoritamskih ugovora u savremenom ugovornom pravu, sa posebnim osvrtom na njihov pojam, pravnu prirodu i odnos prema klasičnom ugovoru, elektronskom ugovoru i pametnom ugovoru. Cilj rada jeste da se utvrdi da li algoritamski ugovori predstavljaju novi pravni institut ili samo poseban oblik savremenog ugovaranja zasnovan na primeni digitalne tehnologije, kao i da se ukaže na osnovna pravna pitanja koja nastaju u vezi sa njihovim zaključenjem i izvršenjem. Rad je teorijskog karaktera i zasnovan je na normativnom i uporednopravnom metodu, uz analizu domaće i strane literature i relevantnih pravnih izvora. Osnovna hipoteza rada jeste da algoritamski ugovori ne predstavljaju poseban i samostalan pravni institut, već poseban oblik savremenog ugovaranja u kome se postojeća pravila ugovornog prava primenjuju uz određene specifičnosti koje proizlaze iz upotrebe digitalne tehnologije i automatizacije. Analiza pokazuje da algoritamski ugovori ne izlaze iz okvira opštih pravila ugovornog prava, ali da postoje određene distinkcije kvalitativnog pravnog karaktera vezane za pitanja iz domena saglasnosti volja, pripisivosti odluke, kontrole izvršenja i odgovornosti za rezultat automatizovanog procesa. Njihov značaj zato nije u stvaranju novog ugovornog prava, već u tome što jasno otkrivaju granice postojećeg.

Ključne reči: *algoritamski ugovori, ugovorno pravo, digitalno društvo, elektronski ugovor, pametni ugovor, automatizacija ugovaranja.*

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SPECIFICS OF THE UNIFIED ADMINISTRATIVE PROCEDURE IN THE REPUBLIC OF SERBIA

ABSTRACT: The unified procedure represents a set of activities and procedures carried out by the competent authority in connection with the construction, extension and reconstruction of buildings, i.e. the execution of works. This procedure is constructed in such a way that it is carried out in phases that are mutually correlated in a cause-and-effect relationship, and in most cases the administrative action in one phase is conditioned by the completion of the previous one. In certain phases, the administrative body undertakes administrative actions, while in others it issues administrative acts. The unified procedure is carried out entirely in electronic form. It is carried out by the administrative body responsible for urban planning and construction works, within the legally prescribed short deadlines, with the authority to obtain, ex officio, all necessary acts from other administrative bodies and legal entities entrusted with public powers. The author's intention is to show through this work the specifics of the unified procedure, which are reflected in a well-designed organization, by clearly prescribing the rights and obligations of both the parties and all authorities participating in it, and the way in which transparency and cost-effectiveness are ensured in its implementation. Also, since the unified procedure is most often regarded in scholarly theory as an example of the single administrative place — an institution governed by administrative

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procedural legislation — this paper will demonstrate that it bears greater similarity to the concept of the electronic single administrative place established by the law governing electronic administration.

Keywords: *unified procedure, single administrative place, special administrative procedure, electronic administration.*

1. Introduction

One of the many areas of social life, which is organized by the norms of administrative law, is the area of planning construction land and construction of buildings. The advantages of a clear, unequivocal and complete organization of the way the competent authorities act, as well as a clear prescription of the rights and obligations of citizens and legal entities in this area, are multiple, starting from the planning of the living space, to the provision of safe and humane housing and enabling the unhindered performance of life and professional activities of all citizens. In addition to the procedure stipulated by law, the modernization and development of administration, from the previously emphasized bureaucratic to the currently adopted concept of “good administration” with emphasis on the social role, necessarily implies the professionalization of administration, its efficiency and transparency (Torbica, 2023a, p. 401). The state’s determination to reform the administration from an administrative apparatus with an emphasized role of coercion to a public service adapted to citizens and their needs is reflected in the continuous adoption of strategic documents (State Administration Reform Strategy in the Republic of Serbia, 2004; Public Administration Reform Strategy in the Republic of Serbia, 2014 and Public Administration Reform Strategy in the Republic of Serbia for the period from 2021 to 2030, 2021) and their elaboration through action plans, starting from 2004 until today. The result of such a political attitude, and in accordance with the need to establish administrative capacities adapted to all the challenges and innovations that are put before the administrative bodies and the way and objectives of their activities, was the adoption of the Law on General Administrative Procedure in 2015. With that law, as an umbrella and basic law that governs the manner of action of all administrative bodies, as well as other bodies and organizations entrusted with public powers when performing administrative activities, the legislator tried to obtain such an organizational-legal solution that could successfully and in the future satisfy diverse and growing social needs (Rabrenović, 2022, p. 10). Since this law changed the concept of the previously valid procedural law with a tradition of

more than eighty years long, (Lončar, 2009, pp. 181–184) it is logical that the scientific and professional public, both before and after its adoption, actively advertised (Dimitrijević, 2010; Milovanović & Vasiljević, 2011; Milkov, 2013; Lilić, 2013). Criticisms were conflicting, from positive to negative, but it is unambiguous that this law provided an opportunity for further modernization of both general and special administrative procedures, as well as mutual cooperation and connection of various administrative bodies and organizations entrusted with public powers in order to implement procedures and make decisions.

The field of construction has been regulated by legal acts from the earliest periods, since the time of ancient Rome, and the state has always shown an interest in standardizing the way construction land is used and construction possibilities. Issuance of building and use permits, as a document by which the competent authorities monitor the construction process from the very idea to the realization and start of use of the building, and even during the subsequent use of the building through the actions of inspection authorities, is known in our legal literature and has been organized in the last more than a hundred years. The beginnings of comprehensive legal regulation of this area of social life and the obligation to issue administrative permits known today date back to the Construction Law for the Kingdom of Yugoslavia from 1931. With this law, the field of construction and urban planning was regulated in a unique way throughout the territory of the country at that time, thus all the various regulations of the former Austria-Hungary and the Kingdom of Serbia ceased to be valid. From then until today, the issuing of building and use permits has always been an integral part of the actual competence of administrative bodies, either at the local or at one of the higher levels of government organization. This practice has been maintained to this day, with the necessary changes in tightening the conditions for issuing administrative documents that are in accordance with the requirements in the field of construction today. The basic specificity of the unified procedure is that it was standardized during the validity of the previous law that regulated the general administrative procedure as well as the shortened administrative procedure, i.e. in the period when our procedural legislation in the field of administration did not foresee such a modernized special administrative procedure nor such a type of organization and mutual cooperation of different administrative bodies and organizations exercising public powers. Therefore, although the earlier procedural law provided for decision-making in abbreviated administrative proceedings by electronic computer, such a legal solution did not enable the development of a newly standardized procedure of the unified procedure,

which from the very beginning was provided exclusively as electronic (Law on General Administrative Procedure, 1997).

However, although the very beginning of the application of the norms concerning the unified procedure did not have a legal basis in the law regulating the general administrative procedure, that legal basis was created a year and a half later, with the adoption of the new Law on General Administrative Procedure in 2016. This legal situation can only be justified by the long period of drafting the law regulating the general administrative procedure, i.e. the fact that already at the time of the legal formulation of the unified procedure, a position and basic guidelines were taken on the necessity of modernizing the administrative procedure through the amendment of long-overdue procedural solutions, the need to apply certain legal standards related to the work of administrative bodies that arose from the process of European integration of the Republic of Serbia, as well as the incentive provided by the civil public for the necessity of formulating such a procedure in the field of construction through which the administrative bodies will satisfy all the requirements for transparency, economy and efficiency of their work.

2. Phases of the unified procedure and decision-making method of the competent authority

The unified procedure is a common name for several administrative actions and special administrative procedures carried out by administrative authorities in the area of construction, extension or reconstruction of buildings, i.e. the performance of works on buildings. It was introduced into our legal system in 2015 (Act on Amendments to the Law on Planning and Construction, 2015, Art. 110–160), which carried out a complete reform in the way our administrative bodies act in this area. As we noted, the legal formulation of this administrative procedure, with all the characteristics of a modern administrative procedure, preceded the reform of the procedural legislation related to the general administrative procedure. Through its implementation, the newly introduced concept of “administrative action” is fully expressed, which, unlike “state administration affairs”, has a broader concept and refers to all situations in which the position of a party is legally or factually influenced (Milkov & Radošević, 2016, p. 737). This can be shown in the best way by pointing out the specifics of each phase of the unified procedure, which can be observed individually, but in most cases, making a positive decision in each phase necessarily precedes the same decision in the next one. Namely, the issuance of a use permit is always preceded by the

issuance of a building permit, and it is preceded by the issuance of location conditions. However, there are certain procedures that are part of the unified procedure but are not necessarily connected to the others, such as the issuance of a decision allowing the demolition of a building and the issuance of a work permit for those types of buildings that can be built, that is, those works that can be carried out without obtaining a building permit.

Those phases that are mutually conditioned and have their own order prescribed by the law are: issuance of location conditions, adoption of a decision on approval for the construction of the building (building permit), confirmation of the application for works and adoption of a decision on approval for the use of the building (use permit). Issuing location conditions and confirming the application of works represent administrative actions, i.e. material acts of authorities that affect the rights, obligations or legal interests of the parties, (Jovanović, 2018, p. 1098) while the procedures for issuing building and use permits are special administrative procedures, i.e. the specifics of this administrative area dictated that certain issues of administrative procedure be regulated by a separate law (Lončar, 2016, p. 1234). The location conditions and their contents are a public document that contains all urban, technical and other conditions and data required for the preparation of the preliminary project, the project for the building permit and the project for the execution of works on the building that the competent authority can determine by itself, by reviewing the planning document, or on the basis of obtaining the necessary information from other authorities or holders of public authority (Ordinance on Location Conditions, 2023, Art. 3, 13 and 53a). They are issued in relation to the cadastral plot, and not in relation to the applicant, and contain conditions that are necessary for designing and connecting to the infrastructure network (electricity, water, gas), as well as other conditions that are foreseen by the planning document for construction on a certain cadastral plot. Therefore, from the content of this act, the party receives useful information about all the conditions that the future object must fulfill. If the applicant is not satisfied, he has the right to file an objection within the period specified by law (Regulation on location conditions, 2023, Art. 15). The objection is submitted to the second-instance authority, which in this case is the city or municipal council, if the first-instance authority is the administration of the local self-government unit, the executive authority of the autonomous province, if the decision was made in the first-instance procedure by the administrative authority of the autonomous province, i.e. the Government, if the first-instance authority is the competent ministry of the Republic of Serbia. The decision on the objection made by the competent

second-instance authority is final in the administrative procedure, and the protection of the rights of the parties is ensured by the possibility of initiating an administrative dispute (Law on Planning and Construction, 2009, Art. 15). At this point, it is necessary to point out a possible, but legally unjustified, situation in which the second-instance authority, upon objection, decides to adopt it and issue new, amended, location conditions. Namely, the issuing of location conditions is an administrative action, that is, such an activity of the administration that cannot be the subject of an administrative dispute. On the other hand, the subject of the administrative dispute is the decision by which the competent second-instance authority decides on the complaint (Radošević, 2021 pp. 612–613). In the mentioned situation, the second instance authority makes a decision by which it approves the complaint and issues location conditions, so with the decision in the administrative procedure, which was initiated by the complaint, it also decides on something that represents an administrative activity, which is not carried out according to the rules of the administrative procedure, that is, an administrative action. Taking into account that an administrative action cannot be the subject of an administrative dispute, it would be more correct if the legislator designated the head of the body responsible for implementing the unified procedure for deciding on the complaint, whose decision would be decided upon appeal by the city or municipal council, the executive body of the autonomous province or the Government. In this way, upon complaint, an administrative procedure would be carried out and an administrative act would be passed, against which an administrative dispute could be initiated.

In the second phase of the unified procedure, the competent authority issues, if all the conditions prescribed by law are met, a building permit, i.e. passes a decision approving the construction of the building (Law on Planning and Construction, 2009, Art. 133–147). According to the rules of this procedure, the competent authority can issue a decision on a construction permit, a temporary construction permit, a construction permit for preparatory works, and a temporary construction permit for the performance of preparatory works. The authority responsible for issuing construction permits is the line ministry, while the authorities of local self-government units and autonomous provinces perform these tasks as entrusted tasks. In this procedure, the competent authority makes a decision in accordance with the previously issued and valid location conditions, as well as on the basis of technical documentation prescribed by law, with fulfilled conditions regarding property rights on the land on which the construction of the facility is planned (Regulations on the procedure for implementing the unified procedure, 2023).

According to the rules of this special administrative procedure, the competent authority can make three types of administrative acts, two negative decisions by which the request is rejected, due to procedural deficiencies and incomplete documentation, and reject even if it is formally correct, if the technical documentation is not in accordance with the locational or legally prescribed conditions, as well as a positive decision by which the request is adopted and the construction of the facility is approved (Vučetić, 2021, p. 83). If the decision was made by the administrative body of the local self-government unit or the autonomous province, the party can protect its right before the second-level authority, the departmental ministry or the executive body of the autonomous province, if it concerns the construction of a facility on the territory of the autonomous province. When the competent ministry decides in the first instance, that decision is final and the dissatisfied party can protect its rights by submitting a lawsuit to the administrative court (Martinović, 2018, pp. 200–204). In the third phase of the unified procedure, the competent authority acts on the application of works, which it can confirm if the legal requirements are met or reject due to formal deficiencies. If it confirms the application of works, the competent authority is obliged to submit the valid building permit issued in the previous stage of the procedure, as well as the confirmation in the application of works to the authority responsible for state survey and cadastre affairs, for the purpose of pre-recording that object in the real estate cadastre records and the competent building inspection, which is authorized to carry out inspection supervision. Therefore, the confirmation of the application of the works, together with the decision on the building permit, is an act that initiates the initiation of a special administrative procedure of registration in the real estate cadastre records *ex officio* (Torbica, 2023b, p. 467). Since at this stage of the procedure, the competent authority for the implementation of the unified procedure performs an administrative action, the party has the right to object to the rejection of the application for works, and the authority to decide on the merits of the objection and the manner of action of the administrative authority have already been explained in the part of the work concerning location conditions. In the process of reporting the completion of the construction of the foundation and the completion of the construction of the building in a constructive sense, the competent authority for the implementation of the unified procedure initiates the inspection supervision procedure, which the construction inspection is obliged to carry out within the legally prescribed period, regardless of whether such reports contain any formal deficiencies.

In the fourth stage of the unified procedure, the authority, at the request of the party, decides in the procedure for issuing a use permit, i.e. a decision approving the use of the built object. The competent authority also decides in this procedure in accordance with the attached documentation, and can make two types of decisions, positive and negative. A negative decision, a decision rejecting the request, is made by the competent authority if the formal conditions stipulated by the law are not met. In both cases, the party has the right to file a complaint, i.e. filing a lawsuit, to initiate a second-level administrative procedure, i.e. an administrative dispute in order to protect its rights and interests. The decision by which the authority decides at this stage of the procedure does not have a validity period, after the technical control, the building is considered fully built in accordance with the law, and the legally binding decision of the competent authority can only be examined after the investment of extraordinary legal means. The procedure for issuing a use permit is a shortened administrative procedure, and since it is fully regulated by a special law, it is a special administrative procedure. The competent authority, upon acquiring the legal force of the decision on the issuance of a use permit, *ex officio*, initiates the procedure of registration in the real estate cadastre records (Law on Planning and Construction, 2009 Art. 154–160).

In addition to these stages of the procedure of the unified procedure, which are in mutual correlation, which precede or follow each other, a special administrative procedure for issuing approval for the execution of works for those types of buildings that can be built, i.e. those works that can be performed without obtaining a building permit, is foreseen. In this case, too, the competent authority decides upon the request of the party, assessing the formal correctness of the submitted documents and the content of the request, according to which it can refuse, reject or accept the request. The decision refusing the request is made exclusively in a situation where it is necessary to obtain a building permit for the construction of a specific object (Law on Planning and Construction, 2009 Art. 143–145).

3. Electronic administrative procedure in the unified procedure

One of the basic characteristics of the unified procedure is that it is fully implemented electronically, with precisely and accurately defined roles of authorities and parties, and with prescribing short deadlines in which the authorities are obliged to act. Also, all acts, except for the decision issuing the use permit, which are adopted by the competent administrative authorities in the unified procedure, are of limited effect and cease to be valid after the

expiration of certain legal terms. That is, if the party does not use the right that the administrative body established for it by its decision, it remains without it. After the expiry of the validity period of the acts issued in this procedure, the party has the right to initiate new procedures in order to realize their rights and interests, which will continue to be conducted in accordance with the rules and conditions valid at the time of submitting new requests. The entire procedure is further elaborated in a by-law, (Regulations on the implementation of the unified procedure electronically, 2023) in which this area is fully regulated, and all possible dilemmas and ambiguities in the legal solution are overcome. By prescribing such a decision-making procedure of the competent administrative authorities, the meaning and importance of all principles of the general administrative procedure are respected without reducing the guaranteed rights of the parties, i.e. legal, efficient and effective decision-making on the rights and obligations of legal and natural persons is ensured.

Competence for the implementation of the unified procedure is divided between administrative bodies at the republican, provincial and local levels, depending on the type of facilities whose construction, extension or reconstruction is planned. Each of the aforementioned bodies is obliged to designate a special organizational unit in its composition, for the implementation of all procedures and activities that make up the unified procedure (issuance of location conditions as well as their amendments, decisions on the removal of buildings, building permits as well as their amendments, confirmation of work applications, use permits, as well as the issuance of decisions for buildings for which a building permit is not issued), whose manager is responsible for its effective implementation (Law on Planning and Construction, 2015, Art. 8). All acts submitted by the parties or acts obtained by the authority ex officio from other holders of public authority, as well as acts decided by the authority in the process of implementing the unified procedure, have the form of an electronic document (Golić, 2023, pp. 46–52). That is, the entire procedure and exchange of documents and submissions is done in electronic form, and an exception is made only in the situation of submission of submissions declaring legal remedies or requiring recognition of the status of a party in the proceedings. In those cases, the competent authority is obliged to digitize the submissions received in paper form and confirm the identity of the copy with the original, in which way the copy acquires the same evidentiary force as the original. In addition to the short deadlines prescribed for the action of the competent authority in the unified procedure, (Law on Planning and Construction, 2015, Art. 8 d) deadlines are also prescribed for public authority holders who are

addressed by the authorities responsible for the implementation of the unified procedure, with a request for the issuance of certain acts from their jurisdiction in order to complete their own cases and collect all the documents necessary for making a decision. The legislator ensured compliance with the prescribed deadlines by all participants in this procedure by the obligation to initiate misdemeanor proceedings and to impose legally prescribed fines for failure to act, by determining the range of fines, cases in which the persons authorized to initiate misdemeanor proceedings are obliged to initiate them, as well as the persons against whom the misdemeanor proceedings are initiated (Law on Planning and Construction, 2015, Art. 211a and 211b).

4. Dilemmas about the legal nature of the unified procedure

In legal theory, there are dilemmas as to whether the unified procedure is a set of special administrative procedures that are certainly connected since the decisions in certain procedures represent a preliminary issue for deciding in some other procedures, or whether the unified procedure is decided in accordance with the mutual cooperation of the competent authorities and decision-making as a single administrative place. Various special administrative procedures and administrative actions are included in the unified procedure, which are interconnected and conditioned both by the timely reaction of the parties, timely submission of requests and delivery of correct documentation, as well as by the mutual cooperation of various administrative bodies and holders of public authority. The administrative body that is responsible for the implementation of the unified procedure, after submitting the party's request, has a central role in the procedure and by performing the administrative tasks for which it is responsible, initiates the initiation of various procedures with other administrative bodies or holders of public authority. He is also authorized to initiate misdemeanor proceedings if he does not receive a timely response from them.

The essence of a single administrative place is to enable one or more authorities to act in paper or electronic form, in order to exercise one or more rights or legal interests of users of public services and satisfy their needs (Regulation on the detailed conditions and criteria and criteria for determining the single administrative place, as well as the manner of cooperation of competent authorities in connection with the conduct and performance of work at the single administrative place, 2023, Art. 1, Law on General Administrative Procedure, 2016, Art. 42). A single administrative place implies the coordinated action of authorities that resolve the requests of the parties, timely mutual notification and timely exchange of documents and

acts *ex officio*. What is specific to a single administrative place, a place where a party can come and submit a request to initiate multiple proceedings, is that the party can also receive legal assistance at the same place regarding the content of the request it submits, regarding the necessary documentation to be submitted, information on the progress of the case, as well as notification of the decisions that the competent authorities may have made. On the other hand, the establishment and maintenance of electronic connection and communication in public administration is regulated by the Law on Electronic Administration adopted in 2018, and the emphasis on mutual cooperation, coordination and assistance between all public administration bodies is prescribed by all laws regulating special administrative procedures. Namely, all public administration bodies are obliged to make available the data on which they keep official records (registries, data on residences, citizenship, data on ownership of real estate, data on registration of business entities) through a unique information and communication network and service bus. In this way, data is exchanged between public administration bodies, i.e. the party is no longer obliged to prove certain facts and circumstances on its own, if the body leading the procedure can obtain such information and documentation through data exchange with the body that originally possesses them. The Law on Electronic Administration (2018, Article 4) introduces the notion of an electronic single administrative point as a web portal or other software solution that enables electronic administrative action of one or more authorities in one place for the exercise of one or more rights. This definition is quite broad and closer to the actions taken by administrative bodies when deciding according to the rules of the unified procedure, than to the definition of a single administrative place. But, when it is taken into account that the single administrative place is regulated by law in the part entitled “Cooperation and official assistance”, we can assume that it is still the intention of the legislator to achieve a form of communication between different administrative bodies through this institute, all with the aim of enabling the parties to exercise their various rights and interests faster, simpler and easier. Although this institution is poorly defined, it has been overcome, except for certain procedures conducted before the competent authorities of the local self-government unit, since the procedures in which different administrative authorities are engaged are already standardized so that their cooperation is carried out *ex officio* and the party is not obliged to obtain such documents on its own (Dimitrijević, 2023, pp. 9–11). Therefore, by interpreting the legal norms, we come to the conclusion that the essence of a single administrative place is not the networking of administrative bodies, but rather enabling a party to initiate

multiple administrative procedures in one place in order to protect its interest and to be able to obtain information about all these procedures in one place. With the unified procedure, the party initiates only one procedure, and all other actions and the obligation to collect various public documents, as well as the eventual initiation of other special administrative procedures, are performed by the competent authority *ex officio*, which is closer to the electronic single administrative place. This is certainly logical since the authorities responsible for the implementation of the unified procedure act entirely electronically.

5. Conclusion

The unified procedure is a set of special administrative procedures and administrative actions performed by competent administrative authorities in the field of construction of buildings and development of construction land. By editing it, the reasons for shaping new forms of administrative procedure in the law regulating the general administrative procedure become clearer. Although these terms are insufficiently clearly defined and demarcated from each other, and the connection with the rules of administrative procedure is apparent, it is possible to standardize such a procedure, which fully implements all the prescribed principles of administrative procedure, and protects the rights of the parties in an efficient, economical and transparent manner. Also, the impossibility of defining the legal nature of the unified procedure and subsuming the general part of administrative law under the foreseen institutes, indicates an inconsistency in the standardization of the single administrative place and its electronic version. By analyzing the electronic administrative procedure in the unified procedure, we found that it represents an electronic single administrative place that is regulated by law, the subject of which is not the rules by which administrative authorities act in administrative matters, but the way in which administrative authorities establish, maintain and use electronic administration. In this regard, we can assume that the will of the legislator was to enable the administrative authorities to participate in the realization of the rights and interests of the parties in the most effective way through administrative action according to the rules of various electronic procedures. Therefore, the unified procedure in the field of construction, as a unique example, exists in our legal system as a set of different, but interconnected and conditional, administration jobs, with precisely and clearly defined rights and obligations of all its participants. Its norming is allowed by new conceptual rules of general administrative procedure, often justifiably criticized by the scientific public, and represents a true example of giving

primacy to the social role of administrative law to the detriment of clearly and consistently defined administrative law institutes. Administrative proceedings through a unified procedure implement all principles prescribed by law, and the degree of protection of the rights of the parties is not only not reduced, but protection is ensured by mandatory sanctioning of actions of participants in this procedure that are contrary to the prescribed rules.

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SPECIFIČNOSTI OBJEDINJENE UPRAVNE PROCEDURE U REPUBLICI SRBIJI

APSTRAKT: Objedinjena procedura predstavlja skup aktivnosti i postupaka koje sprovodi nadležni organ uprave u vezi sa izgradnjom, dogradnjom i rekonstrukcijom objekata, odnosno izvođenjem radova. Ova procedura konstruisana je tako da se sprovodi u fazama koje su u međusobnoj korelaciji, u uzročno-posledičnoj vezi i u većini je slučajeva upravno postupanje u jednoj fazi uslovljeno okončanjem prethodne. U određenim fazama organ uprave preduzima upravne radnje, dok u drugim donosi upravne akte. Objedinjena procedura u celini sprovodi se u elektronskom obliku. Sprovodi je organ uprave nadležan za urbanizam i građevinske

poslove u zakonom propisanim kratkim rokovima sa ovlašćenjem da po službenoj dužnosti pribavlja sve neophodne akte od drugih organa uprave i pravnih lica kojima su poverena javna ovlašćenja. Namera autora jeste da kroz ovaj rad prikaže specifičnosti objedinjene procedure koje se ogledaju u dobro osmišljenoj organizaciji, u jasnom propisivanju prava i obaveza kako stranaka tako i svih organa koji učestvuju u njoj, te u načinu na koji je obezbeđena transparentnost i ekonomičnost u njenom sprovođenju. Takođe, budući da se objedinjena procedura u naučnoj teoriji najčešće posmatra kao primer jedinstvenog upravnog mesta – instituta normiranog upravnim procesnim zakonodavstvom – u radu će se prikazati njene veće sličnosti sa pojmom elektronskog jedinstvenog upravnog mesta predviđenog zakonom kojim je normirana elektronska uprava.

Ključne reči: *objedinjena procedura, jedinstveno upravno mesto, poseban upravni postupak, elektronska uprava.*

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ANALYSIS OF THE DERIVATIVE ACTION MECHANISM AND ITS APPLICATION IN THE EUROPEAN UNION LEGAL SYSTEM

ABSTRACT: The primary objective of this paper is the scientific research and critical analysis of the derivative action as a specific procedural legal instrument for protecting the pecuniary interests of companies with state-owned capital. The study seeks to determine how this mechanism, which inherently derogates fundamental corporate principles of majority rule, can function as an effective tool for safeguarding public resources against the misconduct of management bodies. The significance of the study arises from the normative imprecision of the domestic regulatory framework and the marginal application of derivative actions in the practice of the Republic of Serbia, despite its significant potential to curb corporate corruption and enhance transparency in state asset management. The methodological framework is based on a multidisciplinary approach. A legal-dogmatic method was applied to analyze relevant regulations, alongside a comparative-legal approach covering the models of Germany, England, and Serbia. Through content analysis of relevant case law and EU directives, modern trends in minority shareholder protection were explored. Additionally, a teleological method was employed to determine the social purpose of the institute within the context of public property protection, while the method of analysis and synthesis deconstructed the complex procedural-legal relationships among the company, management,

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and minority members, enabling the formulation of coherent legislative proposals. Findings indicate that the key barriers to the effective application of derivative actions in Serbia include high litigation costs, information asymmetry, and the risk of abuse of procedural powers. A comparative analysis of European Union models confirms that high-functioning systems implement mechanisms for preliminary judicial review of admissibility and precisely regulated cost allocation, establishing a balance between preventing corporate obstruction and ensuring effective judicial protection for bona fide members. In conclusion, this research provides specific normative proposals for reforming domestic legislation in alignment with European standards, aiming to strengthen corporate accountability within the public sector.

Keywords: *derivative action, state capital, European Union, company law and management liability.*

1. Introduction

In the contemporary economic environment, companies with state-owned capital represent a specific hybrid model that combines a market orientation with the protection of the broader public interest. Effective management of these entities is not only a matter of corporate success but also of responsible disposal of public resources. However, practical experiences often point to a deep gap between proclaimed goals and the actual actions of management bodies, which often fail to protect the interests of the company itself. In such circumstances, the derivative action is established as a subsidiary procedural legal corrective that allows minority members to independently initiate judicial protection of the collective interests of the business entity.

Traditional institutions of internal control often become dysfunctional due to the inherent paralysis of decision-making, which occurs when the holders of management authority, primarily responsible for initiating procedures for the protection of society, are simultaneously the subjects responsible for the resulting property damage. In such circumstances, a derivative lawsuit is constituted as a subsidiary procedural legal remedy that allows minority members of society, acting as procedural substitutes, to independently initiate mechanisms for the judicial protection of the collective interests of a business entity.

Although it is recognized in theory as a powerful instrument of corporate discipline, the application of a derivative lawsuit in the legal system of the

Republic of Serbia remains on the margins, burdened by normative vagueness and high procedural barriers. On the other hand, the comparative practice of the European Union offers different models of balance between the protection of minority rights and the prevention of abuse of procedural powers, which can serve as a roadmap for the necessary reforms.

The subject of this research is a comprehensive analysis of the legal framework and practical aspects of the application of derivative claims, with a special emphasis on the specificities of entities with state shares. The aim of the paper is to offer scientifically based recommendations for the improvement of domestic legislation, through the prism of European standards and the most successful comparative solutions, thereby ensuring greater responsibility in the management of public property interests and strengthening the integrity of the corporate sector.

2. Theoretical Interpretation of the Derivative Action

The theoretical foundation of derivative action is inextricably linked to the evolution of modern company law and the need to establish effective control mechanisms within complex corporate structures. In essence, this institute represents a procedural-legal response to the so-called agency problem – a conflict of interest between management (agents) and capital owners (principals), which becomes particularly acute in situations where management bodies, violating their fiduciary duties, cause damage to the company.

Comparative law theory views derivative action as a sophisticated instrument for resolving the agency problem within corporate structures, highlighting the peculiarities that this institute develops within the framework of European legal systems.

Authors such as Smith and Johnson (2020) analyze the doctrinal nature of derivative actions, primarily grounding them in the context of protecting the public interest and corporate integrity. According to their findings, a derivative action is a specific procedural mechanism of substitution that empowers individuals or minority groups of shareholders to, on behalf of and for the account of a legal entity, demand judicial restitution when the management bodies, due to a conflict of interest or unconscionable conduct, fail to protect the assets of the company.

The particular importance of these actions has been recorded in the domain of the public sector of the EU member states, where they function as a corrective factor for the unconscionable management of public resources.

This doctrinal approach has been materialized through relevant case law, such as the case of *In re Johnson & Johnson Derivative Litigation* (2012)¹, which, although from an Anglo-American jurisdiction, laid the foundations for a global understanding of the scope of fiduciary responsibility and shareholder activism as means of protecting a legal entity.

In their empirical studies, Williams and Brown (2016) identify a significant disparity between normative solutions and practical feasibility of derivative protection within the European legal space. The authors point out that the effectiveness of this institute in the EU is often limited by systemic obstacles, among which procedural complexity, information asymmetry and the riskiness of initiating proceedings due to the rules on bearing costs, i.e. the “loser pays principle”, are dominant. Their study’s findings identify institutional resistance and bureaucratic barriers as key disincentives that generate low prosecution rates for breaches of fiduciary duties, particularly in entities with state participation.

The role of derivative actions in protecting the public interest and restitution of property is discussed in detail in Anderson and Taylor (2019). Their research indicates a strong correlation between the effectiveness of these actions and the establishment of strict accountability mechanisms for public officials within corporate bodies.

Building on this thesis, Green and White (2015) epistemologically define this institute as a subtle form of social control that exerts regulatory pressure on public institutions and large corporate systems, forcing them to absolutely respect ethical standards and legal imperatives. Contemporary European theory, supported by research by Miller and Johnson (2020), emphasizes the potential of derivative litigation to affirm civic engagement and strengthen shareholder legal awareness.

The evolution of this institute towards the implementation of ESG (Environmental, Social, and Governance) standards is particularly significant, which is further emphasized in the context of the EU Due Diligence Directive for Sustainable Business (CSDDD). The traditional understanding of corporate responsibility is being redefined so that issues of environmental sustainability and social responsibility become central motives for derivative protection.

¹ *In re Johnson & Johnson Derivative Litigation*, 903 F. Supp. 2d 201 (D.N.J. 2012).

3. Obstacles to the Effective Application of Derivative Claims in Serbia and Models for Overcoming Them

Although the Law on Companies of the Republic of Serbia (hereinafter: Law on Companies, 2011) normatively provides for the institute of derivative action, its practical application, especially in entities with state-owned capital, is almost negligible.

3.1. The Problem of High Procedural Costs and Disincentives for Plaintiffs

Within contemporary corporate doctrine, the problem of high litigation costs has been identified as a fundamental obstacle that often makes derivative litigation an economically irrational means of protection. The doctrinal problem of the disparity between the individual risk of the plaintiff-shareholder and the collective benefit that flows exclusively into the assets of the company is analyzed in detail by Reisberg (2007), Coffee (1985) and DeMott (1987), emphasizing that the strict application of the loser pays rule in continental legal systems creates an environment of extreme disincentives for potential plaintiffs. As stated by Armour et al. (2009), Cheffins (2001) and Klausner (2013), the shareholder initiating the dispute bears the entire burden of court fees and legal representation costs, while the positive effects of a possible judgment are externalized to all members of the company in proportion to their shares, which creates a “free-riding problem” and results in a chronic by-product of these lawsuits.

Comparative research conducted by Hopt (2011), Davies (2010) and Conac (2011) indicates that European jurisdictions with a high level of investor protection are gradually abandoning rigid cost-responsibility models in favor of solutions that favor conscientious plaintiffs. In this context, Caballero (2014), Payne (2014) and Legg (2011) emphasize the justification for introducing the institute of advance payment of costs by the company itself (so-called indemnity orders), provided that the plaintiff acted bona fide and that the claim has a reasonable prospect of success. This approach, also supported by Arad and Reisberg (2011), transforms derivative litigation from a high-risk individual venture into a legitimate corporate governance tool, where the company, as the ultimate beneficiary, assumes the economic risk of the proceedings.

The scientific justification for introducing the obligation to refund costs to a conscientious plaintiff at an early stage of the proceedings, advocated

by Bebchuk (2005) and Rock (2013), is particularly emphasized in state-owned companies. In these entities, where the risk of managerial opportunism and politically motivated governance is heightened, the absence of a cost incentive regime practically amnesties the administration from liability. Therefore, harmonization of domestic legislation with the trends analyzed by Gevurtz (2010) and Siems (2018) requires redefining the procedural position of the prosecutor, not as a litigant in the classical sense, but as a guardian of corporate and public integrity whose proactivity must not be punished by financial exhaustion.

3.2. Information Asymmetry and the Burden of Proof

The structural problem of information asymmetry between management and minority shareholders represents one of the most complex obstacles in derivative litigation, creating a phenomenon that legal scholars often define as “evidence deadlock.”

As Jensen and Meckling (1976), Bebchuk (1989), and Enriques and Volpin (2007) point out, management’s inherent advantage in accessing internal information allows for the concealment of opportunistic behavior and breaches of fiduciary duties, which places minority members at a disadvantage already in the preparatory phase of the proceedings.

Armour et al. (2017), Keay (2014) and Loughrey (2011) emphasize that without adequate access to business books, internal contracts and minutes of meetings of management bodies, the shareholder plaintiff cannot meet the standards of precision of the claim, which results in the dismissal of claims due to the lack of evidence of a causal link between the actions of the management and the resulting damage.

European legislative trends, encouraged by the analyses provided by Hopt (2011), Conac (2011) and Baums (2003), are moving towards strengthening the right to information as a necessary prerequisite for effective judicial protection. In this regard, Moloney (2014) and Ferran (2008) point to the importance of the Shareholder Rights Directive II (SRD II), which insists on the transparency of related party transactions, which indirectly facilitates the collection of evidence in asset recovery cases. Of particular relevance is the German model within the Aktiengesetz (AktG), which, according to the interpretations of Fleischer (2005) and Mülbert (2010), allows the court to order the management to submit specific documentation in the procedure for granting approval for a lawsuit, thereby partially suspending the classic rule on the burden of proof in favor of minority shareholders.

In the Serbian legal system, scientific research by Siems (2018), Spamann (2010) and Kraakman et al. (2017), suggest that the solution should be sought in expanding the right to extraordinary audit and introducing procedural powers of the court to order pre-trial disclosure. In entities with state capital, where, according to the findings of Pargendler (2011) and Milhaupt (2013), information asymmetry is further deepened by political non-transparency, such mechanisms are essential. Legislative intervention that would allow minority members direct access to documentation in the event of a well-founded suspicion of malfeasance would harmonize domestic law with the standards advocated by Ventoruzzo (2014) and Grundmann (2012), transforming derivative litigation from a reactive to a proactive instrument for protecting corporate and public integrity.

3.3. Preliminary Judicial Review of Admissibility as an Instrument for Preserving Corporate Stability and Shareholder Rights

The fear of the potential instrumentalization of derivative litigation for the purpose of procedural obstruction and extortion, known in theory as the risk of “strike suits”, is a central argument against the liberalization of this institute. While classic authors such as Romano (1991), Coffee (1985) and West (2001) warn of the danger of paralyzing effects of unfounded disputes on operational management, contemporary domestic scientific thought shifts the focus to the inadequacy of rigid legal barriers. Radović (2022) and Jevremović Petrović (2024) argue that the fixed legal threshold of 5% of the share capital, provided for by the current Law on Companies, has become an anachronistic obstacle that indiscriminately eliminates even meritorious claims, especially in large systems with state participation. As Cheffins (2001) and Reisberg (2007) note, such quantitative thresholds compromise the essence of judicial review, while Vasiljević (2025) emphasizes that in entities with state capital, these thresholds often serve as a shield for managerial passivity.

The most effective regulatory response in the European legal space is the German model of prior judicial review of admissibility (Klagezulassungsverfahren), analyzed by Baums (2003) and Hopt (2011). This model delegates to the court the role of an active arbitrator that examines the existence of prima facie evidence of a breach of fiduciary duties and the compliance of the claim with the long-term interests of society. In the domestic literature, Lepetić (2022) and Jovanović (2023) explore the possibility of implementing such a gatekeeping mechanism in Serbia, emphasizing that judicial cognition in the early stages of the procedure would be a far

more effective barrier against abuse than mere asset censuses. According to the findings provided by Čolović (2024), it is precisely the introduction of qualitative criteria, instead of rigid numerical thresholds, that would enable a balance between the right to judicial protection and the need for corporate stability.

For the legal system of the Republic of Serbia, research conducted in the transitional context by Siems (2018) and Conac (2011), and further developed in the latest domestic works by Radović (2025), suggests a paradigm shift towards the model of conditional legitimization. The proposal involves lowering the threshold for filing a lawsuit to a symbolic 1% or introducing individual standing, provided that the plaintiff proves the justification of the claim in a preliminary court test. Such a reform, advocated in light of the latest amendments to the law by Jevremović Petrović, Radović and Jovanović (2025), would eliminate the risk of obstruction of public enterprises, while at the same time allowing for the managerial responsibility of entities with state capital to be subjected to rigorous scrutiny, thereby harmonizing domestic standards with the highest corporate governance requirements of the European Union and OECD recommendations.

4. Comparative Statistical Analysis of the Efficiency of Derivative Claims in the EU and Serbia

4.1. Methodological Framework and Research Sample

The research was conducted using quantitative and qualitative analysis of court registers and annual corporate governance reports for the period from 2021 to 2025. The sample includes three jurisdictions with different procedural models: Germany (threshold and filter model), England (judicial leave model) and Serbia (rigid census model). The primary objective of the research is to determine the correlation between the nature of procedural barriers and the number of derivative proceedings initiated, with a particular focus on the protection of minority shareholders in state-owned companies.

4.2. Descriptive Statistics and Analysis of the Frequency of Disputes

Analysis of data collected from commercial court databases indicates significant disparities in the frequency of use of derivative claims. The English derivative claim model successfully combines the wide availability of the procedure, as it does not provide for a property census, with strict

procedural filters that maintain the number of claims at a stable annual average of 28 initiatives. This, as Davies (2024) states, achieves an optimal balance in which the Companies Act 2006 simultaneously prevents procedural abuses and ensures judicial protection in blatant examples of administrative misconduct.² Although Germany has a 1% asset threshold, the number of cases that overcome the procedural barrier of the Klagezulassungsverfahren stage is stable and averages 15 requests per year. As Hopt (2025) points out, this very selection ensures an exceptional success rate of over 65%, since judicial review eliminates unfounded initiatives in a timely manner and focuses resources on obvious cases of abuse.³

Statistical data for the period 2021–2025 for the Republic of Serbia show a worrying marginalization of the institute, with only one to two proceedings initiated annually in entities with state capital. Radović (2025) and Vasiljević (2025) rightly state that the high threshold of 5% in Serbia acts as an absolute barrier to shareholder activism.⁴

4.3. Quantitative Conditions of Procedural Legitimacy as a Determinant of the Effectiveness of Judicial Control

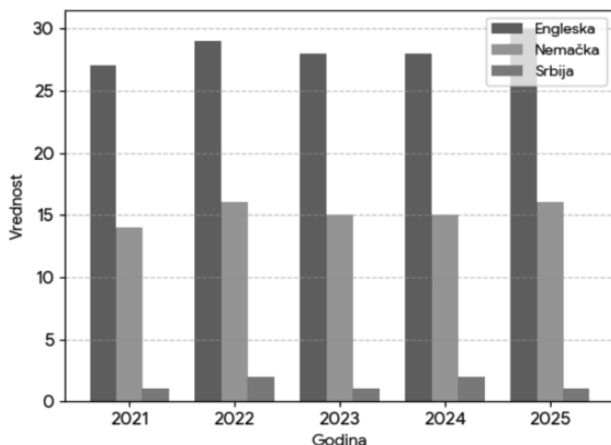
Using Pearson's correlation coefficient (r), a strong negative correlation ($r = -0.81$) was found between the height of the fixed legal threshold and the number of lawsuits. While England, through a model of judicial discretion without a quantitative census, provides access to justice even to the owner of a single share (provided that the lawsuit is in the interest of the company), the Serbian system of 5% disables control in large joint-stock companies where this percentage is unattainable for small investors.

² Source: Ministry of Justice (2024). *Civil Justice Statistics Quarterly*. Downloaded 2026, February 22 from <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

³ Data source: Statistics on proceedings under § 148 AktG (Klagezulassungsverfahren) are based on the annual publications of the German Federal Statistical Office: Statistisches Bundesamt (Destatis), Fachserie 10 Reihe 2.1 - Zivilgerichte. See also: Hopt, K. J. (2025). Aktienrecht im Wandel.

⁴ Source of data: Supreme Court of Serbia, Annual Reports on the Work of Courts in the Republic of Serbia (2021–2025), Section for Commercial Disputes. The analysis includes cases formed on the basis of Articles 79 and 80 of the Law on Commercial Companies. Compare with the conclusions: Radović, V. (2025). Pravo privrednih društava, pp. 214–218.

Graph 1: Comparative analysis of derivative actions for the period 2021–2025



Source: Author's research

4.4. Research Results

The empirical results of the conducted research confirm the initial hypothesis of the work on the systemic inefficiency of the current normative model of derivative litigation in the legal order of the Republic of Serbia. While the models in England and Germany ensure continuous supervision over the administration through a balancing of procedural facilities (low or non-existent thresholds) and judicial filters, the Serbian system favors the status quo, leaving state capital without effective minority control.

5. Conclusion

Based on the conducted research, comparative analysis and presented statistical indicators, it is concluded that the current model of derivative litigation in the legal system of the Republic of Serbia has reached a point of functional exhaustion. The rigid insistence on high quantitative thresholds of procedural legitimacy does not fulfill its primary purpose of protecting corporate stability, but rather generates an environment in which managerial responsibility, especially in entities with state capital, is reduced to the level of theoretical abstraction.

In light of the scientific contributions of leading domestic authors in the period from 2021 to 2026, the conclusion is that the reform of domestic

legislation must move in the direction of a radical shift from mechanistic barriers to more subtle procedural solutions.

It is considered necessary to replace the rigid 5% threshold with a more flexible model that would lower the threshold to 1%, or even recognize active legitimization for individual shareholders, with the mandatory introduction of a mechanism of prior judicial control, i.e. the Klagezulassungsverfahren model. This solution positions the court as an active and professional arbitrator that performs an efficient selection by eliminating obstructive and blackmailing lawsuits, while at the same time opening up space for meritorious claims that protect the company's assets.

The position is that a conscientious plaintiff must not expose himself to financial exhaustion when protecting a collective interest. It is necessary to introduce a legal obligation according to which the company, as the ultimate beneficiary of a successful dispute, would bear the costs of the procedure, provided that the lawsuit was filed in good faith and passed the initial judicial filter.

It is proposed to implement procedural tools for the discovery of documents before the start of the main hearing, similar to discovery mechanisms. Without an adequate right to information, derivative litigation remains an ineffective instrument in the hands of minority members who are forced to prove abuses in conditions of information deficit that the administration often consciously maintains.

In conclusion, derivative litigation in the Republic of Serbia must no longer be seen as a threat to operational management, but as an essential corrective that forces the administration, especially in the public sector, to strictly comply with ethical and legal imperatives. Harmonization of Serbian law with European Union standards and the SRD II Directive does not represent only a technical obligation in the accession process, but a deep moral and economic imperative for the protection of public resources. Through a strengthened role of the court as an arbiter in access to justice and a conscientious shareholder as a protector of the public interest, it is possible to build a transparent corporate system, immune to corruption risks and managerial opportunism.

Conflict of Interest

The author declares that he has no conflict of interest.

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ANALIZA MEHANIZMA DERIVATIVNE TUŽBE I NJENA PRIMENA U PRAVNOM SISTEMU EVROPSKE UNIJE

APSTRAKT: Osnovni cilj rada predstavlja naučno istraživanje i kritičku analizu instituta derivativne tužbe kao specifičnog procesnog pravnog instrumenta za zaštitu imovinskih interesa privrednih društava sa državnim kapitalom. Istraživanje nastoji da utvrdi na koji način ovaj mehanizam, koji po svojoj prirodi derogira fundamentalne korporativne principe većinskog odlučivanja, može postati efikasan instrument zaštite javnih resursa od štetnih radnji organa upravljanja. Aktuelnost teme i potreba za istraživanjem utemeljeni su u normativnoj nepreciznosti domaćeg regulatornog okvira i marginalnoj primeni ovog instituta u praksi Republike Srbije, uprkos njegovom značajnom potencijalu za suzbijanje korporativne korupcije i unapređenje transparentnosti u upravljanju državnim imovinom. Metodološki okvir rada zasnovan je na multidisciplinarnom pristupu. Primenjena je pravnodogmatska metoda za analizu relevantnih propisa, uz komparativnopravni metodološki pristup koji obuhvata modele Nemačke, Engleske i Srbije. Kroz metodu analize sadržaja relevantne sudske prakse i EU direktiva, istraženi su savremeni trendovi zaštite manjinskih akcionara. Dodatno, primenjena je teleološka metoda radi utvrđivanja društvene svrhe instituta u kontekstu zaštite javne imovine, dok su metodom analize i sinteze dekonstruisani složeni procesnopravni odnosi između društva, uprave i manjinskih članova, čime je omogućeno formulisanje koherentnih predloga

za unapređenje zakonodavstva. Rezultati ukazuju na to da su ključne barijere za efektivnu primenu derivativne tužbe u Srbiji visoki troškovi postupka, informaciona asimetrija i rizik od zloupotrebe procesnih ovlašćenja. Komparativna analiza modela Evropske unije potvrđuje da visokofunkcionalni sistemi implementiraju mehanizme prethodne sudske kontrole dopuštenosti i precizno normiranu alokaciju troškova, čime se uspostavlja balans između sprečavanja opstrukcije rada društva i osiguravanja efektivne sudske zaštite za savesne članove. Zaključno, naučni rad nudi konkretne normativne predloge za reformu domaćeg zakonodavstva u skladu sa evropskim standardima, u cilju jačanja korporativne odgovornosti u javnom sektoru.

Ključne reči: *derivativna tužba, državni kapital, Evropska unija, kompanijsko pravo i odgovornost uprave.*

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INVESTOR'S LIABILITY FOR THE LEGAL AND FACTUAL SUITABILITY OF AN APARTMENT UNDER CONSTRUCTION

ABSTRACT: The subject matter of this paper is an analysis of the investor's liability to ensure that an apartment under construction constitutes, at the moment of delivery and legal transfer, a legally and factually suitable object of acquisition. The aim of the paper is to determine whether the investor's liability towards the buyer may be understood solely within the framework of the traditional sale of property and the general rules of contractual liability, or whether it represents a more complex form of liability arising at the intersection of public-law requirements governing construction, contractual relationships established during the construction process, and the marketability of the final object of acquisition. The paper is theoretical in nature and is based on normative, doctrinal, analytical, and systemic methods, accompanied by an analysis of relevant domestic legal scholarly literature and applicable legal sources.

The principal hypothesis of the paper is that the investor's liability for the legal and factual suitability of an apartment under construction does not constitute a separate and autonomous legal institution, but rather a specific form of complex contractual and transactional liability, within which the existing rules of public law, the law of obligations, and property

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law are applied subject to certain specific features arising from the multi-stage nature of a construction undertaking. The results of the analysis demonstrate that the investor's liability towards the buyer is not formed only at the moment of sale, but considerably earlier, through the planning, permitting, design, supervisory, and execution phases of the construction process. Consequently, the content of such liability cannot be adequately explained if the investor is viewed merely as a seller or merely as the employer of works under the construction contract.

Keywords: *investor, apartment under construction, legal suitability, factual suitability, construction contract, investor's liability, transfer of immovable property.*

1. Introduction

The contemporary legal and market position of the investor no longer permits simplistic definitions. An investor is not merely a person who provides capital, nor merely a party who concludes a contract with a contractor, nor solely the person who ultimately sells individual units within a building. The investor's position is multi-layered because it encompasses a series of successive yet interconnected legal and factual activities: from the decision to invest and the relationship with planning instruments, through the acquisition of conditions and permits, to design, organization of supervision, selection of contractors, monitoring of the construction process, and, finally, entering into a transactional relationship with the buyer. This complexity gives rise to the central issue examined in this paper: whether the investor's liability towards the buyer of an apartment under construction can be understood merely as a seller's liability arising from a real estate sale contract, or whether it constitutes a form of liability whose content is determined by the entire preceding course of the project. The legal significance of this issue does not stem solely from the theoretical need to define the investor's position more precisely. Rather, it derives even more from the very nature of the contemporary construction market. A buyer of an apartment under construction does not enter into a legal relationship with a person transferring an already existing and legally secure object of sale, but with a person who promises the result of a process that is either still ongoing or has only recently been completed. In such a relationship, the purchaser inevitably places a certain degree of trust in the investor. For precisely this reason, the investor's liability towards the buyer cannot be adequately explained if it is examined only from the moment of

concluding a preliminary agreement or a contract of sale. Such an approach would be overly narrow and would disregard the legal reality that an apartment under construction is not an ordinary object of legal transactions but rather the outcome of a multi-stage process. The final agreement concluded between the investor and the buyer represents merely the concluding manifestation of a series of prior legal relationships that give substance to that agreement. If those preceding relationships are deficient, legally uncertain, or factually mismanaged, their consequences will most often ultimately emerge in the relationship between the investor and the buyer.

Domestic legal scholarship confirms this conclusion from a variety of perspectives. The importance of planning certainty and spatial regulation for investors has been emphasized in works addressing the relationship between investors and spatial planning, demonstrating that investment security depends upon clear parameters concerning what may be built, where construction is permitted, within what timeframes approvals may be obtained, and how the process ultimately leads to documentation enabling secure legal transactions (Arsić, 2007, pp. 870–880). Investor protection cannot be reduced merely to the existence of legal rules; it also depends upon their quality, transparency, and predictability, as highlighted in the literature on law and investor protection (Vasiljević, 2007, pp. 3–20). At the permitting stage, studies concerning the specific features of the building permit procedure demonstrate that this phase often generates difficulties that may later acquire significantly broader implications (Vučetić, 2013, pp. 325–343).

Within the sphere of contract law, references addressing the contractual liability of designers, the general basis of contractual liability, supervision and the liability of employers, termination of construction contracts, and disputes arising from such contracts all demonstrate, in their respective ways, that a construction project constitutes a legal network in which risks cannot easily be isolated and assigned to a single participant (Jovanović D., 2020, pp. 318–334; Jovanović N., 2020, pp. 40–63; Paunović, 2019, pp. 182–202; Paunović, 2024, pp. 155–173; Mišković, 2017, pp. 107–117; Đorđević, 2023, pp. 89–103). Finally, the literature concerning the concurrence of contractual and non-contractual liability raises an additional question as to whether the investor's liability towards the purchaser is always exhausted within a purely contractual framework or whether, in certain situations, it acquires a broader compensatory dimension (Dudaš, 2022, pp. 795–812).

The subject matter of this research is the analysis of the investor's liability for the legal and factual suitability of an apartment under construction, with particular emphasis on the manner in which the planning, permitting, design,

supervision, and construction phases affect the purchaser's ultimate legal position. The term factual suitability is not used as a normative concept in the positive law of the Republic of Serbia. In this paper, it is employed as a theoretical notion denoting the technical and functional suitability of an apartment for its intended contractual and ordinary use, that is, the set of characteristics corresponding to the design and technical documentation, the contractual specifications, and the legitimate expectations of the purchaser.

The aim of the paper is to determine whether the investor's liability towards the buyer of an apartment under construction may be explained solely through the rules governing traditional contracts of sale and the general principles of contractual liability, or whether it represents a more complex form of liability arising at the intersection of public-law requirements governing construction, contractual relationships established during the construction process, and the marketability of the final object of acquisition.

The principal hypothesis of the paper is that the investor's liability for the legal and factual suitability of an apartment under construction does not constitute a separate and autonomous legal institution, but rather a specific form of complex contractual and transactional liability within which the existing rules of public law, the law of obligations, and property law are applied subject to certain specific features arising from the multi-stage nature of a construction undertaking. The methodological framework of the paper is based on normative, doctrinal, analytical, and systemic methods, accompanied by an analysis of relevant domestic legal scholarship and applicable legal sources.

2. The Concept of the Central Legal Institute and Its Emergence in the Contemporary Legal and Social Context

Defining the investor's liability for the legal and factual suitability of an apartment under construction is not a straightforward task, primarily because the law does not recognize this notion as a fully developed statutory institution. Positive law contains separate rules governing planning and construction, the contractual relationship between the investor and the buyer, real estate transactions, and the registration of rights in the real estate cadastre.

For the purposes of this paper, the investor's liability for the legal and factual suitability of an apartment under construction should be understood as the aggregate of the investor's obligations and risks vis-à-vis the buyer concerning the requirement that the object of acquisition be, on the one hand, legally secure and suitable for legal transactions and the registration

of rights, and, on the other hand, factually usable and consistent with both the contractual specifications and the characteristics that may reasonably be expected. Legal suitability implies that the apartment or other individual unit of the building rests upon properly obtained and legally valid construction documentation and that, on this basis, it may lawfully serve as the subject of a sale and other legal transactions between the investor and the buyer. Factual suitability implies that what is delivered to the purchaser corresponds to its intended purpose, satisfies technical and functional expectations, and conforms to the content agreed upon by the parties.

At this point, a distinction must be drawn between this concept and several related notions. This legal institution is not synonymous with the investor's general liability. The investor's general liability encompasses obligations towards administrative authorities, contractors, designers, co-owners of land, and even the public interest. The central institut examined in this paper is narrower, as it concerns the investor's ultimate relationship with the buyer of an apartment under construction. Likewise, it is not identical to the contractor's liability. The contractor is the direct performer of the construction works, whereas the investor acts as the organizer, project sponsor, and the person who ultimately assumes responsibility for the outcome vis-à-vis the buyer. Nor is the concept equivalent to the traditional seller's liability for legal and material defects. In the case of the sale of an already existing immovable property, attention is focused primarily on the condition of the object at the time of the conclusion and performance of the contract. In the case of an apartment under construction, by contrast, the final defect or legal uncertainty is often the result of the entire preceding process. The emergence of this issue is closely connected with changes in the nature of construction projects and the real estate market. The modern investor typically does not build solely for personal needs but organizes an entire undertaking for the purpose of placing residential units on the market. Consequently, the buyer no longer enters into a relationship with a passive seller of an already existing asset but with a person who has previously managed a complex series of legal and technical processes. For this reason, buyers expect more from investors than the mere delivery of the property and transfer of title. They reasonably expect a legally secure and factually satisfactory result of the entire undertaking.

A further reason why this concept has become increasingly important lies in the growing complexity of construction projects. Planning instruments, location conditions, building permits, technical documentation, professional supervision, various contractual models for the execution of works, technical inspections, transactional formalities, and the registration of rights can no

longer be viewed as simple and isolated stages of a single process. They overlap, interact, and generate consequences for one another. Consequently, the investor's liability towards the buyer is not the "final" stage of the process but rather the cumulative legal expression of everything that has preceded it. The legal literature confirms this conclusion. Arsić (2007) emphasizes planning certainty and ownership documentation as essential foundations of both investment security and transactional certainty (pp. 870–880). Vasiljević further argues that investor protection depends on the quality of the normative framework and its practical implementation (Vasiljević, 2007, pp. 3–20), while Vučetić demonstrates that the permitting phase frequently becomes the source of difficulties that later manifest themselves in broader legal problems (Vučetić, 2013, pp. 325–343). Within this process, design, supervision, and construction relationships shape the internal allocation of risks, which is of particular importance for determining the investor's liability (Jovanović D., 2020, pp. 318–334; Paunović, 2019, pp. 182–202; Vujačić, 2022, pp. 1469–1472). Finally, the possibility of contract termination and the occurrence of disputes further destabilize projects, making the entire process more uncertain and complex (Mišković, 2017, pp. 107–117; Đorđević, 2023, pp. 89–103).

The critical legal analyses offered by these authors demonstrate that the concept of the investor's liability for the legal and factual suitability of an apartment under construction is not an artificial theoretical construct. Rather, it represents a theoretical response to a practical reality that has long been present in contemporary construction and real estate transactions.

3. Legal Nature of the Central Institut

The question of the legal nature of this form of liability constitutes the central theoretical issue of this paper. The fundamental dilemma is whether this liability should be regarded as a distinct legal institut or merely as a particular manifestation of already existing legal relationships and grounds of liability. At first glance, there appear to be compelling reasons to emphasize its distinctiveness. The investor's liability towards the buyer of an apartment under construction extends beyond the ordinary obligation to deliver a thing. It encompasses the outcome of the planning, permitting, design, supervision, and construction phases of the project. From a practical perspective, the purchaser acquires not merely an apartment, but also the legal and factual reliability of the entire preceding process.

Nevertheless, the stronger argument is that this does not constitute an autonomous legal institution but rather a specific form of complex liability

operating within the existing legal system. Its foundation remains firmly rooted in the established rules of public law, the law of obligations, and property law. Accordingly, the central issue is not the absence of legal norms, but rather the manner in which those norms are interconnected. The Law on Planning and Construction (2009) regulates the possibility and conditions of construction, while the Law of Obligations (1978) regulates contractual relationships and the consequences of their breach. Regulations governing real estate transactions address the transactional dimension, whereas the cadastral regime governs registration and the security of legal transactions.

What makes this form of liability distinctive is not the creation of a new normative framework but rather the necessity of interpreting existing legal rules in an integrated manner rather than in isolation. This conclusion gains additional significance when viewed through the general framework of contractual liability. If contractual liability is fundamentally based upon the breach of a contractual obligation (Jovanović N., 2020, pp. 40–63), then the investor's liability towards the buyer is, in its immediate legal form, primarily contractual. The buyer and the investor are parties to a contractual relationship, and any analysis must therefore begin with the examination of the obligations undertaken by the investor and any breach thereof.

However, this starting point is insufficient to exhaust the entire content of the issue. The investor's contractual obligation towards the purchaser differs significantly from the obligation of a typical seller of an already existing and legally finalized immovable property. It necessarily incorporates the results of the preceding construction process. Consequently, contractual liability in this context emerges in a considerably more complex form.

A similar conclusion may be drawn from D. Jovanović's (2020) analysis of the obligations of designers and consulting engineers. Although these obligations are specific to construction projects, they nevertheless remain within the general framework of contractual liability (2020, pp. 318–334). This observation gives rise to an important analogy. The specific nature of a construction project does not automatically justify the creation of a new legal institution. Rather, it requires a more precise and intensive application of existing legal principles. Accordingly, although the investor's liability towards the buyer is highly specific in practical terms, it must still be interpreted within the framework of the existing legal system.

This does not mean, however, that the specific nature of the problem should be disregarded. Its distinctiveness is real, but not institutional. It is functional and systemic rather than constitutive. From the buyer's perspective, the investor serves as the person upon whom the consequences of the project's

internal relationships ultimately converge. As a rule, the buyer does not contract with the designer, the supervising engineer, or the contractor. The buyer contracts with the investor. Consequently, the investor is liable not only for the immediate legal transaction concluded with the purchaser but also for the legal consequences of activities that the investor previously organized, initiated, supervised, or failed to supervise.

The theoretical conclusion is therefore that the investor's liability for the legal and factual suitability of an apartment under construction constitutes a particular form of complex contractual and transactional liability, but not an autonomous legal institution. Its specific features are not sufficient to justify its recognition as a new legal category, yet they are sufficiently significant to require a more integrated interpretation of existing legal rules.

4. Fundamental Legal Issues

4.1. Public-Law Preconditions for Construction as the Initial Segment of Investor Liability

The first fundamental legal issue concerns whether the investor's liability towards the buyer can be separated from the public-law preconditions governing construction. The very subject matter of the Law on Planning and Construction (2009) demonstrates that the answer must be in the negative. This statute regulates the conditions and manner of spatial planning, construction land, the erection of buildings, the exercise of supervision, and other matters of significance for construction activities. Moreover, the legislative framework remains subject to continuous modification, as evidenced by the amendments adopted in 2025. This is not merely an abstract normative circumstance, it carries direct practical implications. Arsić (2007) correctly observes that, from the investor's perspective, it is of decisive importance that there exist clear parameters concerning what may be built, where construction is permissible, within which timeframes approvals may be obtained, and how ownership documentation is ultimately secured so as to enable legally certain real estate transactions (pp. 870–880). Consequently, the investor's position does not begin with the contract concluded with the buyer. Rather, it begins with the public-law framework that determines whether the project itself is legally viable.

Vasiljević (2007) develops this conclusion further by emphasizing that investor protection depends not only on the existence of legal norms but also on the quality, transparency, and predictability of the regulatory system (pp. 3–20). Public-law certainty is therefore important not only for the investor as

the party undertaking the investment but also for the buyer as the future acquirer of the property. If the public-law framework is normatively deficient, unclear, or inconsistently applied, the final object of the transaction inevitably becomes burdened with a higher degree of legal uncertainty. Vučetić's analysis of the building permit procedure is particularly significant because it demonstrates that the permitting phase is neither neutral nor purely technical. Difficulties arising during this stage, as well as broader issues concerning the quality of planning instruments and the relationship between legal and technical requirements, do not necessarily remain confined to the sphere of administrative law (Vučetić, 2013, pp. 325–343). On the contrary, problems emerging at this stage may subsequently manifest themselves as delays, inconsistencies between planned and completed construction, legal uncertainty in transactions, or obstacles to the registration of the buyer's rights. More recent institutional analyses of permitting systems likewise confirm that, although the regulatory framework is relatively detailed, its effectiveness continues to depend substantially upon administrative practice and institutional performance.

A further important observation must be made. In practice, it is often incorrectly assumed that public-law preconditions concern only the relationship between the investor and public authorities, while the buyer remains entirely outside that relationship. From a formal legal perspective, this assumption is correct. From a substantive perspective, however, the buyer ultimately bears the consequences of the success or failure of that relationship. If the planning basis is unclear, if permits are delayed, if difficulties arise in harmonizing documentation, or if deviations emerge during implementation that undermine the legal stability of the project, the buyer will inevitably experience the consequences, despite not being a party to those legal relationships. The buyer's legal interest therefore begins much earlier than might initially appear.

The partial conclusion of this section is that the public-law preconditions for construction are not merely preliminary requirements for the investor's activities. Rather, they constitute the initial component of the investor's subsequent liability towards the buyer.

4.2. Design, Supervision, and the Internal Structure of Liability

The second fundamental legal issue concerns the internal structure of relationships within a construction project and the question of whether the investor may remain "neutral" vis-à-vis deficiencies attributable to designers, supervising engineers, and contractors. The point of departure is once again the

Law of Obligations, which governs legal relationships arising from contracts, damages, and other legally relevant facts. Design activities, professional supervision, the execution of construction works, and the interaction among these activities, notwithstanding their technical specificity, are first and foremost relationships governed by the law of obligations.

Jovanović D. (2020) demonstrates that neither the design contract nor the supervision contract is specifically regulated by the Law of Obligations. Consequently, the content of these relationships and the liability arising from them must be derived from general legal principles, the nature of the services involved, and the specific contractual arrangements concluded by the parties (pp. 318–334). This issue is of particular importance for the investor. If the content of obligations is largely left to contractual autonomy, then the investor actively determines the allocation of risks already at the stage of contract formation. Poorly defined obligations, imprecise standards of control, and unclear distributions of professional responsibility may later emerge as problems that can no longer be confined to the investor's relationships with designers or supervising engineers. Paunović's (2019) analysis of construction supervision further reinforces this point. Where the legal framework governing supervision lacks sufficient clarity, there is a genuine risk that technical and factual irregularities will not be identified and remedied in a timely manner (pp. 182–202). In his subsequent work on the liability of employers in construction projects, Paunović goes a step further, demonstrating that an employer cannot simply evade responsibility by invoking the involvement of other engaged professionals (Paunović, 2024, pp. 155–173). This observation is directly relevant to the present subject. In the internal dimension of the project, the investor may possess rights of recourse and claims against other participants. In the external dimension, however, the investor remains the central figure vis-à-vis the buyer. Vujačić's (2022) contribution, although situated within a somewhat different disciplinary framework, is likewise important because it demonstrates that the type of contract employed influences the manner in which the project is managed and, consequently, the allocation of risks within it (pp. 1469–1472). The investor's challenge therefore lies not merely in complying with formally prescribed legal requirements but also in effectively organizing the project, establishing appropriate control mechanisms, and managing complex legal and factual relationships.

At this point, an important practical reality becomes apparent. The buyer does not select the designer. The buyer does not appoint the supervising engineer. Nor does the buyer contract with the contractor. All of these relationships exist "behind" the investor from the buyer's perspective. For

this reason, the investor's liability towards the buyer cannot be equated with that of a conventional seller delivering a contractual object of sale. Rather, the investor is also responsible for the functional outcome of the internal network of contractual and organizational relationships that the investor has established and managed. Consequently, the investor cannot escape liability merely by invoking the autonomy of those professional actors. Their autonomy undoubtedly exists within the internal structure of the project, but it does not negate the fact that the investor created that structure and presented it to the buyer as a coherent and reliable undertaking.

The partial conclusion of this section is that the investor's liability towards the buyer cannot be properly understood without first understanding the investor's contractual and organizational position vis-à-vis the designer, supervising engineer, and contractor. Although the purchaser does not participate in these internal relationships, it is often the purchaser who ultimately bears their consequences.

4.3. The Construction Contract as a Source of Subsequent Transactional Uncertainty

The third fundamental legal issue concerns the construction contract and the manner in which its formation, performance, and potential disruptions affect the subsequent relationship between the investor and the buyer. In practice, the construction contract is often viewed primarily as an internal instrument for the implementation of a project. Such an understanding, however, is incomplete. A construction contract is not merely a technical framework for the execution of works, it also constitutes the legal foundation upon which the realization of the entire project rests.

Grujić (2023) demonstrates that legal complexity arises already at the stage of concluding a construction contract, particularly where competitive tendering procedures are employed (pp. 601–628). This means that the investor's risk does not begin only when construction works commence, but also at the stage of selecting the contracting model, determining the criteria for choosing contractual partners, and allocating initial responsibilities. In this respect, the investor is not merely a passive employer of works but a party that actively constructs the fundamental legal relationship upon which the future course of the project will depend. Đorđević (2023) shows that disputes arising from construction contracts are an almost inevitable feature of construction practice (pp. 89–103). This observation is particularly significant for the present analysis because it demonstrates that deficiencies in the construction contract

do not remain merely an “internal problem” of project implementation. Once the contractual relationship becomes destabilized—whether through disputes, delays, disagreements concerning quality, or other forms of disruption—the consequences frequently extend beyond the investor–contractor relationship and directly affect the buyer.

Mišković (2017) further explains that termination of a construction contract is neither a typical nor a simple remedy and that its consequences cannot readily be reduced to the general model of restitution following contract termination (pp. 107–117). This is important because the investor cannot successfully defend his position vis-à-vis the buyer merely by asserting that a dispute has arisen with the contractor or that the construction contract has been terminated. From the purchaser’s perspective, the decisive issue is whether the object of acquisition is suitable and whether it will be delivered properly and within the agreed timeframe. Internal termination, disputes, or crises within the investor–contractor relationship do not alter the fact that the purchaser expects a result from the investor. In other words, although the construction contract is internal with respect to its parties, it is not internal with respect to its ultimate effects. Its success or failure directly influences whether the purchaser will receive a legally and factually suitable property. For this reason, the construction contract should be viewed as one of the most important indirect sources of the investor’s subsequent liability towards the buyer.

It is also important to recognize that construction contracts inherently contain a greater degree of uncertainty than many other contractual arrangements. The reason lies in the fact that their performance does not occur within a static environment. During construction, changes arise, additional works become necessary, technical adjustments are made, questions regarding deadlines emerge, difficulties in the supply of materials occur, and regulatory or market circumstances may change. Consequently, construction contracts naturally generate a heightened risk of disruption. What is most important for the purposes of this paper, however, is that this increased risk does not remain confined to the investor–contractor relationship. Ultimately, it becomes a risk borne by the buyer. The buyer may have had no involvement whatsoever in the contractual arrangements between the investor and the contractor, yet the consequences of deficiencies in those arrangements frequently materialize in the purchaser’s legal and factual position.

The partial conclusion of this section is that the construction contract is not merely an internal technical and legal relationship between the investor and the contractor. Rather, it constitutes one of the principal sources of subsequent

transactional certainty or uncertainty. Accordingly, the consequences of disruptions affecting the construction contract cannot be examined in isolation from the position of the buyer.

4.4. Real Estate Transactions, Registration of Rights, and the Legal Suitability of the Object of Acquisition

The fourth legal issue concerns the very concept of legally secure real estate transactions. The Law on Real Estate Transaction proceeds from the principle that the transfer of immovable property is free unless otherwise provided by law, while the Law on the Procedure for Registration in the Real Estate Cadastre and Infrastructure Cadastre (2018) expressly defines the objective of the registration procedure as ensuring accurate and comprehensive records in the interest of legal certainty in transactions. Taken together, these legislative premises demonstrate that real estate transactions are not merely a matter of formally concluding a contract, but they also depend upon the legal condition of the object of acquisition placed on the market.

This issue is particularly significant in the context of apartments under construction. The purchaser acquires not merely a future object in an economic sense, but the future outcome of a legally organized process. If the object of acquisition has been physically constructed but is not suitable for secure legal transactions or proper registration of rights, the investor's obligation towards the buyer cannot be regarded as fully performed. It is precisely at this point that the traditional seller's liability expands and becomes liability for the outcome of the entire preceding project.

Arsić's (2007) thesis concerning ownership documentation as a foundation of transactional security acquires its full significance in this context (pp. 870–880). If the object of acquisition is not legally structured in such a manner that the buyer can securely acquire and register the relevant rights, the buyer's contractual expectations have not been fully satisfied. Likewise, if the object has been formally delivered but remains legally uncertain or factually unusable, it cannot reasonably be maintained that the investor has fulfilled what the buyer was entitled to expect under the contract.

This analysis also reveals the close relationship between legal and factual suitability. Legal suitability is not merely a matter of permits, official records, and documentation, but it is also a matter of the actual ability of the acquired object of acquisition to function as a legally secure object of rights. Factual suitability, on the other hand, is not merely a technical issue concerning construction quality. It is equally a question of whether the apartment under

construction corresponds to what was contractually promised. In the context of object of acquisition under construction, these two dimensions cannot be strictly separated.

A further observation should be made. Legal certainty in this area is not exhausted by the formal possibility of concluding a contract or by the existence of documentation suitable for registration. Genuine transactional security exists only where the purchaser may reasonably expect that the object of acquisition will correspond, both legally and factually, to what was represented during the transaction. If a contract exists but performance is seriously compromised in practical terms, legal certainty remains incomplete. Conversely, if the apartment is technically usable but legally questionable in a significant respect, full suitability likewise cannot be said to exist. For this reason, an excessively formalistic understanding of the investor's obligation must be rejected. The investor's duty is not exhausted by merely transferring whatever rights happen to exist. In the context of apartments under construction, the investor is not a simple transferor of rights but rather the person responsible for creating the conditions under which the object being transferred becomes a legally secure and factually reliable result of the entire preceding project.

The partial conclusion of this section is that the legal suitability of an apartment under construction encompasses considerably more than the mere contractual act of delivery. It presupposes a legal and factual condition that enables secure transactions, proper registration of rights, and the effective enjoyment of the rights acquired by the purchaser.

4.5. The Limits of the Investor's Contractual and Non-Contractual Liability

The fifth fundamental legal issue concerns whether the investor's liability towards the purchaser remains exclusively contractual in nature. The starting point for addressing this question is undoubtedly contractual liability. As a rule, the purchaser and the investor are parties to a contractual relationship, and any analysis must therefore begin with the breach of contractual obligations. In this regard, the general framework of contractual liability remains decisive (Jovanović N., 2020, pp. 40–63). However, Dudaš (2022) convincingly demonstrates that a single harmful event may give rise to both contractual and non-contractual grounds of liability (pp. 795–812). For the purposes of this paper, this observation is important not because every defect affecting an apartment under construction automatically gives rise to tortious

liability, but because the investor's liability should not be too readily confined within the narrow framework of defective contractual performance. Where the buyer's loss extends beyond the ordinary consequences of delayed or defective performance and affects the buyer's broader legal or factual position, it becomes legitimate to consider the possibility of a wider compensatory framework.

This issue becomes particularly relevant in cases involving serious legal or factual deficiencies. An apartment that cannot be securely registered, that substantially fails to correspond to the characteristics contractually promised, or whose legal status is seriously compromised may produce consequences that the purchaser experiences as something more than an ordinary contractual breach. For this reason, the question of the limits of the investor's liability should not be prematurely closed. At the same time, caution is required. It would be unjustified to infer non-contractual liability automatically from every breach of the investor's obligations. Such an approach would be excessively broad and legally imprecise. A more accurate position is that contractual liability constitutes the primary framework, while the multi-stage and complex nature of construction projects justifies a more nuanced and expansive understanding of the potential boundaries of that framework.

A particular reason for such caution lies in the fact that buyer in these relationships frequently suffer not only direct economic loss, but also losses associated with delay, organizational disruption, and the inability to use, enjoy, or dispose of the apartment in the manner originally contemplated. Some of these consequences can readily be accommodated within the traditional framework of contractual liability. Others occupy a more ambiguous position and illustrate that the investor's relationship with the purchaser is not entirely straightforward. For precisely this reason, it is useful to maintain a broader analytical perspective regarding the limits of the investor's liability. The complexity of the construction process, the multiplicity of legal relationships involved, and the variety of potential consequences for the purchaser all indicate that rigid categorizations may not always provide satisfactory solutions.

The partial conclusion of this section is that the investor's liability towards the buyer is primarily contractual in nature. Nevertheless, the specific characteristics of a construction undertaking may justify a broader understanding of both the foundations and the scope of that liability in certain circumstances.

5. Discussion

The analysis conducted in this paper demonstrates that the fundamental issue of investor liability is incorrectly framed when reduced solely to the question of whether the investor acts as the employer of construction works or as the seller of an apartment. Such a distinction may be practical and conceptually convenient, but it is insufficient from a legal perspective. The investor simultaneously occupies several roles: employer, organizer, initiator of the public-law processes necessary for construction, contractual party in relationships with professional participants involved in the project, and ultimately the person who assumes responsibility towards the purchaser for the outcome of the entire undertaking. For this reason, the investor's liability towards the buyer cannot be properly understood through a fragmented approach. If attention is focused exclusively on the transactional stage, one loses sight of the fact that the causes of the problem may have arisen much earlier, within the planning or permitting phases. If the analysis is confined to the construction contract, the ultimate position of the buyer—who has not participated in that internal relationship—is overlooked. Likewise, if the issue is viewed solely through the lens of legal or material defects, insufficient attention is paid to the reality that such defects often originate in a broader network of design, supervision, and organizational failures. The principal value of the analytical framework developed in this paper lies precisely in its ability to reconnect these different dimensions.

This observation also reveals the principal limitation of existing legal approaches. Positive law contains a sufficient number of rules to address the problem, but it does not present them in a unified form. The Law on Planning and Construction, the Law of Obligations, regulations governing real estate transactions, and cadastral legislation each regulate a specific aspect of the issue from their respective perspectives. The legal literature similarly illuminates individual segments of the problem: planning certainty, investor protection, permitting procedures, designer liability, supervision, contract termination, construction disputes, and the concurrence of different grounds of liability. What appears to be lacking is not necessarily a new legal rule, but rather a more integrated method of interpreting the existing legal framework. The most significant finding of this paper is therefore not that investor liability creates a new branch or category of law. On the contrary, the more persuasive conclusion is that it creates a need for a more integrated interpretation of the law that already exists. This also reveals the practical value of the topic. The buyer's position cannot be adequately protected if the investor is viewed

merely as a seller, nor can the investor's liability be properly assessed if the earlier phases of the project are ignored. The investor's liability towards the buyer is, in essence, liability for the outcome of the entire construction undertaking to the extent that this outcome ultimately materializes in legal and factual form in the buyer's position.

A further observation should be added. A more integrated reading of the law does not imply the erosion of distinctions between different branches of law. On the contrary, only a precise differentiation between public-law, contractual, and transactional elements makes it possible to understand how they interact in a particular case. Problems arise when these distinctions are treated as absolute and the investor's position is artificially confined to only one legal dimension. Such an approach obscures what is perhaps the most important characteristic of contemporary construction practice: the result ultimately delivered to the buyer is never the product of a single phase of the project nor of a single legal norm. From this follows a broader conclusion for legal practice. The more complex construction projects become, the less convincing is the characterization of the investor as merely a seller of a completed object. At the same time, the more pronounced the investor's organizational role becomes, the less persuasive is the argument that the investor should be liable only for acts personally performed. The true legal nature of the investor's position lies precisely between these two extremes.

6. Conclusion

The investor's liability for the legal and factual suitability of an apartment under construction does not constitute a separate and autonomous legal institut. Its legal nature supports the conclusion that it represents a specific form of complex contractual and transactional liability in which the existing rules of public law, the law of obligations, and property law are applied subject to certain particularities arising from the multi-stage character of a construction undertaking. The analysis has demonstrated that the investor's liability towards the purchaser is not formed only at the moment of sale. On the contrary, it takes shape much earlier: during the planning and permitting phases, in relationships with designers, supervising engineers, and contractors, within the structure of the construction contract, and ultimately in the capacity of the object itself to be validly transferred and properly registered. For this reason, the investor cannot be viewed merely as a seller vis-à-vis the buyer, but rather as the central actor within the project as a whole.

The principal hypothesis of this paper may therefore be regarded as confirmed. The investor's liability for the legal and factual suitability of an apartment under construction constitutes a specific manifestation of already recognized forms of legal liability. Its significance does not lie in creating a new institution of law, but rather in demonstrating the limitations of interpreting the investor's position exclusively through a single phase of the project or through the perspective of a single branch of law. What the contemporary construction undertaking requires is not a new legal regime governing investors, but a more precise and systematic interpretation of existing law from the perspective of the buyer, who ultimately bears the consequences of the entire preceding process. In other words, the central contribution of this paper does not consist in arguing that investors should be accorded a special legal status normatively separated from the existing legal system. The more significant contribution lies in demonstrating that the investor's liability towards the buyer can be properly understood only when all relevant segments of the construction and sales process are viewed as an integrated whole: planning, design, procurement of the permits required for construction, supervision, execution of works, and, ultimately, the conclusion of the contract of sale. Only through such an integrated perspective does it become clear why, in the contemporary market for apartments under construction, the investor is not merely a contractual party but rather a legal figure upon whom the consequences of the entire preceding project ultimately converge.

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ODGOVORNOST INVESTITORA ZA PRAVNU I FAKTIČKU PODOBNOST STANA U IZGRADNJI

APSTRAKT: Predmet rada jeste analiza odgovornosti investitora za to da stan u izgradnji u trenutku prodaje i pravnog prometa bude pravno i faktički podoban predmet sticanja. Cilj rada jeste da se utvrdi da li se odgovornost investitora prema kupcu može razumeti samo u okvirima klasične kupoprodaje nepokretnosti i opštih pravila ugovorne odgovornosti ili je reč o složenijem obliku odgovornosti koji nastaje na preseku javnopravnih pretpostavki gradnje, ugovornih odnosa u toku izgradnje i prometne podobnosti konačnog predmeta sticanja. Rad je teorijskog karaktera i zasnovan je na normativnom, dogmatskopravnom, analitičkom i sistemskom metodu, uz analizu relevantne domaće literature i važećih pravnih izvora. Osnovna hipoteza rada jeste da odgovornost investitora za pravnu i faktičku podobnost stana u izgradnji ne predstavlja poseban i samostalan pravni institut, već poseban oblik složene ugovorne i prometne odgovornosti u kojem se postojeća pravila javnog, obligacionog i stvarnog prava primenjuju uz određene specifičnosti koje proizlaze iz višefaznosti građevinskog poduhvata. Rezultati analize pokazuju da se investitorova odgovornost prema kupcu ne formira tek u trenutku prodaje, već znatno ranije, kroz plansku, dozvolnu, projektnu, nadzornu i izvođačku fazu, zbog

čega se njen sadržaj ne može pravilno objasniti ako se investitor posmatra samo kao prodavac ili samo kao naručilac radova.

Ključne reči: *investitor, stan u izgradnji, pravna podobnost, faktička podobnost, ugovor o građenju, odgovornost investitora, promet nepokretnosti.*

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JOINDER OF ACTIONS FOR PROTECTION AGAINST DOMESTIC VIOLENCE

ABSTRACT: Active legitimation for the purpose of protection against domestic violence belongs to the family member who was a victim of domestic violence, the legal representative of the victim of violence, the guardianship authority, as the authority for family protection, and the public prosecutor, as a state authority. The procedure for protection from domestic violence can also be initiated ex-officio. Given that different plaintiffs can initiate a lawsuit for protection against violence against the same defendant who behaved violently, the question arises whether it is possible to join the initiated lawsuits for protection against domestic violence, especially those initiated by the victim of violence and the public prosecutor, in order to effectively determine one or more measures for protection against domestic violence through joint discussion, investigation and decision-making in the joint procedures and achieve not only effective protection of the victim of violence, but also cost-effectiveness and legal certainty.

Keywords: *domestic violence, system of protection against violence, special litigation procedure for protection against domestic violence, public prosecutor as a party in a functional sense, joinder of actions for protection against violence.*

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1. Introduction

Domestic violence is a harmful and dangerous social phenomenon and a “factor in the weakening of the family and society as a whole” (Ponjavić 2012, p. 146). It is a general social problem that occurs in all countries, regardless of the fact that domestic violence is not always obvious and visible, since it often occurs within the most intimate circles, among the closest people. This negative social phenomenon, which can appear in the physical, psychological, sexual or economic form of domestic violence, as well as the form of prohibited behavior, has long been defined as a personal and intra-family issue, and not as a prohibited action that requires state intervention in order to prevent it and protect the victim of domestic violence, due to the way family life is conducted (behind “closed doors”) (Kostić 2006, p. 236).

The system of protection against domestic violence includes protection within the framework of the Criminal Code (2005), which, in its Art. 194, provides for a special criminal offense of “Domestic Violence”, the Law on Prevention of Domestic Violence (2016), which in its Art. 17, para. 2, provides for the imposition of emergency measures, and the Family Law – FL (2005), which regulates domestic violence as a family law phenomenon and provides for substantive and procedural norms.

2. Procedure in litigation for protection against domestic violence

The provisions of the FL (2005) provide for family law protection against domestic violence in domestic law by regulating a special civil procedure for protection against domestic violence (Art. 283 – 289), in which the common rules prescribed for all special civil procedures for resolving family law disputes also apply (Art. 201 – 208)¹, as well as the general rules of the Civil Procedure Law – CPL (2011), given that special civil procedures are regulated in a fragmentary manner as a deviation from the general civil procedure.

¹ The provisions of the FL, which regulate special litigation procedures in family matters, lack careful professional editing of the legal text, which primarily refers to the failure to distinguish between civil law disputes and litigation, since they are not synonyms. The procedural literature states that in the titles of the tenth part of the legal text, which regulates special family litigation procedures, in parts of the second, third, fourth, fifth, sixth and seventh section, although it concerns litigation procedures in which family law disputes are resolved, the words “procedure in the dispute” are incorrectly written instead of “procedure in litigation” (Stanković 2025, p. 5).

The procedure for protection against domestic violence is specific in its legal nature because the court provides protective assistance to the victim of domestic violence and imposes family law sanctions on the perpetrator of violence, and does not resolve a civil law dispute, which is regularly the cause of litigation, given that in the case of domestic violence, there is no classic civil law dispute in litigation, which is characterized by disagreement between the parties in a legal relationship regarding their rights and obligations and their conflict of interests (Stanković & Boranijašević 2023, p. 598).

The procedure in litigation for protection against domestic violence is initiated by a lawsuit filed by authorized persons or bodies or *ex officio*. These lawsuits can be conducted independently or joined with proceedings in other family law matters. Joined, adhesion proceedings for protection against domestic violence can be initiated by the parties or the court *ex officio*.

Active legitimation in litigations for protection against domestic violence in which the determination of a protective measure against violence (FL, 2005, Art. 198) or the extension of the duration of a time-limited protective measure ordered by the court is requested allows this procedure to be initiated by a family member against whom violence was committed, his or her legal representative, the public prosecutor and the guardianship authority (FL, 2005, Art. 284, para. 2). In order to protect the victim of domestic violence, the legislator has provided for a wide range of persons and authorities who are given active legitimation, because domestic violence is not treated as a personal problem of the victim of domestic violence, but as a social problem and phenomenon.² In this special civil procedure, the child has active procedural legitimation when he or she initiates a procedure for his or her own protection against violence. The child is represented as a party in the litigation by his or her legal representative. The legal representative of the person under guardianship against whom the violence was committed, the public prosecutor and the guardianship authority have the status of a party in the functional sense. In the litigations that they initiate against the perpetrator of domestic violence, the child or the victim of violence does not have the status of a party because the litigation is based on a two-party scheme.

The literature emphasizes that the need to provide protection to the victim of domestic violence even without their initiative, has led to the expansion of active legitimation to both the public prosecutor's office, as a state body, and the guardianship authority, as a body for the protection of

² The procedure for terminating the measure of protection against violence can be initiated exclusively by the family member against whom the measure was determined.

the family and persons enjoying special social protection, in order to prevent the situation in which the victim might not initiate legal proceedings at all or might reluctantly withdraw from them under pressure from the perpetrator of domestic violence, due to fear of the perpetrator (Draškić 2016, p. 629).

Litigation proceedings for protection against domestic violence can also be initiated *ex officio* as an adhesion procedure to a proceeding initiated by a lawsuit filed by a party with active legitimation (Stanković & Boranijašević 2020, p. 598). In proceedings for the protection of a child against domestic violence initiated *ex officio*, the child does not have the procedural status of a party, because he or she is then a “hidden” or “concealed” party” (Stanković 1997, p. 113) since the proceeding is initiated in the interest of the child and his or her protection.

The court may impose the proposed protective measures against violence not only in the interest of the parent as the plaintiff who filed a lawsuit for personal protection against domestic violence, but also of their minor child who was not designated as a party in the initial action and who witnessed the act of domestic violence as a passive victim, assessing the degree of vulnerability of the plaintiff – the parent and their child and showing “zero tolerance” for the manifested psychological violence in order to, not only eliminate the consequences of the violent event, but also to act preemptively to prevent the repetition of the defendant’s violent behavior and the possible occurrence of more serious consequences (see decision of the Supreme Court, Rev. 2015/25, February 27, 2025). The court is obligated to assess *ex officio* whether, in order to ensure effective and complete protection against domestic violence, it is necessary to initiate an official adhesion procedure and to include in the family law protective measures a minor child who, as a passive victim, witnessed the psychological or physical violence committed by the defendant against the parent as the plaintiff, thereby violating the child’s mental health and peace of mind. The court is obliged to obtain an expert opinion on this matter from the competent guardianship authority in order to protect the rights of the minor child, not only the parent as a victim of violence. Although the minor child is not named as a party in the lawsuit, nor did the parent, as the legal representative of the child or as the representative of a family member who endures violence, request the imposition of protective measures against the child, the court may conclude that the child was an indirect victim of violence. In adhesion initiated civil proceeding, the court *ex officio* determines the subject matter of the lawsuit, formulates a request for a judgment and, in accordance with its investigative powers, collects the necessary procedural material (Stanković & Boranijašević 2023, p. 595).

If the guardianship authority has not initiated a procedure for protection against domestic violence, in a procedure initiated by other authorized entities or the court *ex officio*, it may appear as a supporting body to the court, when, upon the court's order, it provides assistance in obtaining the necessary evidence, and as a specific expert, when it gives its opinion on the appropriateness of the requested protective measure against domestic violence (Stanković 1984, pp. 74–89).

A lawsuit requesting the determination of a protective measure against violence is usually of a condemnatory nature when a conviction for an act is requested because the plaintiff requests that a specific measure be imposed that will order the defendant to do something, to suffer something, or to refrain from doing something. A lawsuit requesting the extension of an already imposed measure is of the same nature. A lawsuit can also have a transformative-condemnatory nature if it is requested that the defendant be denied the exercise of a right, while at the same time requiring that he do something, suffer something or refrain from doing something. The transformative nature of the lawsuit is manifested in the plaintiff's request for the termination of a certain measure determined by a judgment.

The procedure in litigation for protection against domestic violence is based on a specific deviation from the fundamental procedural principles of general litigation procedure.

The principle of formality in litigation for protection against domestic violence allows the court to initiate an adhesion proceeding and to expand the scope of family law protection beyond the limits of the requests made by the parties. It allows it to apply imperative norms in the proceedings, thereby removing all procedural barriers arising from the court's attachment to the parties' dispositions (Stanković 2006, p. 490). Therefore, the decision to impose one or more protective measures against domestic violence also depends on the court's assessment.

Deviation from the principle of disposition, as in other special litigation proceedings for resolving family law disputes is manifested through limiting the parties' freedom of disposition of their rights and obligations and undertaking those litigation actions that represent the prohibited disposal of claims. In these litigations, the court is not bound by the claim formulated in the lawsuit by the party with active procedural legitimation. It may also determine a protective measure against domestic violence that was not requested if it assesses that such a measure best achieves protection.

There are also deviations from the general procedural principles in terms of methodological procedural principles. In these disputes, the adversarial

principle applies, according to which the parties are obliged to provide the court with the procedural material necessary for the decision. The investigative principle also applies in these disputes, given that family law norms are of a mandatory nature, that the court is obliged to provide special legal protection to certain categories of persons and that it is obliged to consider the interests of minor children. In disputes involving domestic violence, the court may establish facts even when they are not disputed between the parties and may also independently investigate facts that neither party has presented (FL, 2005, Art. 205). Likewise, the court may present evidence that neither party has proposed. In these litigations, the application of the investigative principle causes a number of specificities in the evidentiary procedure (Palačković 2024, p. 30).

In litigations involving domestic violence, the principle of urgency of court proceedings dominates to prevent further escalation of domestic violence and protect the victim. This principle is operationalized by prescribing particular urgency in proceedings (FL (2005), Art. 285), by not delivering the lawsuit to the defendant for a response, by the court's obligation to schedule and hold a hearing within eight days from the date the court received the lawsuit, by requiring the court to conduct the proceedings in a maximum of two hearings because of the need to effectively protect the victim of domestic violence (FL, 2005, Art. 204, para. 1 and 3) and by requiring the second-instance court to issue a decision within 15 days of the date the appeal, i.e. the legal case files by the first-instance court are delivered to it (FL, 2005, Art. 285, para. 2 and 3). The prescribed short deadlines for taking legal action should enable the court to act efficiently and provide immediate protection to the victim of violence.

Deviation from basic procedural principles in these litigations is manifested through the exclusion of the general public, as provided for by law, in order to protect the private life of the parties. The general public is excluded and the data from the court files represent classified information that all participants in the proceedings are obligated to keep secret.

In the litigation procedure for protection against domestic conducted for the protection of a child, independent representation of the child should be ensured when there is a conflict of interest between the child and his or her legal representative. The court is obliged to appoint a temporary representative for the child when it determines that his or her legal representative is not adequately representing him or her.

A judgment granting a claim or rendered by a court *ex officio* has a condemnatory or transformative character, regardless of whether the

proceeding in litigations for protection against violence was conducted as an independent or as an adhesion proceeding. Depending on what is requested in the lawsuit or what the court has decided *ex officio*, the operative part of the judgment may be complex.

The court decides on the costs of the proceedings, considering reasons for fairness.

The court delivers the judgment in litigations for protection against domestic violence to the parties. The court is obliged to immediately deliver the judgment to the guardianship authority in whose territory the family member against whom the violence was committed has primary or temporary residence, and to the guardianship authority in whose territory the family member against whom the protective measure has been ordered has primary or temporary residence. The guardianship authority is obliged to keep records and documentation on persons against whom violence has been committed and on persons against whom a protective measure has been determined in accordance with the regulations governing the procedure and manner of recording these cases.

An appeal against a judgment determining or extending a protective measure against violence does not have suspensive effect. It does not delay the execution of the judgment on the determination or extension of a protective measure against domestic violence unless the court decides otherwise.

3. Joinder of litigations for protection against domestic violence

Although the joinder of proceedings in litigations for protection against violence with other litigations, by the nature of the matter, is not expressly provided for by the provisions of special family litigation proceedings, considering that in this special litigation proceedings the rules of general civil proceedings are subsidiarily applied, it is possible to join lawsuits if there are conditions for their merger. Lawsuits in which protection from domestic violence is required are joined for the purpose of simultaneous investigation, discussion and decision-making, because in this way, effective treatment and effective protection of the victim of domestic violence is enabled by determining the measure or measures of family law protection, reducing the costs of the procedure and achieving legal certainty.

The fact that active procedural legitimation is recognized for a wide range of persons allows for the joinder of the initiated litigations to occur in the proceedings before the first instance court. First of all, there may be a joinder of litigations initiated by a lawsuit or a countersuit, filed by family members

who consider themselves victims of violence. It often happens in practice that spouses or unmarried partners, due to damaged mutual relations, after a conflict has occurred, consider themselves victims of violence and file lawsuits against each other and demand protection against domestic violence or that they file a countersuit during the initiated proceeding. Furthermore, a litigation conducted between a family member against whom violence was committed and the perpetrator may be joined with a litigation initiated against the perpetrator by the public prosecutor, as a party in a functional sense, regarding the same violent behavior of the perpetrator towards the victim of domestic violence, regardless of whether the public prosecutor exercises his authority under the provisions of the FL (2005) or the Law on Prevention of Domestic Violence (2016). It is also possible to join a litigation initiated by a center for social work as a guardianship authority for the purpose of protecting a victim of violence as their actively legitimized legal representative with a litigation possibly initiated by a public prosecutor to whom a report of violent behavior towards a victim of domestic violence was filed.³

Joinder of litigations may also occur if, during the initiated proceeding for protection against domestic violence, the court initiates an adhesion procedure *ex officio*. These proceeding are joined by the decision of the court, if the court, in addition to a proceeding initiated by a parent as a victim of domestic violence, initiated an adhesion proceeding in order to protect the child as a passive victim of violence and in the interests of the child upon learning that the child witnessed an event that constitutes physical or verbal domestic violence.

The joinder of litigations for the purpose of joint investigation, discussion and decision-making before the same court is possible under the provisions of general litigation procedure if the conditions required by law are met.

One of the conditions is subjective in nature – the parties are the same or the same person is in one of the party roles, although this procedural role is not the same in each litigation. In a litigation for protection against domestic violence, the subjective condition is met when two litigations are being conducted against the same person as the defendant regarding the same event, one of which was initiated by the plaintiff who is the victim of violence, and the other by the basic public prosecutor's office as a party in a functional sense

³ In judicial practice, it is increasingly common for the competent public prosecutor to initiate proceedings before a civil court for the imposition of family-law protective measures, in addition to pursuing criminal prosecution, and to request, for example, the issuance of a restraining order for the victim of domestic violence or the extension of such a measure.

that is authorized to file a lawsuit against the perpetrator of violence with the court for the purpose of determining family law protective measures.

Joinder of litigations according to the provisions of the CPL (2011) is possible only if the same type of procedure is provided for all joined litigations. In joint lawsuits conducted for the purpose of protecting victims of domestic violence, even though the lawsuits were filed by the victim of domestic violence and the public prosecutor or the guardianship body, the rules of procedure are the same. By joining lawsuits, it is possible to present evidence using the same means of evidence in the joined lawsuits for protection against domestic violence in which the same contested facts are involved.

In the domain of family law protection, there is a deviation from the rule of general civil procedure which prescribes the same type of procedure as a condition for joinder of litigations, as it is permitted, in special family law litigation procedure, not only to join different civil procedures initiated by a lawsuit, but also adhesion procedures in which different rules of special civil procedures are applied. Thus, for example, it is possible to join divorce proceedings or paternity proceedings with alimony proceedings or to join those with adhesion proceedings for protection against domestic violence (Stanković & Boranijašević 2023, p. 591).

In joined litigations for protection against domestic violence, the court acts in a collegial composition; a three-member panel consisting of one judge and two lay judges, and in the appeal procedure, a panel consisting of three judges decides (CPL, 2011, Art. 35 and 37). The court acts in joined litigations for protection against domestic violence according to the rules of the special civil procedure provided for these cases.

Given that the first-instance court in litigations for protection against domestic violence can decide on the determination or extension of a protective measure against domestic violence, the question arises whether the litigations can be joined if, for example, the public prosecutor requested the determination of a protective family law measure, and the plaintiff who is the victim of violence requested the extension of an already issued protective measure against domestic violence in the lawsuit? We think that, in terms of the conditions stipulated in the provisions of the CPL (2011), the conditions for the joinder of litigations are met even in the event that the court needs to decide on the determination or extension of a protective measure against domestic violence, given that the legal conditions regarding the admissibility of the joinder of litigations have been met, regardless of the fact that the stated claims are substantively different.

Joinder of litigations is a possibility and not a duty of the civil court, because the court decides on this *ex officio* and for reasons of expediency. The proposal to merge litigations can also originate from one of the parties. The court issues a separate decision on the joinder of litigations, regardless of whether this occurred *ex officio* or at the proposal of a party (Bodiroga 2022, p. 324). The court may issue a decision on the joinder of litigations during the preparatory procedure and at the stage of the main hearing. This decision is, by its legal nature, a decision on the management of the procedure. No appeal is allowed against the decision to join litigations.

The court may decide on the joining of the litigations at a hearing or outside the main hearing. When deciding on the joining of the proceedings, the court is obliged to take into account the stage of each of the cases being joined and, depending on considerations of expediency, it will decide accordingly, bearing in mind that the principle of urgency takes precedence over procedural economy.

Litigations joined for the purpose of joint discussion and decision-making do not lose their independence, so they are still independent and self-contained from each other, because each of the joined litigations has its own separate subject matter.⁴ The joinder of litigations does not change the subject-matter and territorial jurisdiction of the court, although the judge who, according to the annual trial schedule, was responsible for resolving a specific dispute in one of the initiated litigations may possibly change. As a rule, the court decides that the litigation that was initiated later or in which the proceedings began later is merged with the litigation that was initiated earlier. After that, all submissions and minutes are kept in the register under the same number, the number under which the “older” case was registered.

Joinder of lawsuits does not lead to adversariality, nor does it withdraw the application of the provision on a joint attorney for the receipt of documents and a joint legal representative for the receipt of documents, because this is not a case of adversarial proceedings. Furthermore, the joinder of lawsuits does not cause objective accumulation of claims, since each of the litigations was initiated by a separate lawsuit in which claims for judgment may be accumulated.

⁴ Even though the indirect subject matter of the litigations is the same (perpetrated domestic violence), the direct subject matter of a litigation i.e. the request for a judgement can be different because the imposing of different protective family law measures is requested in the initial procedural action (see, for example, Stanković & Boranijašević, 2023, p. 54).

The plaintiffs in the joined lawsuits for protection against domestic violence (the victim of domestic violence and the public prosecutor) independently undertake the litigation actions that produce an effect in the lawsuit they initiated. The factual allegations may be identical or different, even though the same event is involved, depending on the type of measure for preventing violence requested by the lawsuit. The evidence offered by the plaintiffs in the merged lawsuits may be the same or different. A plaintiff who is a victim of domestic violence may be heard as a witness in the lawsuit initiated by the public prosecutor, since he or she is not a party to it.

When the litigations are joined for the purpose of joint decision-making, the court decides depending on the results of the procedure conducted. The term “may” used in the provision of Art. 328 of the CPL (2011) means that the court is not obliged to issue a judgment to decide on the claims from the joined litigations. The court’s decision on the joining of litigations always depends on its assessment of expediency and economy.

The judgment rendered by the court in joined litigations, regardless of whether they were initiated by a lawsuit or in an adhesion procedure, may have one or more dispositions depending on the content of the claim of the family member against whom the violence was committed, the claim of the public prosecutor, or the court’s decision to protect the child as a passive victim of violence in an official adhesion procedure and in his or her interest.

When merging lawsuits for protection against domestic violence, the court may issue a single joint judgment, which will impose a single measure of family law protection, a combination of multiple measures, or all requested and necessary measures prescribed by law in order to provide efficient and effective protection to the victim or victims of domestic violence. By issuing a single decision in joined lawsuits conducted in connection with domestic violence, imposing family law protection measures against the same defendant in connection with the same event in which domestic violence occurred, in which the prosecutor appears as the victim of violence, or the basic public prosecutor’s office or guardianship authority as a party in a functional sense, the risk of judgments being issued with contradictory reasoning, which would jeopardize legal certainty, is eliminated.

The adoption of a joint decision granting protection from violence in joined lawsuits is an option that depends on the specific situation and the court’s decision. If the same measure of protection against violence is requested in both lawsuits, the judgment approving the claim may be formulated identically in both lawsuits. If one of the parties in the joined lawsuits requested the

imposition of multiple measures of family law protection against violence, the disposition of the joint judgment will, by the nature of the matter, be different.

The decisions regarding the reimbursement of litigation costs in these joined lawsuits will be different because they contain substantively different accessory condemnatory claims on which the court decides according to special rules. The public prosecutor as a party has the right to reimbursement of costs but not the right to a reward (Stanković 2024, p. 526), while the prosecutor who is a victim of domestic violence has the right to reimbursement of necessary litigation costs, which also includes the reward to the attorney for representation (Stanković 2024, p. 508). The same rules that determine the compensation for the prosecutor, as a victim of violence, also determine the compensation for litigation costs to the guardianship authority as a foreign party in a functional sense, given that the center for social work, as a family protection authority, is a legal entity.

In terms of declaring legal remedies, when the joined litigation is decided by a single, joint judgment, each litigation is still independent because the legal remedy challenges the decision made on the individual claim that was raised in the individual litigation. The deadlines for appeal run independently for each party from the moment of delivery of the judgment.

The decision made in joint litigation for protection from domestic violence may be challenged by regular and extraordinary legal remedies. FL (2005), in its provision of Art. 288, stipulates that an appeal does not stay the execution of the judgment on the determination or extension of a measure of protection from domestic violence. A general review is permitted against a decision made in joint litigation for protection from domestic violence, which follows from the provision of Art. 208 of the FL (2005).

4. Concluding review

The Family Law establishes a system of family law protection against domestic violence, which provides for measures of protection against domestic violence and regulates a special procedure in litigation for protection against domestic violence. The law assigns the role of procedural actors who can initiate the aforementioned special procedure to the family member against whom the violence was committed, the public prosecutor and the guardianship authority. This procedure, in the interest of child protection, can also be initiated as an official adhesion procedure.

Given that the legislator has broadly defined active procedural legitimation, as well as that the procedure can be initiated *ex officio* in order to

protect a child as a passive victim of violence, the paper specifically presents and comments on the provisions on the merger of lawsuits for protection from domestic violence at the request of a family member against whom violence was committed. In these lawsuits, the role of the prosecutor is played by subjects with active procedural legitimation, while in the officially initiated adhesion procedure, the hidden party is the child who was a passive victim of violence.

The rules of general civil procedure allow for the merger of the aforementioned lawsuits in which the defendant is the person who committed domestic violence for the purpose of joint discussion, investigation and decision-making, provided that the proceeding is not prolonged. Both cases are heard by the same court with local jurisdiction and the same collegial composition. The same rules of procedure are prescribed for joined litigations, although in cases involving family disputes, joinder of litigations is possible even when the procedures and rules of procedure are different. The court decides on joining cases, depending on the assessment of expediency, efficiency and procedural economy, and this act of managing the procedure concentrates the procedural material, ensures expedient proceedings, procedural economy, effective legal protection and legal certainty, as it avoids the same decisions on the same act of violence being explained differently.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

Conceptualization, G.S.; methodology, G.S. and S.Ć.; formal analysis, G.S. and S.Ć.; writing – original draft preparation, G.S. and S.Ć.; writing – review and editing, S.Ć. All authors have read and agreed to the published version of the manuscript.

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SPAJANJE PARNICA ZA ZAŠTITU OD NASILJA U PORODICI

APSTRAKT: Aktivna procesna legitimacija u cilju zaštite od nasilja u porodici pripada članu porodice koji je bio žrtva nasilja u porodici, zakonskom zastupniku žrtve nasilja, organu starateljstva, kao organu za zaštitu porodice, i javnom tužiocu, kao državnom organu. Postupak za zaštitu od nasilja u porodici može da bude i oficijelno pokrenut. S obzirom na to da različiti tužioci mogu da pokrenu parnicu za zaštitu od nasilja protiv istog tuženog koji se nasilnički ponašao, postavilo se pitanje da li je moguće spajanje pokrenutih parnica za zaštitu od nasilja u porodici, posebno onih koje su pokrenili žrtva nasilja i javni tužilac da bi se zajedničkim raspravljanjem, izviđanjem i odlučivanjem u spojenim postupcima efikasno odredila jedna ili više mera za zaštitu od nasilja u porodici i ostvarila ne samo efikasna zaštita žrtve nasilja već i ekonomičnost i pravna sigurnost.

Ključne reči: *nasilje u porodici, sistem zaštite od nasilja, poseban parnični postupak za zaštitu od nasilja u porodici, javni tužilac kao stranka u funkcionalnom smislu, spajanje parnica za zaštitu od nasilja.*

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THE RELATIONSHIP BETWEEN THE MIGRATION CRISIS AND CRIME IN THE REPUBLIC OF SERBIA

ABSTRACT: The main problem discussed in the paper is the existence of a causal relationship between certain criminal phenomena in the Republic of Serbia and the European Union, on the one hand, and the migrant crisis, on the other. A special problem is represented by certain criminal acts that can be classified as a direct consequence of migrant population movements. The time frame is the period of the past ten years, during which the migrant issue has been considered one of the most topical issues in the European Union. The aim of the paper is to indicate the existence of a correlation between the migrant crisis and intensive criminal activity in the countries of the European Union, as well as in the countries located on the so-called migrant route. The hypothesis of the paper is that intensive migrant changes contribute to a change in the demographic picture and additional criminalization of Europe. The co-authors use analytical, historical, comparative and normative methods. The research results partially confirmed the hypothesis that the migrant crisis has an impact on the demographic picture of Europe, but the part that relates to the additional

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criminalization of Europe was not proven, because no parameters were established that could confirm this.

Keywords: *migration, population, crime, abuse, state border.*

1. Introduction

The migration crisis is a general term for the process of demographic change that began in mid-2010, when a large number of Asian and African populations sought new refuge and a place to live in developed European countries. Migrants from these areas began to seek a better life in Europe en masse and mostly came illegally, and the reason for their arrival lies in the poor economic and security conditions in their countries of origin. On the one hand, the high unemployment rate and extremely unfavorable economic situation, and on the other hand, wars and conflicts between different ethnic and other groups, resulted in a mass exodus of the civilian population. We can conclude that these were (and still are, because the migration crisis is still ongoing!) strong drivers, especially for younger people, for migration and seeking better and more peaceful living conditions in the countries of the European Union. The main problem discussed in this paper is the relationship between the aforementioned demographic, socio-economic and geopolitical changes in the world and the emergence of a new demographic picture of Europe, in the context of increased criminal activity and the emergence of certain forms of crime. Today, the structure of crime is focused on both national and international activity, with the predominant direction towards profit (Igrački, 2026, p. 65).

Many see the so-called Arab Spring as the main and essential reason for the large-scale migration of the population from Africa and Asia. First, the war-torn Syria, then the violent regime change in Libya, and so on, have led several countries from that region, from a relatively decent life, into serious problems. The war and revolutions have abolished existing legal orders, thereby creating conditions for the activities of various opposing groups, which ultimately resulted in anarchy, the suspension of human rights and freedoms, as well as a danger to their own lives and existence. The population of those countries had almost no choice before them, nor a certain future, so many sought salvation for themselves and their loved ones in Europe. They became migrants whose goal was to escape such political and legal uncertainty, from the huge crisis and major problems they were facing.

Entire migrant routes have been formed, each of which is uncertain in itself and carries enormous risks and problems. The main routes to European countries are as follows: the Mediterranean route, which is also the most dangerous and on which the largest number of migrants have lost their lives. It runs from North Africa, across the Mediterranean Sea to Italy and Malta. Then the Western Balkan route, which is overland, via Turkey, Greece, North Macedonia, Serbia, Bosnia and Herzegovina, to Croatia, Hungary and other European Union countries. The Eastern Mediterranean route, which goes via Greece, Cyprus, Bulgaria and Turkey and is partly overland, partly by water. The Western Mediterranean route, which connects Morocco and Algeria with Spain, via the Strait of Gibraltar. The West African or Atlantic route, which starts from the West African countries, Mauritania, Senegal and Gambia, by a long and dangerous sea route to the Spanish Canary Islands (Ilić, 2022, p. 165).

On African soil, there is another migrant route. This is a particularly dangerous direction of movement in East Africa or the so-called Horn of Africa, from where migrants head towards South Africa or go via Yemen to Middle Eastern countries. When it comes to Asian routes, the most famous is the so-called southwest route, which starts from Afghanistan, Pakistan, Bangladesh via Europe (Antonović, 2017, p. 417).

In order to better understand this problem, it is necessary to clearly distinguish between the concepts of migrants, asylum seekers and irregular migrants. Migrants are persons who move from their place of residence, both within the national borders of their country and abroad, for employment, better living conditions, education or for compelling reasons, such as wars and economic crises. Asylum seekers are persons who have left their country of origin and have applied for international protection – asylum in another country. The reasons for seeking asylum are mainly protection from persecution, war, violence and other reasons that can negatively affect the quality of life itself (Marušić, 2024, p. 41).

The initial hypothesis of the paper is that intensive migration changes contribute to the change in the demographic picture and the additional criminalization of Europe. The fact that European countries are flooded with a new population structure originating from other continents is an initial assumption that contributes to the formulation of the hypothesis. It is also further supported by statistical data, which are publicly available, as well as media coverage and reports by relevant European institutions engaged in security research. Also, the paper analyzes crime in the Republic of Serbia, in the period from 2015 to 2024, using analytical, comparative and normative

methods, with a special emphasis on property crimes, crimes against life and body, crimes against sexual freedom and unauthorized crossing of the state border.

In preparing the paper, the co-authors use data that is publicly available from available databases of both domestic and international institutions dealing with the fight against crime and its suppression. As for domestic sources, the database of the Republic Institute for Statistics and Informatics is used, namely the database of adult perpetrators of criminal offenses from 2015 to 2024, as well as the Report on the Results of the Implementation of the Action Plan for the Period 2018 - 2019 of the Development Strategy of the Ministry of Internal Affairs of the Republic of Serbia for the Period 2018 - 2023.

In the analysis procedure, the co-authors had a certain limitation due to the insufficient precision of the aforementioned reports, because they do not contain precise data on migrants as perpetrators of criminal acts. However, the causality of the crime rate can be linked to migrant processes based on the territorial principle, especially in border areas with the Hungarian-Serbian and Croatian-Serbian borders. For the purposes of the research, available data from different regions in Serbia were used: Belgrade, Vojvodina, Southern Šumadija and Eastern Serbia.

The research is limited to certain criminal acts, for which there is a reasonable assumption that migrants and the migrant population most often participated in their commission. These are the criminal acts of theft and robbery from the scope of property crimes, the criminal acts of murder and causing bodily harm from the scope of crimes against life and body, the criminal act of rape from the scope of crimes against sexual freedom, and the illegal crossing of the state border and human smuggling from the scope of crimes against public order and peace. Consequently, the penitentiary system in Serbia plays an extremely important role in the process of crime control and, in cooperation with other social mechanisms, forms a social reaction to crime and other sociopathological phenomena (Igrački, 2020).

2. Challenges and problems in Europe

Europe has been facing numerous challenges and difficulties for a long time. First of all, there is a problem in the demographic sense, which is increasingly visible. Depopulation, or the disappearance of the population, is gaining momentum. The problem of depopulation is multifaceted, as it includes social, security, cultural, legal and other problems that threaten the

stability of the oldest continent. The decrease in the total number of European inhabitants is the result of a number of (natural) factors, such as low birth rates, high mortality rates and high migration rates, the outflow of one population and the influx of another. Factors that have particularly contributed to the high mortality rate are the COVID 19 virus pandemic, which has left major consequences. The countries that suffered the greatest population blow during the COVID 19 pandemic were Italy, Spain, Poland, Hungary, Romania and Bulgaria... (Radanović, 2024, p. 121)

COVID 19 has not only contributed to an increase in the mortality rate, but also to a decrease in the birth rate. The pandemic has contributed to the additional aging and illness of the European population, caused a shortage of labor, but also reduced population movement within the European Union itself. The pandemic has also caused certain criminological problems (Antonović, 2024, p. 220). The problem of depopulation is also reflected in the economic development of the European Union, as there is an increasing shortage of labor.

When the issue of the migrant population, which has been moving en masse to the European Union in recent years, became topical, some countries, especially Germany, opened their doors wide to a new workforce, with a particular interest in highly qualified labor, which is particularly scarce in this country. In addition to Germany, migrants, especially educated and skilled ones, have also been well received in other European countries, such as the Netherlands, Sweden and France, and today (regardless of qualifications), according to data from the International Labor Organization, they represent as much as 30 percent of the total labor force in Europe (Tabarošćak, 2024, p. 352).

The jobs that migrant workers mostly work in Europe today are physical work in construction, in agriculture as seasonal pickers and farm workers, in the health sector as caregivers, hospital workers and nurses, or technicians, in the catering sector mainly as waiters, cooks and kitchen support staff, in the transport sector as drivers and delivery drivers, while in the IT sector they work as programmers.

In the Republic of Serbia, according to recent data published by the Commissariat for Refugees and Migration, a total of 108,808 migrants were registered in 2023 who completed all procedures in asylum reception centers for migrants. After 2023, a smaller number of migrants were registered, and thus in 2024 “only” 19,603 migrants were registered. According to the same sources, around 100 thousand foreign citizens from different countries are employed in our country, but most of these persons are not migrants.

When it comes to migrants specifically, only 45 managed to find satisfactory employment here, which is a very small number compared to how many of them passed through the Republic of Serbia. One of the key reasons for this is that Serbia is not a desired destination country, but rather a necessary stopover point on the migrant route.

3. Migrants and crime

The influx of migrant populations into Europe, viewed as a whole, has caused numerous security threats, which have included, among other things, an increase in the crime rate. Migrants appear in a dual role - as perpetrators, but also as victims of criminal acts. Given that they represent a particularly vulnerable category, as they do not know the language, customs, culture and law of the country to which they have emigrated, they can often be the target of various types of fraud and abuse.

They are most often victims of the crime of human trafficking. They are promised assistance in illegally crossing the state border and in return are taken a large amount of money (Atanasov & Otašević, 2021, p. 170). In these situations, when they appear as victims of the crime of human trafficking, their difficult material and social situation is usually abused, force, threats, coercion, deception are used, and these persons are led and maintained in a state of delusion. In such circumstances, one of the most severe forms of human rights violations occurs, as victims are exposed to various forms of exploitation and serious violations of human dignity (Matijašević & Pavlović, 2009, p. 30).

They are also often victims of the criminal act of human smuggling. The expansion of human trafficking in the territory of the Republic of Serbia occurred at the end of the last decade of the twentieth century. At that time, Serbia faced a structural crisis in the political, economic, normative-legal and social spheres, as well as the entire public sphere of citizens (Igrački, Manojlović & Mijalković, 2024, p. 636). This usually occurs in situations where they are allowed to illegally cross the state border, bypassing legal procedures and controls. Smugglers exploit their difficult situation, as well as their desire to reach developed European countries as soon as possible, and demand large amounts of money from them for this illegal service (Igrački, 2016, p. 356). In fact, smugglers often deceive them, expose them to certain risks and problems, blackmail them with additional payments, and often do not transfer them across the border, but leave them in places where they can be

easily noticed and exposed to additional risks, in the form of arrests, mutual conflicts, and various dangers to their own lives, etc.

Previous experience shows that migrants also appear as victims of inhuman treatment, harassment, psychological and physical abuse, beatings, and officials often appear as perpetrators. In this regard, we note that the European Union Committee for the Prevention of Torture issued a statement in which it cited evidence of the existence of physical abuse of migrants by Croatian police officers, and particularly brutal acts include hitting, kicking, forcibly stripping, pushing, forcing migrants into the river, and similar inhuman treatment. It is common knowledge that they have not been welcomed in many European countries in recent years, especially as the crisis has spread, deepened, and the number of people arriving has increased.

Various criminal acts of a discriminatory nature were committed against migrants in Europe, exclusively because of their differences from the majority population. Due to their origin, language, religion, skin colour, and other personal characteristics, they were exposed to discrimination, while their integration into European society was hindered. At the same time, the acceptance of migrants by a part of the European population was limited, while after the first waves of migration, they were increasingly perceived as a social and economic burden on the Member States of the European Union. In addition to discrimination, migrants have also been subject to criminal acts in the form of violations of equality, as they have been placed in a less favourable position compared to the local population and denied access to certain benefits available exclusively to domestic citizens. This primarily refers to the accessibility of health and educational institutions, where they are often treated in an unfair and inhumane manner (Igrački, 2023, p. 472). Unfortunately, when it comes to the concept of human rights, they are not only violated by the migrant population, but there are entire regions in which the minority population does not enjoy all the necessary basic human rights. An example of this is Kosovo and Metohija, where the rights of members of the non-Albanian people have been significantly violated and threatened (Antonović, 2023, p. 167).

Migrants generally have a certain amount of money and mobile phones. So to speak, this is their "all property". However, even what they own is often the subject of theft. In addition to money and phones, their identity cards and documents were also taken away, thus denying them freedom of movement and the exercise of certain human rights to which they are entitled (Schilling et al., 2017, p. 299).

It is not uncommon for them to be victims of crimes against life and limb. These criminal offenses constitute one of the most serious forms of threats to security, and migrants are particularly exposed to them due to their vulnerable position (Subotin & Matijašević Obradović, 2020, p. 5). In this regard, cases of aggravated murder, murder, causing serious bodily harm, and the like have been recorded. These crimes are mainly committed by human traffickers and smugglers, who previously take large amounts of money from migrants. Migrant women are mainly victims of crimes of rape and prostitution (Bernstein, 2018, p. 116).

As already mentioned, migrants can also be found in the role of perpetrators of criminal acts. The reason for their criminal activity should mainly be sought in their lack of adaptation to the new environment, as well as their lack of acceptance. Many of them were involved in crime in their countries of origin, and they simply continued this activity in the new environment. According to Europol statistics, migrant crime is not higher than crime committed by the local population, and they appear as perpetrators of serious crimes such as theft, robbery, violation of public order and peace, drug trafficking, but also crimes against sexual freedom and the like.

The most common crime is the unauthorized crossing of the state border and smuggling of people, which will be discussed in more detail below. In addition to crossing the border illegally, they are also illegally staying on the territory of a certain state. The reason for committing this crime is the fact that they do not have personal and travel documents, and the only way to cross the border is illegally. In the territory of the European Union, illegal crossing of the state border is not treated as a crime, but as a misdemeanor. Then, situations have been recorded where they committed petty theft, in the form of pickpocketing, breaking into basements and common areas in buildings, stealing handbags and bicycles, food, clothing and cosmetics from shops, mobile phones and other easily accessible items.

Numerous cases have been recorded involving the use of forged identity and travel documents for the purpose of illegally crossing national borders, applying for asylum, obtaining employment, and accessing certain social rights. Some migrants have also been associated with criminal offences related to narcotic drugs, particularly the unlawful production and trafficking of narcotic drugs. In certain European countries, such as France, Germany, and Italy, migrant involvement in street-level drug dealing has been observed, mostly at lower levels of drug trafficking networks.

Criminal acts against sexual freedom were recorded in smaller numbers and were registered in Germany, Austria and Sweden, where they committed

sexual harassment, not only of women, but also of men. Unfortunately, the rate of rape of children and minors within the family circle is becoming increasingly common, especially in countries such as Canada, the USA, New Zealand, the UK and South Korea, where as many as 15 percent of girls and young women are raped by their closest relatives (Antonović, 2024, p. 97). European legislation firmly stands on the prohibition of sexual exploitation and abuse of children, and the Council of Europe Convention on the Protection of Children criminalizes incitement to witness sexual acts for persons who, according to the provisions of the signatory states, have not reached the age below which sexual intercourse with them is criminalized (Milović, 2021, p. 196). In the Republic of Serbia, two Pakistani migrants were arrested in 2016 for attempting to rape a woman in Subotica.

Criminal offences and misdemeanours in the field of labour relations have also been recorded. In Europe, migrants frequently engage in undeclared work, often using forged identity or travel documents or without the required work permits and visas, while employers fail to register them for mandatory social security. Such forms of employment frequently lead to serious workplace accidents, including fatal incidents, particularly on construction sites and other high-risk workplaces.

In the Republic of Serbia, several incident situations with elements of a criminal offense have been recorded in previous years, in which migrants participated. According to data from the Ministry of Internal Affairs, in 2015, 34 criminal offenses were committed, while in 2016, there were a total of 103 criminal offenses in which migrants participated as perpetrators. According to the nature of the criminal offenses, in offenses against life and body, 5.2 percent of migrants participated in relation to the total number of criminal offenses. In property crimes, 25.6 percent of migrants participated. In terms of the commission of sexual offenses, migrants participated in 0.8 percent.

When it comes to more recent data from 2023 and 2024, there are statistical gaps and incomplete data. During 2023, 108,808 migrants entered the territory of the Republic of Serbia, while in 2024 there were drastically fewer, 19,483. In this two-year period, the Ministry of Internal Affairs of the Republic of Serbia filed 600 criminal charges against 791 persons for the crimes of illegal crossing of the state border and human smuggling. In September 2023, the police in Serbia conducted an action to combat illegal migrants. On that occasion, 371 illegal migrants were caught in the area of Subotica, Sombor and Kikinda. Illegal weapons were also found with these illegal migrants, so proceedings were initiated against them for both illegal crossing of the state border and possession of firearms. In October 2023, in a

new action against illegal migrants, 4,500 of these migrants were discovered in the border areas.

4. Human Smuggling and the Migration Routes through the Republic of Serbia

One of the key goals of the migrant population is to reach their final destinations, which are the countries of Central Europe. On the so-called migrant route, they encounter numerous difficulties, which they try to overcome in various ways. Illegal crossing is the commission of the criminal offense of unauthorized crossing of the state border and human smuggling under Article 350 of the Criminal Code (2005). Due to these illegal crossings of the state border, mixed military and police teams were established in 2016 to patrol the border areas along the borders with Bulgaria and North Macedonia. These measures yielded certain results, as the number of illegal crossings decreased, but they did not solve the problem. Routes of illegal migration and methods of carrying out unlawful activities continuously evolve in response to emerging challenges and changing circumstances (Ristić, 2022, p. 99).

In order to reduce the rate of this type of crime, the state authorities of the Republic of Serbia have decided to tighten criminal sanctions for the criminal offense of unauthorized crossing of the state border and human smuggling. The influx of migrants on their way to the countries of the European Union, who pass through the Republic of Serbia, is monitored and controlled by a large number of human smugglers. For this reason, amendments and supplements to the Criminal Code of the Republic of Serbia (2005) were initiated regarding the criminal offense of unauthorized crossing of the state border in terms of the punishment imposed. The previous penal provisions were not adequate, what is more, they were outdated. In some cases, “human smugglers” got away without prison sentences, with suspended sentences, because the Criminal Code (2005) allowed them to do so, and court practice also favored them with lenient sentences.

The 2016 Law on Amendments and Supplements to the Criminal Code of the Republic of Serbia increased the minimum and maximum prison sentences for this criminal offense, so that anyone “who, with the intention of obtaining some benefit for himself or another, enables another to illegally cross the border of Serbia or to illegally stay or transit through Serbia shall be punished with imprisonment for a term of one to eight years”, instead of the previously stipulated sentence of six months to five years (paragraph 2). In paragraph 3, if the offense from the previous paragraph “is committed by

a group, by abuse of official position, or in a manner that endangers the life or health of the person whose illegally crossing the border of Serbia, stay or transit is enabled or a large number of persons are smuggled, the perpetrator shall be punished with imprisonment for a term of two to twelve years”, and previously it was from one to ten years. The following paragraph (paragraph 4) has also undergone changes in terms of the penalty imposed, so for the offense from paragraph 2 (which we quoted), if it is “committed by an organized criminal group, the perpetrator shall be punished by imprisonment for a term of three to fifteen years”, instead of the previous sentence of three to twelve years.

In the past few years, both due to geopolitical circumstances and better organization of the relevant state institutions, a smaller influx of migrants has been recorded, including those entering illegally. According to a statement by the Ministry of Internal Affairs of the Republic of Serbia dated September 17, 2024, it is stated that from January 1 to September 2, 2024, Serbia recorded a 61.8 percent decrease in the number of illegal border crossings compared to the same period in 2023. At that time, 26,775 cases of human smuggling were recorded, and in 2024, 10,216.

The influx of migrants is also decreasing, so at the end of 2025, the reception center in Bujanovac accommodated 30 of them, while the other five reception centers accommodated about 200. According to data from the Commissariat for Refugees and Migration, in 2025, about 9,500 people with migrant status were registered, which is a significant decrease compared to the previous year of 2024 by about 50%. These are mainly people from Afghanistan, Morocco, Egypt, Palestine, Turkey, etc.

However, in the first six months of 2023, according to a report by the Serbian Ministry of Internal Affairs, 162 people (142 men and 20 women) were arrested for transporting migrants and 116 criminal charges were filed against them. More than 100 vehicles used for their transport were seized.

In July 2025, 11 people were arrested on suspicion of facilitating the transportation of migrants between December 2024 and April 2025. During that period, they organized the transportation of 160 migrants of undetermined citizenship, 13 citizens of Afghanistan, three citizens of Turkey and six citizens of Egypt, by picking them up in a van on the territory of the municipality of Dimitrovgrad, ensuring their transit and stay in Belgrade, and then their further transit and illegal transfer to European Union countries. This organized criminal group made illegal property gains by taking from 200 to 1,000 euros per migrant.

In the areas of Sombor, Apatin and Ruma, six members of an organized criminal group were deprived of their liberty, which during 2024 facilitated the unauthorized transit of at least 71 migrants through the territory of the Republic of Serbia (Nikolić & Gagić 2025, p. 552). This group facilitated transit from the areas of Pirot and Dimitrovgrad to Belgrade, with the aim of further unauthorized transit to European Union countries.

5. Conclusion

Based on the available data from the Statistical Bulletin, published by the Republic Office of Statistics and Informatics for the Republic of Serbia for 2024, we have come to the conclusion that a total of 24,835 criminal offenses were committed in the Republic of Serbia. The statistical parameters set in this research relate to the nationality of the perpetrators of criminal offenses, given that the subject of the research is migrants and their criminal potential. Of the total number of criminal offences committed, members of the Serbian people committed a total of 13,717 criminal offences (12,426 male persons and 1,291 female persons). Montenegrins committed a total of 9 criminal offences (all persons were male). Albanians committed a total of 25 criminal offences (24 male persons and 1 female person). Hungarians committed a total of 41 criminal offences (37 male persons and 4 female persons). Muslims committed a total of 18 criminal offences. Roma committed a total of 163 criminal offences (128 male persons and 35 female persons). Romanians committed a total of 7 criminal offences (6 male persons and 1 female person). Other peoples, including members of peoples from areas from which rapid migration flows originate, committed a total of 359 criminal offences (334 male persons and 25 female persons). In addition, there were 58 criminal offences whose perpetrators could not be identified by nationality (54 male persons and 4 female persons). The reason for this should be sought in the fact that a large number of migrants do not have personal identification documents, as a result of which they are registered as unknown persons whose identities have not been established.

Furthermore, the research according to the given parameters relating to the types of criminal offences committed in the territory of the Republic of Serbia indicates the following results. Of the total of 1,313 criminal offences against life and limb committed, Serbs committed 753 offences (707 male persons and 46 female persons), Montenegrins committed 1 criminal offence, Albanians committed 2 offences, Hungarians committed 4 offences, Roma

committed 15 criminal offences (12 male persons and 3 female persons), and members of other peoples committed 17 offences (all persons were male).

Of the total of 272 criminal offences against sexual freedom committed, Serbs committed 146 offences (140 male persons and 6 female persons), Roma committed 3 criminal offences (all persons were male), and members of other peoples committed 1 offence (a male person).

Of the total of 1,534 criminal offences against public order and peace committed, Serbs committed 762 offences (720 male persons and 42 female persons), Albanians committed 4 offences, Muslims committed 7 offences, Roma committed 9 criminal offences (8 male persons and 1 female person), Romanians committed 1 offence, and members of other peoples committed 50 offences (49 male persons and 1 female person).

According to the given criterion of territorial character, the following data is obtained:

A total of 5,330 criminal offences were committed in the Belgrade region. Serbs committed a total of 3,659 criminal offences (3,311 male persons and 348 female persons). Montenegrins committed 5 criminal offences, Albanians committed 2 criminal offences, Roma committed 1 criminal offence, and Romanians committed 1 criminal offence (all of the aforementioned offences were committed by male persons). Members of other peoples committed a total of 24 criminal offences (22 male persons and 2 female persons).

A total of 7,096 criminal offences were committed in the Vojvodina region. Serbs committed a total of 911 criminal offences (822 male persons and 89 female persons). Montenegrins committed 2 criminal offences, while Albanians committed 4 criminal offences (all persons were male). Hungarians committed a total of 40 criminal offences (36 male persons and 4 female persons). Muslims committed 2 criminal offences (male persons). Roma committed a total of 46 criminal offences (39 male persons and 7 female persons). Members of other peoples committed a total of 24 criminal offences (21 male persons and 3 female persons).

A total of 6,478 criminal offences were committed in the Šumadija region. Serbs committed a total of 4,816 criminal offences (4,374 male persons and 442 female persons). Montenegrins committed one criminal offence (a male person). Albanians committed a total of 4 criminal offences (3 male persons and 1 female person). Muslims committed 7 criminal offences (male persons). Roma committed a total of 58 criminal offences (57 male persons and 1 female person). Romanians committed one criminal offence (a male person). Members of other peoples committed a total of 199 criminal offences (188 male persons and 11 female persons).

A total of 5,931 criminal offences were committed in the region of Southern and Eastern Serbia. Serbs committed a total of 4,331 criminal offences (3,919 male persons and 412 female persons). Montenegrins committed one criminal offence (a male person). Albanians committed a total of 15 criminal offences (male persons). Hungarians committed one criminal offence (a male person). Muslims committed 9 criminal offences (male persons). Roma committed a total of 148 criminal offences (121 male persons and 27 female persons). Romanians committed a total of 5 criminal offences (4 male persons and 1 female person). Members of other peoples committed a total of 117 criminal offences (108 male persons and 9 female persons).

By applying the analytical method to the period 2017-2019 in the Republic of Serbia, and based on all available data on criminal offenses of general and special crime, and thanks to the application of operational activities to suppress all forms of general crime, the crime rate has decreased. During 2018, the total crime rate decreased by 6.06 percent compared to 2017. During 2019, the total number of criminal offenses decreased by 40.43 percent compared to 2017.

Through the implementation of good preventive measures, preventive and repressive work of the police in the Republic of Serbia, general crime decreased by 3.92 percent in 2018, and by 8.57 percent in 2019 compared to 2017.

Regarding organized crime, the Criminal Police Directorate filed a total of 23 criminal charges against members of organized crime groups in 2018. During 2019, a total of 25 criminal charges were filed against members of organized crime groups. These data indicate an increased number of newly discovered organized crime groups in the period. The number of detected criminal acts, especially with corrupt elements, in the field of high-tech crime has increased, thus achieving the indicators of defined measures and strategic plans in the Republic of Serbia.

When it comes to crimes against life and body, a total of 73,590 crimes were committed in 2024. Of these, the crime of murder occurred 98 times by known adult perpetrators. Aggravated murder occurred 103 times, one was a murder, two were child murders during childbirth, and in three cases there was involuntary manslaughter.

There were a total of 31,873 criminal offenses against property in 2024. Of these, theft occurred in 16,137 cases, aggravated theft in 6,571, robbery in 50, and robbery in 652. Illegal crossing of the state border and human smuggling were detected in 401 cases in 2024.

In this paper, by applying the presented research model and methods, the hypothesis that intensive migration changes contribute to a change in

the demographic picture and additional criminalization of Europe has been partially confirmed, namely in the first part of the stated assumption, which refers to the demographic part. The confirmation of the stated hypothesis is supported by the fact that, according to certain preliminary data from the organization "Human Rights Watch", around 29 million migrants arrived by the first half of 2025. The largest number of migrants came from Syria (19,251), followed by Afghanistan (12,914), Mali (10,079), Bangladesh (6,386), Egypt (6,137), Morocco (4,732), Senegal (4,616), Guinea (3,418), Tunisia (3,308) and Turkey (2,722).

The migration path was mostly directed towards Germany, followed by France, the United Kingdom, Austria, Italy and the Netherlands. During 2023, a new wave of migrants from Ukraine is expected, migrating to Russia (1,229,571), Poland (958,646), the Czech Republic (374,954), Slovakia (125,448), Lithuania (78,136), Romania (84,657), Portugal (53,688), Ireland (106,345), Spain (215,116) and Italy (188,965). Migrants from Syria mainly headed towards Germany (2,177,455), Great Britain (305,106), Belgium (113,408), Switzerland (110,843), Luxembourg (10,837), Austria (234,902), Sweden (163,777) and France (204,486).

The largest influx of migrants into Europe was in 2015, with 1,493,590 people, and in 2022, with 1,772,207 people. Therefore, based on these parameters, it can be concluded that the part of the hypothesis related to the change in the population structure of the European continent is confirmed.

When it comes to the additional criminalization of Europe, with a special focus on the Republic of Serbia, no relevant indicator provides exact data on the possible involvement of the migrant population in certain criminal acts. For the purposes of the research, the following parameters were selected: the type of criminal offenses, where property crimes, crimes against life and body, crimes against sexual freedoms and crimes against public order and peace are particularly highlighted. In contrast to these parameters, the parameter of nationality and the territorial parameter of the commission of criminal offenses were taken. It is concluded that members of the Serbian people are most frequently represented among the perpetrators of the aforementioned criminal offences, while the territorial parameter does not indicate increased criminal activity in border areas or areas where migrant reception centres are located.

From all of the above, it follows that migrant changes have a major impact on the demographic picture of Europe, but it cannot be confirmed that the migrant population has a major or any impact on crime in Europe, nor in the Republic of Serbia.

Conflict of interest

The authors declare that there is no conflict of interest.

Author contributions

Conceptualization A. R., methodology I. J. and P. M.; formal analysis I. J., A. R. and P. M.; first draft: A. R., writing, review and editing by I. J., A. R., and P. M. All authors have read and agreed to the published version of the manuscript.

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ODNOS MIGRANTSKE KRIZE I KRIMINALA U REPUBLICI SRBIJI

APSTRAKT: Osnovni problem koji se razmatra u radu jeste postojanje uzročno-posledične veze između pojedinih kriminalnih pojava u Republici Srbiji i Evropskoj uniji, s jedne strane, i migrantske krize, s druge. Poseban

problem predstavljaju određena krivična dela, koja se mogu podvesti pod direktnu posledicu migrantskih pomeranja stanovništva. Vremenski okvir predstavlja period od proteklih deset godina, koliko se migrantsko pitanje smatra jednim od najaktuelnijih pitanja na tlu Evropske unije. Cilj rada je ukazivanje na postojanje korelacije migrantske krize i intenzivnih kriminalnih aktivnosti u zemljama Evropske unije, kao i u zemljama koje se nalaze na tzv. migrantskoj ruti. Hipoteza rada je da intenzivne migrantske promene doprinose promeni demografske slike, kao i dodatnoj kriminalizaciji Evrope. Koautori se koriste analitičkim, istorijskim, komparativnim i normativnim metodama. Rezultati istraživanja delimično su potvrdili postavljenu hipotezu u delu – da migrantska kriza ima uticaj na demografsku sliku Evrope, ali nije dokazano da migrantska kriza utiče na dodatnu kriminalizaciju Evrope, jer nisu utvrđeni parametri koji bi to mogli potvrditi.

Ključne reči: *migracije, stanovništvo, kriminal, zloupotreba, državna granica.*

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LEGAL PROTECTION OF THE RIGHT TO PERSONAL DATA AND LIABILITY FOR DAMAGES – BETWEEN THE NORMATIVE FRAMEWORK AND ACTUAL EFFECTIVENESS

ABSTRACT: The right to protection of personal data is one of the key modern human rights, the violation of which is becoming increasingly frequent amid intensive digitization and mass data processing. Although the normative framework, especially in the European legal space through the General Data Protection Regulation (GDPR, 2016), provides for the right to compensation for material and non-material damage due to the violation of this right, in practice, this raises the question of the real effectiveness of civil law protection for injured persons. The aim of this paper is to examine the scope and limitations of civil liability for the violation of the right to the protection of personal data, with special reference to the institution of compensation for non-material damages. The paper applies the normative-legal and comparative legal method, as well as an analysis of the relevant case law of the Court of Justice of the European Union, especially with regard to the interpretation of Article 82 of the GDPR (2016). Special attention is devoted to the consideration of the relationship between the

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violation of rights and the existence of legally relevant damage, as well as the problems of proving non-material damage in national legal systems. The research results indicate the existence of a normatively established, but in practice, often fragmented system of civil legal protection, in which uneven judicial practice and the absence of clear criteria for establishing the existence and amount of compensation for non-material damage reduce the real effectiveness of the right to compensation. In conclusion, the work points to the need for further harmonization of civil law institutes with the objectives of the right to protect personal data, in order to ensure complete and effective legal protection of injured subjects.

Keywords: *protection of personal data, civil liability, compensation for damage, non-material damage, GDPR, effectiveness of legal protection.*

1. Introduction

The right to the protection of personal data today represents one of the key rights of the modern legal order, the importance of which is further emphasized by the intensive development of digital technologies, massive data processing and increasingly frequent violations of the privacy of individuals. The increasing frequency of the exchange of personal information is accompanied by numerous violations, which is why regulations on personal data protection have been developing intensively around the world over the past twenty years (Jašarević, 2018, p. 293). Although the normative framework for the protection of personal data, especially at the level of the European Union and in domestic law, is extremely developed, the question of the actual effectiveness of legal protection remains open, especially in the domain of civil liability and compensation for damages caused by the violation of this right.

A special challenge is the realization of the right to compensation for non-material damage due to the violation of the right to the protection of personal data. Personal data represent the manifestation of an individual's personality in legal life and serve the purpose of exercising various rights and interests (Andonović & Prlja, 2020, p. 14). Sensitive personal data enjoy a higher degree of legal protection compared to other categories of personal data (Krivokapić et al., 2019, p. 14). Children and young people are regarded as a digital generation, pioneers in the development of digital competence; however, at the same time, they are considered a vulnerable group of internet users who are exposed to potential risks (Zuković & Slijepčević, 2015,

pp. 241–242). Although modern legal systems recognize the possibility of compensation for both material and non-material damage, judicial practice shows significant doubts regarding the concept of damage, the threshold of its severity, the burden of proof and the criteria for determining the amount of compensation. These issues have been additionally actualized by the development of the practice of the Court of Justice of the European Union, especially in connection with the interpretation of Article 82 of the General Data Protection Regulation (2016), which increasingly affects national civil law systems.

The aim of this work is to examine to what extent the existing normative framework provides effective civil law protection of the right to personal data, with special reference to responsibility for damage and realization of the right to compensation for non-material damage. The paper starts from the thesis that a formally high level of normative protection does not necessarily mean effective protection in practice, especially in situations where the criteria for recognition and quantification of damage are uneven or insufficiently precise.

In a methodological sense, the work is based on a normative analysis of relevant sources of law, primarily the General Data Protection Regulation (GDPR, 2016) as well as on an analysis of contemporary case law of the Court of Justice of the European Union in the area of compensation for damages due to the violation of the right to personal data. In addition, the comparative law method was applied, in order to see the relationship between European standards and traditional institutes of civil law, as well as the analytical-dogmatic method in order to clarify the concept of non-material damage and civil liability in this specific context.

In this way, the paper seeks not only to provide a critical review of existing normative and judicial solutions, but also to identify key practical challenges in exercising the right to compensation for damages due to violations of the right to protection of personal data. Special attention is paid to considering possible directions for improving the efficiency of civil law protection, including the development of clearer criteria for assessing non-pecuniary damage, strengthening procedural mechanisms that facilitate proving violations and their consequences, as well as the importance of case law in ensuring uniformity and more effective protection of persons whose personal data have been violated. Based on this, the paper points to the need to establish a balance between normative requirements and their actual application in case law.

2. Term and significance of the right to protection of personal data

The right to the protection of personal data is today considered one of the fundamental rights of the modern legal order, the meaning of which has significantly exceeded the framework of the classical understanding of privacy. Although historically it was developed within the right to private and family life, the protection of personal data is affirmed in modern legal systems as an autonomous basic right, with special normative content, institutional mechanisms and judicial protection, which is confirmed by both the normative sources of European Union law and contemporary judicial practice and legal doctrine (Charter of Fundamental Rights of the European Union, 2012; Art. 7-8; Van Alsenoy, 2016, pp. 272–273; Slijepčević, 2019, pp. 4–6).

Personal data includes all information related to a specific or determinable natural person and that enables his identification, either directly or indirectly, while their inadequate use can lead to the violation of privacy and other basic rights such as identification and contact data, such as first and last name, unique citizen registration number, residential address, telephone number, personal document numbers, as well as data on the age, employment, functions, status and position of the individual in certain legal or social relationships (Slijepčević, 2019). It is about data whose disclosure or misuse can endanger the life, bodily and physical integrity, honor, reputation, family life, identity and name of an individual, and they refer to both living persons and those who have died or been declared dead. In modern society, which is characterized by a constant increase in the availability and exchange of information, the protection of personal data represents one of the most significant and sensitive legal issues, since the increased availability of data simultaneously carries a greater risk of its misuse, understood as any unauthorized or illegitimate processing of data that can cause or could cause damage to the person to whom the data refer.

The relationship between the right to privacy and the right to the protection of personal data is theoretically ambiguous. It should be borne in mind that, once personal data have been published, it is almost impossible to monitor their further dissemination (Diligenski, Prlja & Cerović, 2018, p. 106). The need to strike a balance between innovation and privacy protection has become increasingly evident with the emergence of digital technologies, social networks, and artificial intelligence, all of which significantly facilitate communication and business activities (Zečević, 2025, p. 88). In recent years, with the advancement of medical informatization, the collection of medical

data has gained growing importance. However, since medical data are often closely linked to the safety of human life and property and require a high level of security protection, it is difficult to fully assess and realize the value of such data (Shi Yun, 2022, p. 470).

While privacy is traditionally understood as the right of an individual to exclude the public from certain segments of his life, the protection of personal data has a wider scope, as it also refers to situations in which there is no element of intimacy, but there is a risk of misuse of information that enables the identification of a person (Li, 2023, p. 337). It is precisely in this difference that the civil law significance of this right lies, since damage can occur even without classic encroachment on private life, for example through loss of control over data, fear of its abuse or damage to reputation.

The civil law dimension of the right to the protection of personal data comes to the fore especially in the context of liability for damage. Violation of this right can lead to material and non-material damage, which is reflected in psychological suffering, feeling of insecurity, fear or loss of trust in institutions that process data (Novović & Bubalo, 2025, p. 36). In this way, the right to the protection of personal data is functionally connected with the general institutes of obligation law, primarily with the rules on tort liability and compensation for damages.

The importance of the right to the protection of personal data is further enhanced by the fact that modern data processing takes place on a massive, automated and often non-transparent basis, which increases the risk of injury and makes it difficult to obtain legal protection. This is precisely why consideration of this right cannot remain at the level of normative recognition, but requires an analysis of its real effectiveness in practice, especially through the lens of civil compensation mechanisms.

3. Normative framework for the protection of rights to personal data

The development of information and communication technologies led to an exponential growth in the processing of personal data, which required the establishment of a comprehensive and multi-layered legal framework that regulates this area both at the international and national level. Normative protection of the right to personal data cannot be viewed in isolation, but as part of a broader system of protection of privacy, personal rights and civil law interests of an individual, including the right to judicial protection and compensation in case of injury.

At the international level, the protection of the right to personal data has its foundations in general human rights documents. The Universal Declaration of Human Rights guarantees the protection of private and family life, home and correspondence, prohibiting arbitrary interference in these spheres (1948). Similar protection is contained in the International Covenant on Civil and Political Rights, which imposes an obligation on states to provide legal protection against illegal or arbitrary invasion of privacy (1966). Of particular importance in the European context is the Convention for the Protection of Human Rights and Fundamental (1950), Article 8 of which guarantees the right to respect for private and family life, home and correspondence, while the practice of the European Court of Human Rights significantly contributed to the development of protection standards in this area.

A normative step towards a more precise and systematic protection of the right to personal data was made by the adoption of the Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data, known as Convention 108, as the first international binding instrument dedicated exclusively to this area (1981). This convention, together with the Additional Protocol, set the basic principles of lawful processing, data security and international transfer, which were later incorporated into modern European standards.

For almost fifteen years, Data Protection Directive (1995) represented the fundamental normative framework for the protection of personal data in the European Union. Although its basic goals and principles remained essentially valid, the accelerated development of information and communication technologies, mass digitization of the public and private sectors, centralization of databases and globalization of data processing made the existing regulatory model insufficient for contemporary social and technological circumstances. In 2010, the European Commission indicated the need for reform, while a public consultation conducted in 2009 confirmed the growing concern regarding the impact of new technologies on privacy, as well as the need for a more unified, coherent and efficient data protection system at the Union level (Van Alsenoy, 2016).

With the adoption of the General Data Protection Regulation in 2016, which applies from 2018, the basic structure of responsibility from Directive 95/46/EC was retained, but it was qualitatively improved at the same time. The GDPR introduces a modern, comprehensive and directly applicable regulatory framework, which ensures uniform protection of personal data throughout the European Union, but also outside of it, given its extraterritorial reach.

The normative contribution of the GDPR (2016) is reflected primarily in the more precise definition of key terms, the expansion and systematization of the basic principles of personal data protection, as well as their direct connection with the data processing process itself. Unlike the previous regime, in which these principles were predominantly declarative in nature, they have acquired the status of operational legal standards whose compliance with the controller must be able to continuously prove. In particular, the principles of lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, limitation of the retention period, as well as integrity and confidentiality have been elaborated, which together form the normative basis for the lawful processing of personal data.

At the same time, the GDPR (2016) significantly strengthens the position of the individual through the introduction and elaboration of new subjective rights, including the right to clear and understandable information about data processing, the right of access, the right to data portability, the right to erasure (“the right to be forgotten”), the right to be notified in the event of a data breach, as well as the special protection of children in the digital environment. These rights are complemented by a stronger institutional framework of supervision and significantly tightened sanctioning mechanisms, which ensures the effective application of regulations and increases the preventive effect of legal protection.

In terms of liability, the GDPR (2016) establishes a comprehensive framework governing the responsibility of controllers and processors for unlawful data processing and the damage resulting from infringements of its provisions. At the same time, for the first time, it clearly and expressly positions data processors as subjects with direct legal obligations and independent liability towards the persons whose data are processed. This established a cumulative system of responsibility, within which both handlers and processors can be held responsible for the entire damage, if they at least partially contributed to its occurrence, with the possibility of subsequent internal distribution of responsibility among the participants in the processing. It is particularly significant that the GDPR explicitly recognizes the right to compensation for both material and non-material damages, which further strengthens the position of the individual in the personal data protection system compared to the previous regulatory framework (Van Alsenoy, 2016). The literature emphasizes that the right to compensation from Article 82 GDPR (2016) is not a mere sanction not for violation of regulations, but a civil protection mechanism that requires the cumulative existence of injury, damage and causal connection, whereby the responsibility of the data handler

and processor must be interpreted in accordance with the basic principles of the law of liability for damage (Zanfir-Fortune, 2020, p. 1175; Walree & Wolters, 2020, p. 353).

The jurisprudence of the Court of Justice of the European Union further clarified the scope of this right, especially with regard to the concept of non-property damage, the absence of a seriousness threshold and the criteria for its compensation, thereby affirming the GDPR as a regulatory instrument that directly affects national civil law rules on liability and compensation for damage. In this way, the protection of personal data outgrows the framework of classical administrative supervision and becomes an integral part of the modern system of civil law protection of personal rights (Li, 2023, pp. 336–339).

In the domestic legal order of the Republic of Serbia, the right to protection of personal data has a constitutional character. The Constitution of the Republic of Serbia (2006) guarantees the protection of personal data and prohibits their use outside the purpose for which they were collected, with the right of the person to judicial protection in case of abuse. At the legal level, this area is regulated by the Personal Data Protection Act (2018), which is largely aligned with the GDPR (2016) and introduces similar institutions, principles and rights of data subjects. In addition to administrative protection before the Commissioner, the national framework also enables civil protection, including the right to compensation for damages.

The civil law dimension of the protection of the right to personal data is realized through the general rules of the law of obligations, especially the institute of liability for damage. Although the Law on Obligations (1978) does not contain specific provisions on the protection of personal data, its general rules on causing damage, violation of personal rights and compensation for non-material damage are also applied to these cases (Law on Obligations, 1978). Additionally, certain situations of violation of the right to personal data may have criminal legal implications, especially through the incrimination of unauthorized collection and use of personal data (Criminal Code, 2005), as well as procedural protection mechanisms within criminal proceedings (Criminal Procedure Code, 2011). The authors point out that the interaction of administrative, civil and criminal law mechanisms is key to the real effectiveness of the protection of the right to personal data (Slijepčević, 2019, pp. 4–6).

In conclusion, the normative framework for the protection of the right to personal data is characterized by multi-layered and interwoven international, European and national sources. Of particular importance is the GDPR (2016),

which strongly influenced the redefinition of responsibility and the right to compensation for damages, bringing the protection of personal data closer to the classical institutes of civil law. Nevertheless, normative development in itself does not guarantee full and effective protection, but its real effectiveness depends on consistent application, developed judicial practice and awareness of the importance of this right in modern society, which opens up space for further analysis of civil liability and challenges in realizing the right to compensation for damages.

4. Violation of the right to protection of personal data and its legal consequences

Violation of the right to the protection of personal data occurs in situations where the processing of personal data is carried out contrary to the applicable legal rules, i.e. without the existence of a legal basis, exceeding the permitted purpose or without respecting the basic principles of processing. Modern legal theory and practice especially indicate that the violation of this right does not necessarily have to be exclusively related to mass security incidents, such as the leakage of large databases, but can also occur in individual cases of unauthorized collection, use or publication of data about a specific person (Slijepčević, 2019, p. 3–5).

The most common forms of violation of the right to the protection of personal data include illegal processing of data, their unauthorized publication, as well as insufficient security of data that leads to unauthorized access by third parties. Particularly problematic situations arise in the digital environment, where automated processing and profiling enable the processing of a large amount of data without real control of the person to whom the data relates. The jurisprudence of the Court of Justice of the European Union indicates that even a temporary loss of control over personal data may represent a relevant violation of rights, regardless of whether their further abuse has occurred (C-300/21, *UI v. Österreichische Post AG*).

One of the key issues related to the violation of the right to the protection of personal data is the question of the occurrence of damage. In accordance with modern European standards, damage can have both material and non-material character. Material damage is most often manifested through financial loss, identity theft or the inability to exercise certain rights, while non-material damage includes a violation of psychological integrity, a sense of insecurity, fear and loss of trust in institutions that process data (Li, 2023, pp. 336–339). Of particular importance is the opinion of the EU Court of

Justice that non-material damage does not have to reach a certain threshold of seriousness to be legally relevant, but it is enough that it is real and individually recognizable.

The limits of liability of the person who violated the right to the protection of personal data are determined depending on the nature of the violation, the position of the entity that processed the data and the degree of its control over the processing process. Although the GDPR (2016) introduces a high degree of responsibility for data handlers and processors, judicial practice emphasizes that the violation of regulations does not automatically lead to the obligation to compensate for damages, but it is necessary to prove the existence of damages and the causal link between the violation and the resulting consequences (Novović & Bubalo, 2025, pp. 33–36). This establishes a balance between the protection of the rights of persons and the prevention of excessive burden on the responsible entities with unfounded demands.

In conclusion, the violation of the right to the protection of personal data represents a complex legal phenomenon that goes beyond the traditional frameworks of privacy protection. Its consequences are not only reflected in individual damage, but also in the violation of trust in the legal and institutional system of data protection. Precisely because of this, understanding the forms of injury and their legal consequences is a necessary step towards consideration of civil liability and the effectiveness of compensation mechanisms, which will be the subject of the next chapter.

5. Civil liability for violation of the right to personal data

Civil liability for violation of the right to protection of personal data is one of the key mechanisms of private law protection of an individual in the modern digital environment, in which the processing of personal data becomes an integral part of almost all social, economic and contractual relations. Data protection is a significant concern across all spheres of life, presenting a variety of challenges and requiring diverse solutions (Morić, Dakić, Đekić & Regvart, 2024, p. 731). The development of information technologies and mass data processing have led to the fact that the violation of the right to personal data is no longer an exception, but a real and frequent risk, which further strengthens the importance of civil protection instruments. The special importance of this institute stems from the fact that the GDPR expressly recognizes the right of a person to compensation for damages due to a violation of data processing rules, which extends the protection of the right to personal data from the domain of predominantly public law supervision

to the classic institutes of civil law, primarily to liability for damage (GDPR, 2016). In this way, the right to the protection of personal data acquires a clear property and non-property dimension, enabling the individual to demand judicial protection and fair compensation, independently of the sanctions imposed by the supervisory authorities.

In theory and practice, there has long been no unified understanding of the legal nature of liability for violations of the right to the protection of personal data. The prevailing view is that it is a special form of tort liability based on unlawful conduct that violates a personality right, with personal data being viewed as an integral part of an individual's personal, psychological and informational autonomy (Van Alsenoy, 2016, p. 271). In this sense, a violation of data protection regulations constitutes a violation of a legally protected good, which fulfills the basic assumption for the emergence of tort liability with the application of the general principles of civil law on liability for damage. This understanding is particularly present in legal systems that view the right to the protection of personal data as part of a broader concept of personality rights and the right to privacy.

At the same time, modern legal theory indicates that liability for violations of the right to the protection of personal data cannot always be reduced exclusively to the tort framework. In certain situations, especially when data processing is carried out within the framework of a contractual relationship, such as contracts for the provision of digital services, the use of platforms or e-commerce, a breach of the obligations under the GDPR may also constitute a breach of contractual obligations towards the user (Li, 2023, p. 336). In such cases, civil liability may also have the characteristics of contractual liability, with the application of general rules on liability for breach of contractual obligations and the observance of specific standards for the protection of personal data. This confirms the hybrid nature of liability in this area, which moves between classic tort and contractual models. The question of whether Article 82 of the GDPR (2016) establishes elements of objective liability has long attracted significant attention in theory and case law. Such discussions were based on the fact that the GDPR provides for a high level of protection of data subjects, as well as limited possibilities for exemption from liability. In this context, it has been pointed out that even strict or objective liability regimes do not automatically lead to an obligation to compensate for damages if no specific legally relevant damage has occurred and if there is no causal link between the unlawful conduct and the resulting consequences (Shavell, 1980, p. 1).

The interpretation of the legal nature of the liability of controllers and processors has been the subject of intensive development in the case law of the Court of Justice of the European Union. The most recent case law of the Court of Justice of the European Union has significantly contributed to the clarification of the legal nature of liability under Article 82 of the GDPR (2016). In case *C-667/21 Krankenversicherung Nordrhein v. Verbraucherzentrale Nordrhein-Westfalen eV*, the Court took the view that in order to establish the liability of the controller, the existence of his fault is necessary, whereby fault is presumed unless the controller proves that the event that caused the damage was in no way a consequence of his actions (Judgment of the Court of Justice of the European Union C-667/21 of 21 December 2023). In this way, the Court confirmed that Article 82 of the GDPR (2016) does not establish a regime of objective liability, but of subjective liability based on presumed fault. This interpretation simultaneously ensures a high level of protection for the person to whom the data relates and the preservation of the basic principles of civil liability (Novović & Bubalo, 2025, p. 32).

Accordingly, the modern understanding of liability for violations of the right to the protection of personal data is increasingly abandoning earlier views that emphasized the objective nature of liability and is based on the understanding that the right to compensation under Article 82 GDPR (2016) requires the existence of an infringement, damage, a causal link and the presumed fault of the controller or processor. Once these requirements are fulfilled, the issue of compensation becomes the central element of civil law protection afforded to data subjects. The issue of compensation for damages is a central segment of civil protection in case of violation of the right to personal data. The GDPR expressly recognizes the right to compensation for both material and non-material damages, thereby confirming a broad understanding of the consequences of a violation of this right. In practice, material damage is most often manifested through financial losses, costs of repairing the consequences of an injury, misuse of identity or unauthorized use of data for commercial purposes. Non-material damage, on the other hand, includes a violation of psychological integrity, loss of control over personal data, fear of its misuse, damage to reputation, as well as feelings of insecurity and humiliation (Li, 2023, p. 339).

In the judgment *UI v. Österreichische Post AG*¹, the Court of Justice of the European Union took the position that the violation of the GDPR (2016) alone is not sufficient to realize the right to compensation, but it is necessary

¹ *UI v. Österreichische Post AG*, judgment of the Court of Justice of the EU, C-300/21, May 4, 2023.

to prove the existence of specific damage and the causal connection between the violation and the resulting consequences, but at the same time rejected the request for the existence of a threshold of seriousness of non-material damage. Thus, judicial practice established a balance between preventing abuses of the right to compensation and ensuring the effective protection of injured persons.

Further judicial practice confirms that the temporary loss of control over personal data, as well as the fear of their future abuse, can be grounds for compensation for non-material damages, if it is proven that the violation had a real impact on the position of the injured person (Judgment of the Court of Justice of the EU, C-182/22, *Scalable Capital*, December 14, 2023; Judgment of the Court of Justice of the EU, C-340/21, *VB v. National Agency for Revenue*, October 26 2023)². This interpretation confirms the tendency of a broader understanding of harm in the context of personal data protection, in accordance with the goals of the GDPR (2016). The authors believe that the loss of control over personal data should be recognized as an independent form of non-material damage, regardless of whether their actual misuse subsequently occurred. The very loss of a person's ability to control access to, use of and further processing of their own data constitutes a violation of informational autonomy, which can produce a feeling of insecurity, anxiety and violation of privacy. In this regard, a justified fear of future data misuse should not be viewed as an abstract or hypothetical possibility, but as a legally relevant consequence when it is based on the specific circumstances of the case and when it is capable of producing real negative effects for the injured person.

Comparative analysis shows that, despite the harmonized normative framework, the member states of the European Union still approach the issue of recognition and measurement of non-material damages differently. While some legal systems traditionally maintain a restrictive approach, others accept a broader interpretation, relying on the principles of effectiveness and equivalence of European Union law (Van Alsenoy, 2016, p. 275; Li, 2023, p. 344). This limitation can be observed in the fact that, in Decision U.14718/15, the Administrative Court focused on examining whether the supervisory authority acted within its legal powers and in accordance with the prescribed procedural rules, without engaging in a substantive analysis of the concrete consequences of the violation of the right to the protection of personal data

² *VB v. National Revenue Agency*, C-340/21, judgment of the Court of Justice of the European Union, 26 October 2023, para. 58–60, 72–75. *Scalable Capital*, C-182/22, judgment of the Court of Justice of the European Union, 14 December 2023, para. 27–32, 41–45.

for the individual. The Court confined its review to the formal legality of the Commissioner's decision, while the question of whether there had been an actual violation of personal rights and the occurrence of non-material damage requiring effective judicial protection was not subjected to in-depth consideration (Decision of the Administrative Court of the Republic of Serbia U.14718/15 dated September 22, 2015).³

The issue of the significance of the case law of the Court of Justice of the European Union for the domestic legal system deserves special attention. Although the Republic of Serbia is not a member of the European Union and the decisions of the Court of Justice of the European Union do not formally constitute a binding source of law for domestic courts, the fact that the Law on the Protection of Personal Data (2018) is largely aligned with the GDPR (2016) opens up the possibility of using the positions of this court as a relevant interpretative source. In this regard, the interpretations developed in the case law of the Court of Justice of the European Union in relation to Article 82 of the GDPR (2016) may have a significant impact on the development of domestic case law, especially when it comes to defining the concept of non-material damage, assessing the significance of the loss of control over personal data, recognizing the fear of their misuse as a legally relevant damage, as well as establishing a causal link between the violation of the regulations and the damage incurred.

In the cases *VB v. National Agency for Revenue*, (C-340/21) and *Scalable Capital*, (C-182/22) it was confirmed that the loss of control over personal data and the well-founded fear of their future misuse can constitute non-material damage if such consequences are real and demonstrable. Such positions may be of particular use to national courts in situations where the breach of the right to the protection of personal data has not produced direct material damage, but has led to a feeling of insecurity, anxiety or a violation of the privacy of the injured party.

The acceptance of standards developed in the case law of the Court of Justice of the European Union could contribute to the development of clearer criteria for the assessment and award of compensation for non-pecuniary damage in domestic law, greater legal certainty and predictability of court decisions. This is of particular importance given that domestic case law has so far focused predominantly on the control of the legality of the Commissioner's decisions, while the issues of civil liability and compensation for damage

³ As stated in the Decision of the Administrative Court of the Republic of Serbia, U.14718/15 from September 22, 2015, (*Bilten Upravnog suda Republike Srbije*, U.14718/15).

due to violations of the right to the protection of personal data are still not sufficiently developed.

6. Challenges in practice and real efficiency of protection

The challenges in practice and the actual effectiveness of the protection of the right to the protection of personal data clearly indicate the existence of a gap between the normatively proclaimed high level of protection and the real possibilities of its realization in everyday practice. The emergence of new technologies has posed a particular threat to the right to privacy (Sekulić & Grujić, 2020, p. 348). Privacy has become a matter of increasing concern for the international community, as the global population relies more and more on the Internet to access information and services (Chatsuwan, Phomma, Surasvadi & Thajchayapong, 2023, p. 2). Although the GDPR (2016) and national regulations establish an extensive and complex system of legal remedies, experiences from judicial and administrative practice show that individuals often encounter serious obstacles when exercising their rights, especially when it comes to civil protection and compensation.

In domestic judicial practice, the protection of the right to personal data is most often realized through administrative disputes against the decision of the Commissioner for Information of Public Importance and Protection of Personal Data, whereby the Administrative Court examines the legality of the processing and the application of the law, which is confirmed by the judgment of the Administrative Court of the Republic of Serbia, U.17892/17 where the Administrative Court reviewed the contested act exclusively through the prism of its legality, assessing whether the Commissioner correctly applied the relevant provisions governing the processing of personal data and whether the decision was adopted within the scope of statutory competence. The court limited its examination to the compliance of the processing with the applicable legal framework, without extending its review to issues of civil liability or compensation for damage allegedly suffered by the data subject, thereby reaffirming the administrative nature of judicial protection in this field (Decision of the Administrative Court of the Republic of Serbia U.17892/17 dated November 1, 2017)⁴. This discrepancy between normative standards and their practical application is also recognized in the practice of the European Court of Human Rights, which has repeatedly emphasized that

⁴ As stated in the Decision of the Administrative Court of the Republic of Serbia, U.17892/17 from November 1, 2017, (*Bilten Upravnog suda Republike Srbije*, U.17892/17).

the formal existence of a legal framework is not in itself a sufficient guarantee of effective protection of the right to privacy and personal data (*Rotaru v. Romania*, par. 59–61)⁵.

One of the key challenges relates to the complexity of proving damage and the existence of a causal link between the violation of data protection regulations and the resulting consequences. The Court of Justice of the European Union has repeatedly emphasized that the right to compensation for damages does not arise automatically from the violation of the GDPR (2016), itself, but that it is necessary to prove the concrete existence of material or non-material damage, as well as the causal connection between the violation and the resulting damage (*UI v. Österreichische Post AG*, C-300/21)⁶. In practice, this requirement often represents a significant obstacle for injured persons, especially when it comes to non-material damage, the consequences of which are subjective and difficult to measure. The practice of the ECtHR points to exactly these problems, which recognizes that a long-term feeling of insecurity, loss of control over personal data and psychological pressure can represent relevant elements of non-material damage, even in the absence of immediate material consequences. However, proving such consequences in national civil law proceedings often remains difficult, which contributes to the unevenness of judicial practice and increased legal uncertainty (Li, 2023, p. 341). The modern theory of data protection indicates that violations of the right to personal data often produce a state of permanent risk and anxiety, which manifests itself as a loss of control over personal information and a constant fear of its future abuse, even when material damage has not yet occurred. This “damage in the form of risk” is one of the key reasons why proving non-material damage in practice is particularly difficult, despite its real and long-term impact on the individual’s position (Citron & Solove, 2018, p. 749).

An additional problem is the non-uniformity of judicial practice regarding the criteria for determining the existence and amount of compensation for non-material damage. Although the Court of Justice of the European Union has expressly rejected the requirement for the existence of a threshold of seriousness of damage, national courts still apply different standards when assessing whether a specific injury has reached an intensity that justifies the award of compensation. A similar problem has been identified in the practice

⁵ *Rotaru v. Romania*, no. 28341/95, judgment of the Court of Justice of the European Union 4. may 2000, par. 59–61, 67.

⁶ *UI v. Österreichische Post AG*, C-300/21, judgment of the Court of Justice of the European Union, 4 May 2023, para. 36, 44–48, 54–59.

of the ECtHR, which recognizes states with a certain freedom of assessment regarding the amount of compensation, but at the same time requires that the awarded satisfaction is not symbolic and that it ensures the real protection of the violated right (*Biriuk v. Lithuania*, par. 45–47)⁷. This combination of broad discretion and the absence of precise criteria leads to a situation in which factually and legally similar cases are resolved differently depending on the national legal system or even the practice of individual courts, which calls into question the principle of equal and effective protection of rights guaranteed by the GDPR (Van Alsenoy, 2016, p. 275).

The challenges are not exhausted exclusively in court practice, but are also expressed at the level of administrative protection. Although the supervisory authorities have broad powers to impose corrective measures and sanctions, the procedures before them are often lengthy, and the imposed measures do not necessarily lead to the complete satisfaction of the injured party. In this context, the European Court of Human Rights emphasized that the existence of supervisory and preventive mechanisms cannot replace the need for effective judicial protection, especially when an individual is deprived of the opportunity to achieve personal satisfaction due to a violation of the right to privacy (*Rotaru v. Romania*, para. 67). Administrative sanctions, such as fines, primarily have a preventive and repressive function, but by themselves do not provide direct compensation to the individual, which further emphasizes the importance of civil protection as a supplementary, but also necessary, mechanism for the protection of rights (Novović & Bubalo, 2025, p. 34). This approach is confirmed by the judgment of the Administrative Court of the Republic of Serbia, U.13873/18 in which the court confirmed the legality of the Commissioner's decision, but without considering the issue of personal satisfaction or compensation for damages to the injured party, which further emphasizes the difference between administrative and civil protection (Decision of the Administrative Court of the Republic of Serbia U.13873/18 dated July 5, 2018).

A special problem in practice is the insufficient information of citizens about their rights and available legal remedies. Although the GDPR starts from the idea of empowering the individual, the complexity of the normative framework, as well as the technical nature of modern forms of data processing, often lead to the fact that injured parties are unable to reliably assess whether their rights have been violated, nor how they can effectively exercise legal

⁷ *Biriuk v. Lithuania*, application no. 23373/03, judgment of the European Court of Human Rights, November 25, 2008, para. 45–47.

protection (Knetsch, 2022, p. 140). This problem especially comes to the fore in the context of mass data processing by large digital platforms, where the asymmetry of power between the individual and the data handler is strongly emphasized, which the ECtHR recognized as a factor that further increases the risk of violation of the right to privacy (*S. and Marper v. the United Kingdom*, par. 103–105).

In light of the aforementioned challenges, the need for further development and unification of judicial practice, as well as for a more precise normative and judicial definition of criteria for determining non-material damage, in order to ensure greater legal certainty and predictability of court decisions, is increasingly emphasized in contemporary literature. The continuity of this judicial practice, which is also reflected in the judgment of the Administrative Court of the Republic of Serbia, U.12679/17 indicates that judicial protection of the right to personal data in domestic law is predominantly achieved through the control of the legality of administrative acts, while the issue of compensation remains left to civil law mechanisms, the application of which in practice is still not sufficiently developed (Decision of the Administrative Court of the Republic of Serbia U.12679/17 dated August 7, 2017). At the same time, the importance of continuous education of judges and other legal practitioners in the field of data protection is pointed out, as well as the need to strengthen procedural mechanisms that would facilitate the proof of injury and its consequences, especially when it comes to non-material damage (Li, 2023, p. 344).

In order to improve the real efficiency of civil law protection, it is necessary to develop clearer criteria for determining the existence and amount of non-pecuniary damage resulting from a violation of the right to the protection of personal data. When assessing the existence of damage, courts could take into account the nature and sensitivity of the data that are the subject of the violation, the scope and duration of the unlawful processing, the degree of loss of control over the data, the existence of a justified fear of their future misuse, as well as the specific impact of the violation on the private and professional life of the injured party. The application of such criteria could contribute to greater uniformity of case law and reduce the risk of different decisions in factually similar cases.

In addition, it is justified to consider strengthening procedural mechanisms that would facilitate the proof of non-pecuniary damage. Bearing in mind that consequences such as a feeling of insecurity, loss of control over personal data or fear of their misuse are often difficult to prove with direct evidence, indirect evidence and factual assumptions based on the circumstances of the specific

case could gain greater importance. Such an approach would not imply automatic recognition of the right to compensation, but would contribute to establishing a fairer balance between the need to prove the damage and ensuring effective protection for the person whose rights have been violated. Although the Court of Justice of the European Union still leaves the issue of determining the amount of compensation to national legal systems, further development of common interpretative standards could contribute to greater legal certainty and more uniform protection of the right to the protection of personal data at the European level.

All of the above confirms that the actual effectiveness of the protection of the right to personal data protection does not depend solely on the quality of the normative framework, but equally on its consistent, uniform and functional application in practice. The development of clearer criteria for determining and assessing non-pecuniary damage, the strengthening of procedural mechanisms that facilitate the proof of the violation and its consequences, as well as the further unification of case law are important prerequisites for the achievement of effective civil law protection. It is precisely in overcoming the gap between high normative standards and the practical limitations of their application that one of the key challenges of the modern system of personal data protection and civil liability for their violation lies.

7. Conclusion

The right to the protection of personal data is today one of the most important rights in the modern legal order, the importance of which is continuously growing along with the accelerated development of digital technologies and increasingly intensive data processing. In such circumstances, civil liability for damage gains special importance as one of the key instruments for ensuring effective protection of the individual. The regulatory framework established by the GDPR undoubtedly represents one of the most developed systems for the protection of personal rights in modern law, as it guarantees not only the recognition of the right to the protection of personal data, but also effective legal remedies, as well as the right to compensation for material and non-material damage resulting from their violation.

The research results show that the mere existence of a developed regulatory framework is not enough to ensure effective protection of rights in practice. Although the case law of the Court of Justice of the European Union has significantly contributed to clarifying the conditions for liability under Article 82 of the GDPR (2016), in particular with regard to the concept

of damage, causality and the presumed fault of the controller and processor, numerous uncertainties still exist in practice, in particular when it comes to the recognition and measurement of non-material damage. Uneven case law and different approaches of national courts reduce legal certainty and may lead to different levels of protection for individuals whose rights have been violated.

The study confirmed that the greatest shortcoming of the current system is the absence of clear criteria for assessing non-material damage resulting from a breach of the right to the protection of personal data. Precisely for this reason, case law should develop a uniform approach based on objective and foreseeable criteria. When deciding on compensation for damages, the following should be assessed in particular: the type and sensitivity of the unlawfully processed data, the scope and duration of the infringement, the number of persons to whom the data became available, the degree of loss of control over the data, the existence of a justified fear of their future misuse, the real consequences for the private, family and professional life of the injured party, as well as the actions of the operator after the infringement, in particular the speed of eliminating the consequences, cooperation with the supervisory authority and timely notification of the person whose data was infringed.

In addition to the development of substantive legal criteria, it is necessary to improve procedural protection mechanisms. This includes clearer rules on the distribution of the burden of proof, wider acceptance of circumstantial evidence when proving non-pecuniary damage, as well as greater use of forensic expertise when it is necessary to determine the psychological and other consequences of a violation of rights. At the same time, it is necessary to ensure continuous education of judges in the field of personal data protection and more systematic reliance of domestic courts on the standards developed in the practice of the Court of Justice of the European Union, bearing in mind that the Law on the Protection of Personal Data (2018) is largely aligned with the GDPR (2016).

The initial thesis of the paper, according to which a high level of normative protection does not necessarily imply an equally high level of its practical effectiveness, is fully confirmed. The future development of civil law protection of the right to personal data protection should be aimed not only at further harmonization of legislation with European standards, but also at the development of uniform judicial criteria, strengthening procedural guarantees and improving judicial practice. Only by combining clear substantive rules, effective procedural mechanisms and consistent application of the standards of the Court of Justice of the European Union can it be ensured that the right

to the protection of personal data does not remain a normatively proclaimed right, but represents a real and effective means of protecting individuals in the digital age.

The right to the protection of personal data in a digital society must not remain a declarative human right, but must represent a right whose judicial protection is rapid, effective and predictable. Only if civil law mechanisms are able to provide real satisfaction to the injured party can we speak of the full realization of the objectives of the GDPR (2016) and of a modern personal data protection system.

Conflict of Interest

The authors declare that there is no conflict of interest.

Author Contributions

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PRAVNA ZAŠTITA PRAVA NA LIČNE PODATKE I ODGOVORNOST ZA NAKNADU ŠTETE – IZMEĐU NORMATIVNOG OKVIRA I STVARNE EFIKASNOSTI

APSTRAKT: Pravo na zaštitu podataka o ličnosti predstavlja jedno od ključnih savremenih ljudskih prava, čija se povreda sve češće javlja u uslovima intenzivne digitalizacije i masovne obrade podataka. Iako normativni okvir, posebno u evropskom pravnom prostoru kroz Opštu uredbu o zaštiti podataka (General Data Protection Regulation, GDPR, 2016) predviđa pravo na naknadu materijalne i nematerijalne štete usled povrede ovog prava, u praksi se otvara pitanje stvarne efikasnosti građanskopravne zaštite oštećenih lica. Cilj ovog rada jeste da ispita domete i ograničenja građanskopravne odgovornosti za povredu prava na zaštitu ličnih podataka, sa posebnim osvrtom na institut naknade nematerijalne štete. U radu se primenjuju normativno-pravni i uporednopravni metod, kao i analiza relevantne prakse Suda pravde Evropske unije, naročito u pogledu tumačenja člana 82 GDPR-a (2016). Posebna pažnja posvećena je razmatranju odnosa između same povrede prava i postojanja pravno relevantne štete, kao i problemima dokazivanja nematerijalne štete u nacionalnim pravnim porecima. Rezultati istraživanja ukazuju na postojanje normativno uspostavljenog, ali u praksi često fragmentisanog sistema građanskopravne zaštite, u kojem neujednačena sudska praksa i odsustvo jasnih kriterijuma za utvrđivanje i visinu naknade nematerijalne štete umanjuju stvarnu delotvornost prava na naknadu. Zaključno, rad ukazuje na potrebu daljeg usklađivanja građanskopravnih instituta sa ciljevima prava zaštite podataka o ličnosti, kako bi se obezbedila potpuna i efektivna pravna zaštita oštećenih subjekata.

Ključne reči: zaštita podataka o ličnosti, građanskopravna odgovornost, naknada štete, nematerijalna šteta, GDPR, efikasnost pravne zaštite.

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BEYOND DETERMINISM – LEGAL RESPONSIBILITY IN THE AGE OF PROBABILISTIC AI SYSTEMS

ABSTRACT: This paper examines the fundamental distinction between classical deterministic programming and contemporary artificial intelligence systems, with particular emphasis on the legal consequences arising from the non-deterministic behavior of AI models. By analyzing the basic postulates of programming, the *Softmax* function as a key mechanism for output generation, and stochastic factors in training and generative processes, the paper demonstrates that artificial intelligence deviates from expected norms of predictability—an aspect that has far-reaching implications for the law of obligations, consumer protection, and tort liability regimes. In addition to a theoretical overview, the paper provides a legal analysis of the European Union’s AI Act in the context of non-determinism, highlighting regulatory efforts to address this characteristic of AI models through a risk-classification system as well as technical and organizational requirements. The paper aims to contribute to an interdisciplinary understanding of AI-related challenges by positioning legal scholarship as a key factor in developing a new model of liability in the digital age.

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Keywords: *artificial intelligence, non-determinism, law of obligations, EU AI Act, consumer protection.*

1. Introduction

Programming as a discipline has always rested on firm foundations of logic, mathematics, and predictability. At the core of this discipline lies the postulate of determinism—the idea that, for any valid program code that receives the same set of input data, the execution result must be identical in every run. This property enables the formal verification of software systems, guarantees their reliability, and makes the development of complex information systems possible in domains where accuracy and predictability are critical—from aviation and medicine to finance and the management of critical infrastructure. However, with the emergence of advanced artificial intelligence (AI) models—especially those based on deep learning and statistical inference—this foundational postulate is being seriously called into question. AI systems, unlike classical deterministic programs, do not execute instructions according to a strictly defined algorithm; rather, they model probabilities, drawing inferences from vast amounts of data and complex functions such as the softmax function. This means that the same input may produce different outputs across different instances of execution, depending on the model’s state, the temperature of the softmax function, or even the semantic context of the task.

For example, in traditional programming, a function $f(x)$ would always return the same value y if x is the same. In the AI context, a function $f_{AI}(x)$ uses mechanisms such as softmax normalization to produce a probability distribution over possible outputs, where the model then “decides” which output is most appropriate, without thereby guaranteeing identical results on each execution. This concept is fundamentally different from the logical rigor of traditional programming and introduces an element of uncertainty into the behaviour of the software system. The difference between the traditional and AI approach can also be explained philosophically: classical programming relies on an extensional understanding (what the program computes), whereas AI systems increasingly incline toward intensional properties (how the system arrives at a result), as discussed in philosophical analyses of programming such as Quinon’s work (Quinon, 2025), which highlights the distinction between expressing and specifying procedures and the formal correctness of program behaviour. In addition, Bertrand Meyer and Reto Weber, in their work on reconstructing the foundations of programming

through the pure mathematical theory of programming PRISM (Meyer & Weber, 2025), emphasize that all classical postulates of programming—such as composition, restriction, and correctness—are grounded in zero axioms, i.e., they are formally provable from set theory. This paradigm is difficult to transfer to AI systems, which are not formally provably correct, but rather empirically “good enough”. It is precisely the softmax function that amplifies this problem. As part of the output layer of many neural networks, softmax converts unordered logits into probabilities that together form a distribution whose maximum corresponds to the model’s most likely answer. However, softmax also accentuates differences in scores, such that small shifts in input logits can lead to radically different responses. Moreover, models also use so-called temperature-scaled softmax, which further influences how “decisive” the model will be in its response. Higher temperatures lead to a more uniform distribution and lower confidence, whereas lower temperatures lead to more decisive (but potentially premature) conclusions. For this reason, generative AI systems cannot be considered classical programs—they are probabilistic oracles, not exact executors. In such systems, even with the same input, the result may differ due to:

- the different state of internal memory (the so-called context window),
- stochastic elements of the sampling algorithm (e.g., top-k sampling, nucleus sampling),
- or changes in model weights during fine-tuning.

This inherent non-determinism introduces profound challenges into legal frameworks that have hitherto treated software as a deterministic entity. For example, within the legal framework of liability for software defects—under classical doctrine—it is possible to establish causation between software behaviour and the harm incurred. But if software (e.g., an LLM) is not deterministic and instead yields the “most probable” solution, how can liability be proven—and, more importantly, who is liable? This issue becomes even more complex when we consider that most AI systems are not designed, implemented, and controlled by a single party. We have:

- the model developer (e.g., OpenAI),
- the system implementer (e.g., Microsoft, Google),
- the end user (e.g., a lawyer, physician, student) who uses an AI tool for decision-making.

A need thus arises to redefine the concepts of liability, foreseeability, and users’ rights under conditions in which the traditional binary logic of

software code is replaced by the probabilistic decisions of a neural network. At the legal level, the question becomes: does the user have the right to expect deterministic behaviour from a system that technically cannot behave deterministically?

This is why the present manuscript matters—it does not aim to answer technical questions about the performance of AI models, but rather to establish a legal-philosophical foundation for understanding a new form of program behaviour. The need to examine AI systems legally from the perspectives of the law of obligations, consumer protection, and tort liability is no longer theoretical. There is a growing number of examples in which AI provides harmful, incorrect, or non-compliant information, while no clear legal doctrine exists as to how liability should be addressed. Through this paper, we will show how the classical premises of deterministic programming, grounded in theories such as PRISM (Moine, Westrick & Tassarotti, 2025), can no longer serve as the basis for understanding and regulating modern AI systems. Furthermore, by analyzing software mechanisms such as the softmax function, we will demonstrate how the mathematical logic of a model’s output is itself fundamentally different from the traditional, strictly deterministic output of program functions.

In legal terms, this difference opens new space for considering concepts such as:

- acceptable deviation instead of accuracy,
- probabilistic liability instead of binary fault,
- and conditional reliability as a basis for contractual obligation.

Through this interdisciplinary analysis, the aim of this manuscript is to show that what is at stake is not merely a “technical difference” in how an AI system functions, but a fundamental paradigm shift that demands a new understanding of law, responsibility, and trust in twenty-first-century information systems.

2. AI Models and the Undermining of Determinism

The basic postulates of classical programming clearly define determinism as a central attribute: for any specific input to a program, it must always generate the same, predictable, and reproducible result. This principle is grounded in the idea that software functions as a mathematical function or an algorithmic transformation, in which inputs and outputs are deterministically connected through strictly defined operations and formal

semantics. Such predictability enables programmers, engineers, and legal professionals to prove correctness, test behavior, and establish responsibility for the outcome of software execution. However, with the development and accelerated adoption of contemporary artificial intelligence models—especially those based on statistics and neural networks—this fundamental postulate of programming is being called into question. New AI systems—including large language models (Large Language Models – LLMs) and other generative architectures—do not function as classical deterministic functions. Instead, they employ probabilistic approaches in which the output value is not precisely determined in advance, but rather results from a complex process of estimating probabilities among possible outcomes, thereby undermining the foundational assumption of predictability that has governed traditional software engineering.

2.1 The Deterministic Approach in Classical Programming

In traditional software, code is most often executed by directly interpreting explicitly written commands, without internal elements of randomness or statistical evaluation. If the same program is executed multiple times with identical input data, the result will always be the same, provided that external conditions (hardware, environment) remain the same. This behavior enables formal methods for proving correctness and validating software systems—for example, through the use of static analysis tools, proof-theoretic methods, or model checking. Deterministic systems are therefore reproducible, testable, and formally predictable. This determinism is also integrated into legal domains: when software is treated as a reliable product or service, the law of obligations and consumer protection often proceed from the assumption that functionality must be predictable and error-free. For example, if software forms part of a service contract, it is expected to satisfy the agreed specifications—which implies that it will always produce the same result for the same input data.

2.2 The Probabilistic Approach in Modern AI

By contrast, modern AI systems often use probabilistic models grounded in learning from data and statistical inference, rather than in the explicit execution of rules. In such models, the result is not deterministically fixed, but is generated on the basis of an assessment of the probabilities of different possible answers. This approach is particularly pronounced in deep neural networks and generative models that use techniques such as Bayesian

inference, Gaussian process models, or other probabilistic methods to estimate uncertainty and multiple possible outputs (Drabent, 2025). Within these frameworks, the model does not return a single strictly predetermined value for a given input, but rather a probability distribution—which is especially evident in generative tasks such as producing text, images, or other forms of content. Such a probabilistic approach enables models to learn patterns from enormous datasets and to adapt to new, unknown situations. However, it simultaneously introduces non-determinism into model behavior, so that the same input may yield different outputs across different runs of the model, even when all other conditions are nominally the same (Hagen et al., 2012). By way of illustration, LLMs such as GPT are trained to generate, for each next token, the most probable choice based on context and statistical patterns in the training data, using functions such as softmax for normalization and for estimating the probability of each possible output token. Consequently—even with identical input data—the model may behave differently on each invocation, because the generation process is based on probabilistic sampling and contextual learning, rather than on fixed rules (Franke & Degen, 2023).

2.3 The Role of Softmax and Probabilistic Decision-Making

The softmax function in neural networks converts unnormalized values (logits) into probabilities that represent the relative likelihood of different possible responses. This process is inherently probabilistic, because there is no single “certain” result—rather, the model relies on a probability distribution to select the next element of the output. The accuracy and repeatability of responses thus become functions of statistical estimation, model design, and the training set, rather than of deterministic execution of a predefined algorithm. This probabilistic approach is further complicated when sampling techniques and other parameters are used that directly affect the probability distribution. For example, in text generation, a change in the softmax distribution can change token-selection probabilities, enabling the model to provide different answers to the same input in different situations (Krause & Hübötter, 2025).

2.4 Factors That Cause Non-Determinism in AI Models

There are multiple reasons why modern AI systems exhibit non-deterministic characteristics:

- Stochasticity of the training process: Models are typically trained using optimization algorithms such as stochastic gradient descent (SGD),

which introduce randomness into weight initialization and the ordering of data across training epochs. This randomness can lead to different local minima and different model parameters after training (Atil, Aykent, Chittams, Fu & Passonneau, 2025).

- Sampling during output generation: In generative tasks, output may be sampled from a probability distribution rather than selecting the maximally probable result each time, which directly affects reproducibility of results.
- Hardware and system differences: Even when models are configured “deterministically” (e.g., temperature set to zero), variability in hardware or execution modes (e.g., GPU parallelization) can lead to different results due to operation ordering and the accumulation of numerical errors (Fu, 2026).

Because of these factors, AI behaviors such as “black-box” decision-making and unpredictability become an essential feature rather than merely an artifact of implementation or an error.

2.5 Implications of Undermined Determinism within Legal, Ethical, and Regulatory Frameworks

This probabilistic nature of modern AI systems has significant implications—not only for domestic and international deployment of the technology, but also for legal, ethical, and regulatory frameworks. In the context of law, particularly within the law of obligations and consumer protection, determinism is often implicitly assumed. When software produces different outcomes for the same input, this raises questions about reliability, verification, and liability. In the traditional paradigm, if software fails to meet the contractually agreed performance standard, the user may claim damages or terminate the contract. However, for AI systems there is no clear line between normal variation in model behaviour and a software defect, because probabilistic outputs are not technically “wrong”—they are an inherent product of the model. This phenomenon is referred to as the Model Variability Problem (MVP) and relates to the fact that LLMs and similar systems can produce different classifications or outcomes for the same input information due to inherent variability in their design and data-interpretation mechanisms (Herrera-Poyatos et al., 2025). This leads to legal uncertainty, because liability for harm or consequences cannot always be clearly attributed to a “program error” in the traditional sense.

3. Legal Consequences of the Non-Determinism of AI Systems

The non-determinism of contemporary AI systems is not merely a technical or philosophical issue; it generates profound and multi-layered legal consequences, particularly in the fields of the law of obligations, consumer protection, and tort liability. Traditional legal orders—developed over decades in symbiosis with deterministic software and mechanical systems—proceed from the assumption that the behaviour of a technological product is predictable, repeatable, and verifiable. Artificial intelligence, as a probabilistic system, directly undermines these assumptions and thereby calls into question existing legal categories of liability, causation, and fault.

3.1 Determinism as an Implicit Legal Assumption

In classical obligations law, especially in contracts for the provision of services and the sale of software, there is an implicit assumption that a product or service will meet a certain standard of performance. That standard presupposes that, under the same set of circumstances, the same system behavior is expected. In other words, the law proceeds from an assumption of determinism in the technical instrument. This assumption is visible across several areas:

- in rules on material defects of goods;
- in the doctrine of non-performance or improper performance of obligations;
- in standards of professional diligence in the provision of services.

With deterministic software, a deviation in behaviour can readily be qualified as an error or malfunction. With AI systems, however, variability of outputs for the same input does not necessarily signify an error—it is often an anticipated and systemic characteristic of the model (Quinon, 2025). This creates a fundamental legal dilemma: is non-deterministic behaviour of an AI system legally acceptable, or does it constitute a breach of obligation?

3.2 Contractual Liability and the Problem of Performance

In the context of contractual relationships (Law of Obligations), the key questions are:

- whether an AI system performs the contractual obligation;
- how to define the object of the obligation when outcomes are probabilistic;
- who bears the risk of result variability.

With classical software solutions, the contractual object is clearly defined: the software must perform a specific function in a precisely specified manner. With AI systems—particularly those offered as “intelligent assistants”—the object of the contract is often not a concrete result, but rather the best estimate or recommendation. Accordingly, the contractual obligation shifts from outcome to process. This transformation has serious consequences. If an AI system produces an incorrect or harmful outcome, the provider may argue that the system operated in accordance with its probabilistic nature and that no contractual breach occurred. Conversely, the user may argue that they legitimately expected a consistent and reliable response, especially if the system was marketed as “accurate,” “reliable,” or “safe” (Devetzis & Samaras, 2024). This leads to legal uncertainty and indicates the need for more precise regulation of contracts involving AI systems, including:

- an explicit statement of the level of reliability;
- the definition of acceptable deviation;
- the allocation of risks arising from probabilistic behaviour.

A framework for assessing the conformity of digital services with the contract—including services based on artificial intelligence—is provided by Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, which governs the conformity of digital content and services and the remedies available to consumers in the event of a lack of conformity (Directive (EU) 2019/770).

3.3 Non-Contractual Liability and Causation

Even more complex issues arise in the domain of non-contractual (tort) liability. The classical model of liability for damage requires the existence of:

- damage;
- unlawful conduct;
- a causal link;
- fault (or strict liability).

For AI systems, the element of causation is particularly problematic. If the same input can generate different outputs, the question arises whether a specific harmful outcome can be regarded as a necessary consequence of the system’s behaviour, or merely as one among statistically possible outcomes (Wachter, Mittelstadt & Russell, 2021).

For example, if an AI system recommends a particular medical or financial course of action that leads to harm, can it be claimed that the harm was “caused” by the system, or is it a legitimate but unfavourable outcome of probabilistic inference? Traditional causation tests (*conditio sine qua non*) are difficult to apply in such situations. This problem gives rise to the idea of facilitated proof or presumed causation for AI systems, which has also been recognized in contemporary EU regulatory initiatives (European Commission, 2024).

3.4 Consumer Protection and Legitimate Expectations

In consumer law, a key concept is the legitimate expectation of the average consumer. Consumers are entitled to expect that a product or service will function in a reasonably predictable manner and in accordance with its intended purpose. However, the average consumer is often unaware of the probabilistic nature of AI systems. When using an AI tool, the consumer may assume that the system will provide the same answer to the same question, as is the case with classical software tools. If this does not occur, the consumer may consider themselves deceived or misled. This raises issues of unfair commercial practices and duties of transparency. If the manufacturer or provider of an AI service fails to clearly explain that the system does not guarantee consistent results, consumer rights may be infringed (Devetzis & Samaras, 2024).

3.5 Product Liability and the Concept of a “Defective Product”

Another important aspect concerns product liability. Traditionally, a product is considered defective if it does not provide the safety that can reasonably be expected. With AI systems, the question is whether non-determinism can be regarded as a defect. If non-determinism is an essential characteristic of the system, the manufacturer may argue that the product is not defective, but rather functions as designed.

However, if that characteristic leads to harm or serious legal uncertainty, the legislature may conclude that the product fails to meet standards of safety and reliability (European Parliamentary Research Service, 2025). This issue is particularly relevant in the context of the new EU framework—Directive (EU) 2024/2853 on liability for defective products, which repeals the earlier Directive 85/374/EEC. The new Directive retains strict (no-fault) liability as its core principle, but it expressly broadens the notion of a “product” to

encompass software, including artificial intelligence systems, and introduces presumptions that ease the burden of proof for the injured person in cases of technical or scientific complexity (Directive (EU) 2024/2853).

3.6 The Need to Redefine Legal Standards

All of the above indicates that the legal system must evolve to address the challenges posed by the non-determinism of AI systems. Classical concepts such as complete predictability, binary correctness, and clear causation are no longer sufficient. Instead, legal theory increasingly refers to:

- standards of reasonable probabilistic behaviour;
- risk-based liability rather than fault-based liability;
- functional responsibility of actors who exercise control over an AI system.

This transformation has a particularly strong impact on the Law of Obligations, because it requires a redefinition of the very notion of an obligation: the obligation is no longer a guaranteed outcome, but rather due diligence in managing probabilities.

4. EU AI ACT – Legal Analysis in the Context of the Non-Determinism of AI Systems

By adopting the EU Artificial Intelligence Act (AI Act), the European Union has established the first comprehensive normative framework aimed at regulating the development, placing on the market, and use of artificial intelligence systems in order to manage the risks these systems generate. The AI Act, published in the Official Journal of the EU on 12 July 2024 after years of negotiations (Regulation (EU) 2024/1689), represents an attempt to harmonize rules across the Union and has the potential to become a global standard for AI regulation due to the so-called “Brussels effect”—the phenomenon whereby EU regulations often influence non-European jurisdictions through economic and legal channels (EU Artificial Intelligence Act, 2024). In the legal context of AI system non-determinism, the AI Act pursues several objectives: reducing risks through a harmonized classification of systems by risk level; imposing obligations on operators and providers; improving transparency; and enabling oversight and accountability mechanisms. However, its application and interpretation with respect to non-deterministic systems—such as generative large language models (LLMs)—raises numerous legal questions concerning

how traditional legal institutes of the law of obligations and liability adapt to probabilistic outputs that are not deterministic.

The AI Act is based on a risk-based approach, under which systems are classified into several categories: unacceptable risk, high risk, limited risk, and low or minimal risk. Systems that present an unacceptable risk are prohibited, while those considered high-risk are subject to stringent requirements before they may be placed on the EU market. This approach aims to ensure a high level of protection for citizens' rights and safety, with particular emphasis on transparency, documentation, and responsible governance of models that may significantly affect fundamental rights. In this way, the AI Act sets legal standards oriented toward risk minimization, while simultaneously having to address inherent properties of AI systems—such as non-determinism—that conflict with traditional legal assumptions regarding the predictability of software behaviour.

One of the key questions in analyzing the AI Act in the context of non-determinism is how the law treats systems whose results are not always the same for the same input, as a product of statistical and probabilistic learning methods. The AI Act imposes obligations on providers of high-risk systems to establish and maintain systems for collecting, managing, and retaining technical documentation and activity logs so that system behaviour and its impact on users and third parties can be traced (Ivković, 2025). These obligations are intended to enable evaluation of model performance and behaviour, but they do not guarantee automatic legal liability for every possible deviating outcome. The Act requires providers to implement procedures for risk assessment and risk mitigation, including testing prior to deployment and continuous monitoring during operation. At the organizational level, these obligations can be operationalized through auditable AI governance and management system structures (ISO/IEC 42001:2023). This aligns with established AI risk governance approaches that operationalize risk identification, measurement, and mitigation across the AI lifecycle (NIST, 2023). This framework indicates a shift from the traditional understanding of software as a deterministic product toward understanding AI systems as entities whose performance must be assessed and supervised through empirical indicators, statistical tests, and compliance assessment against risk standards (Gasparri, 2025). In addition, AI-specific risk management guidance provides practical structure for identifying, assessing, and treating risks throughout the AI lifecycle (ISO/IEC 23894:2023).

Transparency and explainability are two further components of the AI Act that are directly connected to the problem of non-determinism. For high-risk

systems, the Act requires that users be enabled to understand the rationale of a decision, i.e., to receive an explanation of outcomes in an intelligible format, particularly where decisions affect people's rights (e.g., employment, credit scoring, health decisions). These requirements are significant because they provide a legal framework for reducing the negative consequences of non-determinism—although they cannot eliminate the probabilistic nature of the model itself, they can ensure that embedded uncertainty, expected outcome variability, and the limits of model reliability are clearly communicated to the user. Transparency is thus legally positioned as a core component of responsible AI development and use, thereby partially addressing non-determinism by requiring providers to supply clear information on performance and on the risks associated with managing AI systems (Ivković, 2025).

Another important aspect of the AI Act is its extraterritorial application—clearly articulated in provisions that allow the Act to apply not only to providers and users within the EU, but also to entities outside the EU whose products have market impact or affect the rights of EU citizens. This is particularly important in light of the global nature of AI technology, where large models and services often originate beyond the EU's legal boundaries. The AI Act's extraterritorial reach reflects the EU's legal ambition to set global norms, but it also raises the question of how standards of liability for non-deterministic model behaviour are aligned across jurisdictions when other legal systems do not recognize or regulate AI in a comparable manner. This feature creates an imperative to align domestic legal frameworks with EU standards and may have consequences for international trade and legal practice outside the EU.

Nevertheless, despite its comprehensive framework, the EU AI Act—as many legal scholars commenting on it have noted—faces criticism regarding its capacity to effectively address legally relevant challenges posed by probabilistic AI systems. For instance, analyses of the AI Act indicate that, although it introduces strict obligations for high-risk systems and a risk-based approach, it does not fully resolve questions relating to legal liability in cases of harm or negative outcomes resulting from inherent model variability. These critics argue that the AI Act should include more detailed mechanisms that would provide legal predictability and security for users with respect to probabilistic outcomes, especially where a model may generate objectively inaccurate results that harm the rights or interests of data subjects.

Another paper in *Pravo – teorija i praksa* addressing the AI Act highlights the legal implications of the risk-based approach to regulating artificial intelligence. The paper points out that the AI Act recognizes specific characteristics of machine learning and autonomous behaviour, and that the risk-based approach

enables differentiated treatment of systems according to the potential danger they may cause. The author also notes that a broad definition of AI may lead to over-regulation, because certain characteristics of artificial intelligence do not appear in all types of algorithms. At the same time, the AI Act imposes technical documentation and record-keeping obligations that are important for oversight, yet a legal gap remains regarding what happens when a system operates within its technical limits but nevertheless produces a harmful outcome due to the inherent logic of a probabilistic model (Mladenov, 2023).

A particular legal challenge concerns liability for damage in situations where AI non-determinism leads to a harmful outcome—for example, when an AI model provides an inaccurate diagnosis in a medical context or inadequate legal advice. Traditional rules of liability, both contractual and non-contractual, proceed from the assumption that the precise cause and responsibility can be clearly determined. However, probabilistic models with inherent non-determinism make it difficult to determine whether harm is the result of a “defect” in the system or of legitimately foreseeable variation in performance. The AI Act seeks to mitigate this problem through obligations of risk assessment and mitigation, as well as requirements for system oversight, but it still lacks specific legal mechanisms that directly address the problem of associating a harmful outcome with a model’s probabilistic behaviour.

On the other hand, the AI Act also contains provisions relating to fundamental rights, including protection against discrimination, data privacy, and the transparency of decisions made by automated systems. These provisions are particularly important where AI systems, such as machine-learning models, make decisions affecting individuals’ living conditions or rights. The EU legislature has attempted to capture these aspects normatively as well, yet the challenge remains of how to implement and supervise protection standards when inherent model non-determinism complicates evaluation and the attribution of responsibility for negative outcomes to legal subjects.

5. Liability and Sanctions under EU Law in Cases of AI System Errors

Within the legal system of the European Union, liability for damage caused by artificial intelligence—including damage arising from the non-deterministic behaviour of AI systems—is regulated through a combination of the AI Act and the separate proposal for an Artificial Intelligence Liability Directive (AI Liability Directive). The key legal question is: who is responsible when an AI system produces an unpredictable or inaccurate result that leads to harm? Under

the EU approach, primary responsibility rests with the “provider” and the “user of a high-risk AI system,” where the provider is defined as the entity that develops or places the system on the market, and the user as the party that employs it for professional purposes. Where damage occurs, and it is established that the AI system failed to comply with statutory obligations—such as transparency, risk management, oversight, and safety—the provider may be directly liable, even in the absence of intent or negligence. The AI Act also contains a tiered penalty regime in which the level of the administrative fine depends on the nature of the infringement (Article 99). For the most serious infringements, namely the placing on the market or use of prohibited AI practices under Article 5, administrative fines of up to EUR 35 million or, where the offender is an undertaking, up to 7% of its total worldwide annual turnover for the preceding financial year may be imposed, whichever amount is higher (Article 99(3)). Non-compliance with obligations applicable to high-risk systems and to other operators—other than the obligations laid down in Article 5 - is subject to lower fines of up to EUR 15 million or up to 3% of total worldwide annual turnover (Article 99(4)), while the supply of incorrect, incomplete, or misleading information to the competent authorities is subject to fines of up to EUR 7.5 million or up to 1% of turnover (Article 99(5)). Non-determinism as a technical characteristic does not exempt actors from liability; rather, it entails stricter obligations for providers regarding control and documentation of system behavior, precisely in order to ensure legal certainty and protect users and third parties from the harmful consequences of AI-driven decisions. However, the proposed AI Liability Directive was subsequently withdrawn by the Commission—first announced in the Commission Work Programme for 2025 (11 February 2025) and then formally, through a notice published in the Official Journal of the EU (OJ C/2025/5423, 6 October 2025)—so that specific rules on non-contractual liability for damage caused by artificial intelligence were not adopted. Liability questions are thereby left to be addressed through other instruments, primarily the strict-liability regime established by Directive (EU) 2024/2853 on liability for defective products, as well as through national law mechanisms (European Parliament Legislative Train, 2025).

6. The Legal Framework of AI Non-Determinism in Serbia

Although the Republic of Serbia still does not have a specific statute that explicitly regulates artificial intelligence, the legal consequences of the use of AI systems—especially those exhibiting non-deterministic behaviour—can be assessed within the existing normative framework, primarily through the Law on

Obligations (1974) and the Law on Consumer Protection (2026). These statutes, although enacted in an era of deterministic technological systems, continue to constitute the basis for legal assessment of liability, damage, and the protection of the weaker contracting party in the context of contemporary AI technologies.

The Law on Obligations (1974) proceeds from the assumption that the object of an obligation is determinable, predictable, and verifiable, and that the debtor is liable for non-performance or improper performance where the result deviates from what was agreed. However, in AI systems whose behaviour depends on probabilistic models and statistical estimation, the outcome is not always identical for the same input data. This calls into question the classical understanding of performance of an obligation, because deviations in results do not necessarily constitute an error, but may instead be an inherent feature of the system. This opens the need for a new interpretation of the concept of due care and the allocation of risk in obligations relationships that involve AI systems.

On the other hand, the Law on Consumer Protection (2026) provides a basis for considering the legitimate expectations of users of AI products and services. If the consumer is not clearly informed that an AI system may produce different results for the same inputs, this may lead to a violation of the right to information and the prohibition of misleading commercial practices. A particularly significant question is whether an AI system may be regarded as a defective product if its non-determinism leads to harmful or unreliable outcomes.

In that sense, the topic of this manuscript directly points to the need to align domestic legislation with contemporary technological realities, as well as to the necessity of future normative intervention which would—following the model of the EU AI Act—more precisely regulate the legal consequences of deploying probabilistic AI systems in the Republic of Serbia.

7. Conclusion

This paper has shown that the development of probabilistic artificial intelligence systems seriously challenges the basic postulates upon which classical programming rests, particularly the principle of determinism. This fact has a direct impact on legal systems that traditionally rely on the predictability and verifiability of the behaviour of technical systems. Through an analysis of the functional architecture of AI models—especially the role of the softmax function, sampling strategies, and response temperature—it has been established that these systems produce variable results even under

identical inputs, which raises legal problems concerning liability, causation, and reliability. The legal analysis of the EU AI Act confirms that the European legislature has recognized this specificity and responded with a normative framework based on risk classification, technical documentation, and transparency obligations. However, the question remains open as to how non-determinism should be treated legally in cases where it proves harmful to users or third parties. In the context of the Republic of Serbia, an analysis of existing legislation—particularly the Law on Obligations and the Law on Consumer Protection—indicates that these statutes, although formally applicable, were not designed for technologies operating on principles of stochastic inference. The absence of specific rules governing liability for probabilistic outcomes points to the need for reform of the domestic legal framework, following European approaches. The paper opens space for further research aimed at defining new legal constructs—such as “probabilistic liability,” “technical legitimate expectations,” and “functional accuracy”—which could serve as a foundation for legal adaptation in the age of artificial intelligence. In this regard, legal scholarship has a key role in developing a model that enables a balance between technological progress and legal certainty.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

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IZVAN DETERMINIZMA – PREISPITIVANJE PRAVNE ODGOVORNOSTI U DOBU PROBABILISTIČKIH VI SISTEMA

APSTRAKT: Ovaj rad razmatra suštinsku razliku između klasičnog determinističkog programiranja i savremenih sistema veštačke inteligencije, sa posebnim naglaskom na pravne posledice koje proizlaze iz nedeterminističkog ponašanja VI sistema. Analizom osnovnih postulata programiranja, *Softmax* funkcije kao ključnog mehanizma generisanja izlaza, kao i stohastičkih faktora prisutnih u procesima treniranja i generativne produkcije, pokazuje se da veštačka inteligencija odstupa od uobičajenih očekivanja predvidivosti, što ima dalekosežne implikacije na obligaciono pravo, zaštitu potrošača i režime vanugovorne (deliktne) odgovornosti. Pored teorijskog pregleda, rad pruža i pravnu analizu Akta Evropske unije o veštačkoj inteligenciji (EU AI Act) u kontekstu nedeterminisanosti, ukazujući na regulatorne napore da se ova osobina VI modela normativno obuhvati kroz sistem klasifikacije rizika, kao i kroz tehničke i organizacione zahteve. Rukopis ima za cilj da doprinese interdisciplinarnom razumevanju izazova povezanih sa veštačkom inteligencijom, pozicionirajući pravnu nauku kao ključnog aktera u izgradnji novog modela odgovornosti u digitalnom dobu.

Ključne reči: *veštačka inteligencija, nedeterminisanost, obligaciono pravo, EU AI Act, zaštita potrošača.*

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LEGAL FRAMEWORK OF SUSTAINABILITY DUE DILIGENCE REGIME AS A NEW STANDARD OF CORPORATE RESPONSIBILITY

ABSTRACT: The development of the sustainability due diligence regime in European Union law has opened a debate on whether this regulatory framework introduces a new standard of corporate responsibility or represents an extension of the existing concepts of professional and fiduciary diligence. The objective of our paper is to analyze the legal framework of the sustainability due diligence regime, established by Directive (EU) 2024/1760 on corporate sustainability due diligence, which introduces a qualitatively new standard of corporate responsibility. The findings indicate that the sustainability due diligence regime introduces a preventive and procedural model of risk management that extends the relevant sphere of responsibility of companies to value chains. Although certain normative elements compatible with this approach already exist in the law of the Republic of Serbia, the existing legal framework does not recognize such a systemic model of responsibility.

Keywords: *sustainability due diligence, corporate responsibility, corporate governance, Directive (EU) 2024/1760.*

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1. Introduction

In modern European corporate law, the question of the responsibility of companies for the negative impacts of business operations on human rights and the environment has become the subject of intense regulatory and doctrinal discussion. Particular attention was drawn to the development of the concept of sustainability due diligence, which received a normative form in European Union law with the adoption of Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence. This regulatory framework has raised the question of whether it is about introducing a new standard of corporate responsibility or about expanding the existing concepts of professional and fiduciary care. “The research shows the difference that human rights due diligence (HRDD) can make in terms of identifying adverse human rights impacts of both the company as well as of those which are part of its business relationships” (McCorquodale, Smit, Neely & Brooks, 2017, p. 195).

Different viewpoints on the legal nature of this regime have developed in legal theory. One part of the authors considered that it is an evolution of traditional standards of corporate governance, whereby the existing duties of management are reinterpreted in the light of long-term business sustainability. There were problems in the corporate governance of financial institutions and one mechanism that makes directors accountable is the provision of duties imposed on them by the law (Keay, 2010). In contrast, other authors indicated that due attention to sustainability introduces a qualitatively different model of responsibility, based on preventive risk management and the extension of the relevant sphere of responsibility to value chains as due diligence is at the heart of the United Nations Guiding Principles on Business and Human Rights (Bonnitcha, 2017). This theoretical dilemma opened up the question of the relationship between the new regulatory requirements and the existing institutes of corporate and obligation law.

“In attempting to establish market-based economy in the post socialist period, Serbia has faced the serious challenges of creating the economic system, forming institutions and establishing incentives in order to improve economic performances and corporate governance has been recognized as a crucial part of the reform process” (Denčić-Mihajlov, 2006, p. 169). In the law of the Republic of Serbia, the standard of care in obligation relationships was traditionally formulated through the standard of care of a good businessman, while in corporate law, the standard of due care of management was developed through fiduciary duties and the framework of business assessment. However, in the domestic doctrine, these institutes are mostly analyzed within the internal relations of

society and its immediate legal obligations, without a systematic consideration of responsibility in value chains. Therefore, the aim of this research is to analyse the legal framework of the sustainability due diligence regime, between the due diligence regime of sustainability and the existing standards of professional and corporate responsibility has gained special importance in the context of the process of harmonizing domestic law with the *acquis* of the European Union.

2. Due diligence of sustainability as a new standard of responsibility

The modern regulatory concept of sustainability due diligence did not originate exclusively within the framework of European Union law, but developed in the broader international regulatory context of responsible business. Its basic elements are formulated through international standards, especially through the UN Guiding Principles on Business and Human Rights (Rasche & Waddock, 2021) and the OECD Due Diligence Guidance for Responsible Business Conduct from 2018.

a) Due diligence as a normative standard, not an ethical obligation

Modern sustainability due diligence was developed at the intersection of international standards of human rights, corporate governance and responsible business, but its legal character has changed qualitatively in the last decade. The initial phase relied on “soft-law” instruments which, although non-binding, established the standard of expected behavior of companies in relation to risks to human rights and the environment. A key turning point is the UN Guiding Principles on Business and Human Rights (UNGP), which introduce the concept of due diligence as a process of identifying, preventing/mitigating, monitoring and reporting on negative impacts, with the emphasis that the focus must be on “risk for rights holders”, and not exclusively on reputational or financial risk for the company (Roos, 2013).

In legal theory, this distinction is further normatively sharpened: due diligence is increasingly understood as a shift from managing “social risk” to managing harmful impacts on human rights, thus transforming the concept from a corporate policy into a standard of behavior with elements of legal responsibility (Fasterling, 2017). In this sense, due diligence is no longer a “declarative obligation” or a mere adoption of ethical codes, but a structured and continuous process that requires reasonably expected, proportionate and documented measures in relation to identified risks.

The operationalization of this standard in a normatively usable form is further developed by the OECD Guidelines for Due Diligence in Responsible Business Conduct, which standardize a phased, risk-based approach, applicable to one's own activities, business relationships and supply chains (OECD, 2018). The common denominator of the UNGP and the OECD framework is the understanding of due diligence as a process, not a one-time action: the relevant question is not whether the company has “adopted a policy”, but whether it has established a risk management system that can be evaluated through its outcomes and effectiveness (Bonnitcha, 2017).

b) Elements of the new liability standard in the EU due diligence regime

A normative step forward in EU law was achieved with the adoption of Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence Directive (CSDDD), which constitutes due diligence as a binding regime, including the obligations of risk management, supervision, reporting and responsibility of companies in relation to negative impacts on human rights and the environment in their own activities, activities of related companies and value chains (European Parliament & Council, 2024). In analytical terms, the standard of responsibility arising from the due diligence regime can be broken down into four key elements.

(1) Expanding the scope of the relevant sphere of responsibility (value chain reach).

Unlike traditional models of responsibility, which are usually related to the immediate sphere of control (the company and its internal processes), due diligence functionally extends the “relevant sphere” to business relationships and segments of the value chain in which harmful impacts occur or may occur. This also changes the legal logic of responsibility: the focus is not on formal control, but on predictability of risks and reasonably expected measures that a company can take within its business relationships (De Schutter, 2020).

(2) Preventive character of the obligation (ex ante standard).

Classic tort models of responsibility generally activate consequences after the damage has occurred, where the normative analysis revolves around the breach of duty and causation. The due diligence regime shifts the focus: the obligation is primarily preventive and based on risk management. Such

a construction brings due diligence closer to the “duty of conduct” standard, whereby the relevant question becomes whether the company acted reasonably and proportionately in relation to the risks, and not exclusively whether damage occurred (Bonnitcha, 2017; OECD, 2018).

(3) Continuous and procedural character (systems-based duty).

Due diligence is conceived as a continuous process, which normatively means that compliance cannot be proven by a one-time act, but by establishing and maintaining a functional system. At that point, there is a clear difference between “procedural” and “material” understanding of due diligence: the formal existence of policies is not enough if they are not embedded in operational processes, contractual mechanisms, supplier oversight and performance monitoring systems. Fasterling (2017) points out that HRDD cannot be reduced to an instrument of reputational risk, but must be integrated as a corporate goal that determines strategy and operational decisions.

(4) Integration into corporate governance (governance linkage).

The due diligence regime implies that governing bodies play an active role in establishing, monitoring and auditing processes, thus linking the standard of care to fiduciary duties, business judgment and management responsibility. This link is key to doctrinal understanding: due diligence functions as a “bridge” between the standards of company behavior and the standards of care of governance structures, as sustainability and human rights risks are increasingly introduced as elements of business strategy and corporate oversight (McCorquodale et al., 2017).

3. Standard of professional and corporate responsibility in the law of the Republic of Serbia

In Serbian literature, corporate governance is mainly defined through legal and economic perspectives. Vasiljević (2013, p. 27) explains that, from a legal point of view, corporate governance represents a specific agency relationship between management and a joint-stock company, which is established through contracts and legal regulations. From an economic standpoint, corporate governance is about the internal and external systems that oversee a company to safeguard shareholders’ interests and help the company generate profits (Todorović, 2009). In domestic obligation law, the

standard of professional responsibility is traditionally manifested through liability for damage according to the Law on Obligations (1978), where the general standard is that the debtor must perform the obligation with the care of a good businessman (Article 18). More precisely, the key dilemma in this context is whether the standard of professional responsibility refers to results, ie. business outcomes and damages, or solely on the behavior of the debtor in the given circumstances.

Corporate management in the Republic of Serbia is a more recent topic and it is not sufficiently applied in the business of public companies. Our experience in the application and improvement of corporate management covers only a few years, while in Western countries this experience is much longer. The introduction of corporate rules and corporate management of public enterprises of the national legal framework is a matter of national importance (Vukolić, 2019). The ultimate goal of the existence of the public sector is the satisfaction of the needs of the wider social community, that is, the protection of the interests and rights of individuals who make up the community (Vukosavljević, Kaputo, Tešić & Vukosavljević, 2021). For example, one of the most significant developments in recent Serbian corporate governance is the implementation of the Act on Management of Companies Owned by the Republic of Serbia (2023), as it aims to advance corporatisation, improve management practices, and transform the legal structure of state-owned enterprises. Todorović & Brašić Stojanović (2024) point out that “despite the effective solutions of the Law, some of its provisions are still not completely in line with the OECD Guidelines, as this primarily pertains to stipulations on the transparency of Supervisory Board members’ appointment procedure, on independence of the Supervisory Board members and on publicly proclaimed political aims of state-owned enterprises” (p. 2011).

However, the sustainability due diligence standard cannot be reduced to such a classification, because CSDDD requires not only attention to the damage that has occurred, but also preventive identification and management of risks even before they materialize. In other words, while the domestic standard assesses behavior after the outcome, the standard from the CSDDD is conceived as an *ex ante* duty of conduct, thereby losing the distinction between traditional liability for damage and rights that regulate future prevention of harmful consequences.

4. Fiduciary duties of management and business judgment

In the framework of corporate law, the standard of due care is manifested through the fiduciary duties of the members of the management body. The Law on Business Companies (2011, Article 63) prescribes the obligation of management members to act conscientiously, with the attention of a good businessman and in the best interest of society, which represents the basic normative framework of the responsibility of management structures. In domestic legal doctrine, it is emphasized that these duties aim to ensure loyal and reasonable management of society, but also to limit the possibility of abuse of management powers. The principle of due care is connected with the concept of business judgment (business judgment rule), which implies that the court does not review the business decisions of the administration if they were made in good faith, based on adequate information and without a conflict of interest (Arsić, Milićević & Milačić, 2009).

In the true theory, it is emphasized that this standard of care model is primarily oriented towards intra-corporate assessment — that is, towards the assessment of decisions made by management within its own strategic goals — instead of towards the assessment of the impact of those decisions outside the boundaries of society (eg in supply chains or impact on third parties). Our standard of business assessment applies to decisions that are within the management's discretion and that are not unduly harmful to society, but does not include the obligation to evaluate those decisions in relation to social, environmental or human rights risks.

On the contrary, the CSDDD explicitly requires that governing bodies include sustainability criteria in the management system, whereby the standard of corporate care ceases to be closely tied to the interests of society and moves to a broader standard of responsibility towards various interest groups. Such expansion of fiduciary duties in the domain of sustainability represents a significant normative challenge for domestic corporate law, as issues of impact on value chains cannot be treated only as a business judgment within the governing body.

5. The relationship between professional and corporate attention

The question of who actually controls modern corporations, and for what reasons, has become one of the key power relationships in today's capitalism, while the regulation of corporate governance in the EU shows that these rules

are not only technical or legal matters, but also have an important political dimension (Horn, 2011). In the theory of legal responsibility, it is pointed out that the concept of good business judgment aims to allow management a certain degree of creative discretion, but that discretion does not imply the obligation to integrate social and environmental risks into its deliberations — this obligation arises only when the legal standard explicitly requires it. In the context of the CSDDD, the standard of due care has an element of a strict duty of preventive action, which cannot be equated with the freedom of business judgment.

Similar dilemmas about the relationship between the traditional fiduciary duties of management and the new requirements of sustainability are recognized in the legal literature of the countries of the region. In those analyses, it is emphasized that the integration of sustainability standards into corporate governance does not necessarily mean abandoning the existing institutes of corporate law, but rather their reinterpretation in light of the EU legal framework. “The experiences of the EU Member States and developments in legal and business practices in the EU show that, although a legislative and regulatory framework for the application of the comply-or-explain principle exists, the true will of company bodies and all external stakeholders is needed to apply it in practice” (Horak & Bodiřoga-Vukobrat, 2011, p.199).

The results of the comparative analysis can be systematized through the basic elements of the responsibility standard shown in table 1.

Table 1. Comparative overview of liability standards

Element of responsibility	Traditional standard in Serbian law	Sustainability Due Diligence Regime
Character of obligation	Post factum liability for damage	Preventive risk management
Scope of responsibility	Relations within society and immediate legal relations	Expansion to value chains and business partners
Standard function	Professional due diligence and business judgment	Integration of sustainability management into corporate governance

Source: Authors’ systematization based on the Law on Obligations (1978), Law on Business Companies (2011), Directive (EU) 2024/1760, Bonnitcha (2017), and OECD (2018).

The comparative analysis showed that the sustainability due diligence regime does not only represent a regulatory expansion of the existing liability institutes, but introduces a structurally different model of legal responsibility based on preventive risk management and the expansion of the relevant sphere of responsibility to value chains, which raises the question of the need for their doctrinal reinterpretation in the national legal framework. The sustainability due diligence regime indicates a wider transformation of the corporate responsibility model. Instead of the traditional model of post factum liability for damage, the modern regulatory approach increasingly emphasizes a preventive model.

6. Conclusion

This paper analyzed the relationship between the sustainability due diligence regime, established through Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence, and the existing institutes of professional and corporate responsibility in the national legal framework. The analysis showed that the sustainability due diligence standard introduces a significant expansion of the traditional concept of due diligence, especially through the preventive nature of obligations, the extension of responsibility to value chains and the integration of sustainability into corporate governance. By the Law on Business Companies (2011) our country is closer to international integration, but it is certainly necessary to improve legal solutions in accordance with the world corporate practice. “The implementation of basic standards Corporate governance and company law of the Republic of Serbia listed in the OECD Principles of Corporate Governance, which will speed it up the economic development of the Republic of Serbia” (Dukić Mijatović, 2011, p. 15).

The findings confirm that the domestic legal system already contains certain normative bases that enable the interpretive integration of these standards, primarily through the institution of professional attention and fiduciary duties of management. However, compared to the due diligence regime of sustainability in European Union law, it is evident that the existing institutes of domestic law are not conceived as a systemic risk management mechanism in value chains, nor as a continuous process of preventive action. The scientific contribution of the work is reflected in the systematic analysis of the relationship between the standards of sustainability due diligence and the existing institutes of obligation and corporate law of the Republic of Serbia, which indicates the need for their potential normative adaptation in the process of harmonization with European Union law.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

Conceptualization, D.V. and D.V.; methodology, D.V. and D.V.; resources, D.V. and D.V.; formal analysis, writing – original draft preparation, D.V. and D.V.; writing – review and editing, D.V. and D.V. All authors have read and agreed to the published version of the manuscript.

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PRAVNI OKVIR REŽIMA DUŽNE PAŽNJE ODRŽIVOSTI KAO NOVI STANDARD KORPORATIVNE ODGOVORNOSTI

APSTRAKT: Razvoj režima dužne pažnje održivosti u pravu Evropske unije otvorio je debatu o tome da li ovaj regulatorni okvir uvodi novi standard korporativne odgovornosti ili predstavlja proširenje postojećih koncepata profesionalne i fiducijarne pažnje. Cilj je analizirati pravni okvir režima dužne pažnje održivosti, uspostavljenog Direktivom (EU)

2024/1760 o dužnoj pažnji korporativne održivosti, koji uvodi kvalitativno novi standard korporativne odgovornosti. Nalazi ukazuju na to da režim dužne pažnje održivosti uvodi preventivni i proceduralni model upravljanja rizicima koji proširuje relevantnu sferu odgovornosti kompanija na lance vrednosti. Iako određeni normativni elementi kompatibilni sa ovim pristupom već postoje u pravu Republike Srbije, postojeći pravni okvir ne prepoznaje takav sistemski model odgovornosti.

Ključne reči: *dužna pažnja održivosti, korporativna odgovornost, korporativno upravljanje, Direktiva (EU) 2024/1760.*

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DISCRIMINATION AND HATE SPEECH AGAINST MUSLIM REFUGEES – LEGISLATION AND PRACTICE

ABSTRACT: This paper examines discrimination and hate speech directed at Muslim refugees in contemporary democratic societies, with particular focus on the gap between formally guaranteed human rights and their actual implementation in practice. Although international and national legal frameworks guarantee freedom of religion, equality, and refugee protection, Muslim migrants increasingly experience stigmatization, exclusion, and hostility in everyday social, political, and institutional contexts. The study proceeds from the premise that these phenomena should not be understood as isolated prejudice or sporadic xenophobia, but rather as a structural and systemic phenomenon embedded in political discourse, media narratives, and administrative practices. Drawing on interdisciplinary theoretical perspectives from law and sociology, the research conceptualizes discrimination as cumulative, institutional, and intersectional, operating through both direct and indirect mechanisms. Using qualitative methods—including content and discourse analysis, comparative case studies, and secondary empirical data—the paper analyzes developments in Germany, the United States,

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and Australia to identify recurring patterns of migration securitization, labor market exclusion, and symbolic stigmatization of Muslim refugees. Particular attention is devoted to the role of hate speech and digital platforms in normalizing hostility and legitimizing restrictive migration policies.

Keywords: *discrimination, hate speech, Islamophobia, migration management, human rights protection.*

1. Introduction

Freedom of religion or belief constitutes one of the foundational pillars of contemporary international human rights law. It is explicitly guaranteed under Article 18 of the Universal Declaration of Human Rights (1948) and reaffirmed in Article 18 of the International Covenant on Civil and Political Rights (1966), as well as subsequent international instruments prohibiting discrimination based on religion or belief. These norms are intended to protect individuals regardless of their faith affiliation and apply equally to believers, non-believers, and religious minorities. In principle, therefore, modern legal systems recognize religious pluralism as a necessary precondition for democratic coexistence.

However, despite the existence of comprehensive legal safeguards, the lived reality of many migrants and refugees—particularly those identified as Muslim—reveals a growing discrepancy between formal rights and practical implementation. Across Europe, North America, and Australia, Muslim refugees are increasingly exposed to discrimination, stigmatization, and hostility that undermine their legally guaranteed protections. Rather than being perceived primarily as individuals fleeing violence and persecution, they are frequently framed as security risks, cultural outsiders, or demographic threats. This transformation of refugees from rights-bearing subjects into objects of suspicion marks one of the most significant contradictions of the contemporary human rights regime.

Recent scholarship emphasizes that such exclusion is not merely the result of isolated prejudice or sporadic xenophobia. Instead, it reflects a broader process commonly described as Islamophobia—a multidimensional system of cultural, political, and institutional practices that portray Islam and Muslims as inherently incompatible with Western democratic values. Islamophobia operates through negative stereotyping, racialization, and the construction of Muslims as a monolithic and threatening “Other,” thereby legitimizing discriminatory measures in public policy, employment, and

everyday social interactions (Acim, 2019). Rather than addressing specific behaviors, this framework attributes fixed characteristics to an entire religious group, facilitating collective blame and generalized fear.

Empirical studies further demonstrate that these narratives have tangible consequences. Refugees routinely report discrimination in employment, housing, and public services. Evidence from refugee communities shows significant levels of labor market exclusion and everyday hostility, indicating that stigmatization translates into material disadvantage and reduced social integration (Fozdar & Torezani, 2008). Such patterns suggest that Islamophobia functions simultaneously at symbolic and structural levels: it shapes both how refugees are represented and how they are treated.

2. Aim and Methodology

The aim of this paper is to analyze manifestations of hatred and discrimination directed at Muslim refugees and migrants in contemporary societies and to demonstrate the gap between formally established human rights protections and their practical enforcement. The study seeks to identify mechanisms through which religious hostility is incited, normalized, and institutionalized in political discourse, public policy, and everyday life, while also evaluating existing international and national protection mechanisms.

The research adopts a qualitative, interdisciplinary approach combining:

- Content and discourse analysis of legal documents, international conventions, policy reports, and academic literature addressing Islamophobia, refugee protection, and discrimination;
- Comparative analysis of selected national contexts (Germany, United States, Australia, and EU member states) to identify recurring patterns of anti-Muslim sentiment;

This methodology enables a comprehensive understanding of discrimination as both a legal and socio-political phenomenon rather than as isolated incidents.

2.1. Operationalization of Discrimination in This Study

Building on the conceptual and theoretical foundations outlined above, this study adopts a multidimensional understanding of discrimination that integrates legal, sociological, and systemic perspectives. Rather than limiting discrimination to explicit prejudice or overt exclusion, the analysis

operationalizes discrimination as a set of observable institutional, discursive, and structural mechanisms that systematically disadvantage refugees and religious minorities, particularly Muslims.

First, discrimination is treated as differential treatment based on protected group membership, consistent with legal doctrine and classical definitions of unjustified unequal treatment (Radcliffe Richards & Lucas, 1985). This includes formal restrictions, unequal administrative procedures, or practices that treat refugees or Muslims less favorably in employment, housing, public services, or legal protection. Such direct forms correspond to the traditional legal understanding of discrimination on enumerated grounds (Mercat-Bruns, 2016).

Second, following contemporary anti-discrimination law, the study also includes indirect or disparate-impact discrimination, defined as formally neutral policies that disproportionately burden particular groups without objective justification (Collins, 2003; Mercat-Bruns, 2016). In the context of refugees, this may involve integration rules, labor market requirements, or security procedures that appear neutral but systematically restrict access to opportunities for religious or ethnic minorities. The analysis therefore assesses not only intent but also outcomes, recognizing that inequality may emerge from routine institutional practices rather than deliberate hostility.

Third, the study adopts a sociological and organizational perspective, conceptualizing discrimination as embedded in everyday decision-making processes within institutions. In line with Small and Pager (2020), discrimination is operationalized as differential treatment that may be intentional or unintentional and may arise through organizational routines, gatekeeping, or discretionary judgments. Consequently, the analysis examines patterns such as exclusion from employment, limited access to housing, or administrative delays as indicators of institutionalized disadvantage, even where explicit discriminatory intent cannot be demonstrated.

Based on these principles, discrimination in this study is empirically identified through two main interconnected categories of indicators:

- Institutional indicators – unequal access to employment, housing, welfare benefits, or legal protection;
- Policy indicators – restrictive or disproportionate asylum, security, or integration measures affecting specific religious or ethnic groups;

This multidimensional operationalization provides the analytical basis for the subsequent case studies. It enables the identification of discrimination not only where explicit hostility is visible, but also where exclusion emerges

through routine institutional practices and interconnected social processes that systematically disadvantage refugees and religious minorities.

3. Theoretical and Legal Framework: Understanding Discrimination against Refugees and Religious Minorities

In addition to general anti-discrimination principles, the protection of refugees and religious minorities is grounded in several binding international and regional legal instruments. Article 18 of the Universal Declaration of Human Rights (1948) guarantees freedom of thought, conscience, and religion, while Article 26 establishes the principle of equality and non-discrimination. These guarantees are further elaborated in the International Covenant on Civil and Political Rights (1966, ICCPR), particularly Articles 18, 19, 20, and 26, which simultaneously protect freedom of religion, freedom of expression, and prohibit advocacy of religious hatred constituting incitement to discrimination or violence.

At the regional level, the European Convention on Human Rights (1950, ECHR) provides protection through Article 9 (freedom of religion), Article 10 (freedom of expression), and Article 14 (prohibition of discrimination). The jurisprudence of the European Court of Human Rights has repeatedly emphasized that democratic societies are based on pluralism, tolerance, and broadmindedness, and that states have positive obligations to protect vulnerable groups from hate speech and discriminatory treatment. Furthermore, refugee-specific protection derives from the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, which prohibit discrimination based on race, religion, or country of origin and require states to ensure equal access to courts, education, employment, and public assistance.

In the European Union legal framework, the Charter of Fundamental Rights of the European Union (2000) prohibits discrimination on grounds including religion and ethnic origin (Article 21), while the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) establish minimum standards of protection against discrimination in employment and social life. These instruments demonstrate that the legal protection of refugees is not limited to humanitarian admission but includes broader obligations related to equality, dignity, and social inclusion. Nevertheless, the implementation gap between formal guarantees and everyday institutional practice remains one of the central challenges identified in contemporary scholarship.

At the normative level, the objectives of anti-discrimination law cannot be reduced to the simple principle of identical treatment. Collins (2003) argues that equal treatment alone may reproduce existing hierarchies when social starting positions are unequal; consequently, the broader aim of anti-discrimination law is better conceptualized as social inclusion—that is, enabling marginalized groups to participate fully in economic, social, and political life. From this perspective, discrimination concerns not only whether individuals are treated the same, but whether institutional arrangements systematically exclude particular populations from opportunities and resources. Formal equality may therefore coexist with substantive exclusion.

Sociological research further broadens this understanding by conceptualizing discrimination as a process embedded in organizational practices rather than solely in individual prejudice. Small and Pager (2020) define discrimination as differential treatment based on group membership that may be intentional or unintentional and that often operates through routine institutional decisions. This approach challenges the classical economic dichotomy between “taste-based” and “statistical” discrimination by demonstrating that many disparities cannot be explained solely by personal animus or imperfect information. Instead, organizational gatekeeping, network effects, and bureaucratic routines frequently generate unequal outcomes even when actors perceive themselves as neutral.

Importantly, contemporary theory increasingly conceptualizes discrimination as systemic rather than episodic. Reskin (2012) proposes a systems perspective, arguing that disparities across domains—housing, employment, education, health, credit, and criminal justice—are mutually reinforcing and constitute an integrated structure of cumulative advantage and disadvantage. Within such a system, inequality in one sphere generates disadvantages in others, creating feedback loops that sustain group-based disparities over time.

Empirical studies illustrate how these theoretical mechanisms operate in practice. Research on refugee integration demonstrates that discrimination is frequently experienced in everyday interactions with employers, landlords, and institutions. For example, studies of refugee communities report significant levels of employment discrimination and social exclusion even where formal legal protections exist (Fozdar & Torezani, 2008).

Taken together, these perspectives suggest several analytical principles relevant to the present study. First, discrimination should be conceptualized as structural, institutional, and cumulative rather than episodic or purely interpersonal (Reskin, 2012; Small & Pager, 2020). Second, legal equality of

treatment does not guarantee substantive inclusion, as formally neutral rules may perpetuate disadvantage (Collins, 2003). Third, multiple and intersecting identities—race, religion, and migrant status—intensify vulnerability and require analysis beyond single-category frameworks (Mercat-Bruns, 2016). Finally, discrimination frequently becomes embedded in organizational and policy practices rather than in overt hostility alone (Small & Pager, 2020; Acim, 2019).

4. Religious Hatred toward Refugees and Migrants: Comparative Case Studies

The rise of hostility toward Muslim refugees in contemporary Western societies cannot be explained solely through episodic xenophobia or isolated political radicalism. Rather, scholarship increasingly conceptualizes anti-Muslim discrimination as a structural and discursive phenomenon embedded within political rhetoric, media representation, and institutional practices. Islamophobia, in this sense, operates not merely as prejudice but as a systematic mode of racialization through which Muslims are constructed as culturally incompatible, socially dangerous, and politically suspect (Acim, 2019). By attributing static and negative characteristics to an entire religious group, this process legitimizes exclusion and provides moral justification for discriminatory policies.

A growing body of research demonstrates that Islamophobia intersects directly with migration governance. Refugees, especially those from Muslim-majority regions, are frequently reframed as security threats rather than rights-bearing individuals. This securitization transforms humanitarian protection into a matter of national defense, thereby normalizing restrictive policies and hostile public discourse (Watson, 2009). As a result, discrimination is not confined to interpersonal hostility but becomes institutionalized within legal and administrative frameworks.

4.1. Germany

Germany provides one of the clearest European illustrations of this dynamic. Following the 2015–2016 refugee influx, the country admitted the largest number of asylum seekers within the European Union. Although grounded in constitutional commitments to human dignity and international protection obligations, this policy provoked strong backlash from right-wing actors. Movements such as Alternative für Deutschland (AfD) and PEGIDA

systematically framed Muslim refugees as agents of “Islamization” and cultural erosion, portraying Islam as fundamentally incompatible with the German constitutional order (Rommel, 2017).

Empirical evidence further illustrates the social normalization of anti-Muslim sentiment in Germany. Reports of the European Commission against Racism and Intolerance (ECRI) and the European Union Agency for Fundamental Rights (2020, FRA) indicate a continued rise in anti-Muslim hostility, discriminatory rhetoric, and hate incidents across several European states. Also, reports of the ECRI additionally documented an increase in anti-Muslim hate crimes and discriminatory rhetoric during the post-2015 migration period.

The German Federal Anti-Discrimination Agency has also warned that individuals perceived as Muslim frequently experience unequal treatment in employment, housing, and access to services. Such findings support the argument that discrimination extends beyond isolated extremist incidents and increasingly affects institutional and everyday social relations.

Public opinion data reveal the normalization of such narratives. Surveys indicate that substantial proportions of the German population perceive Islam as a threat to national identity and question the belonging of Muslims within society (Alaverdov, 2020; Reuters, 2016). At the institutional level, these sentiments have coincided with increased deportations and stricter asylum practices, measures that critics argue contradict the constitutional protections of life, dignity, and freedom of religion (Selipsky, 2019). The European Commission against Racism and Intolerance (ECRI) has repeatedly warned that the trivialization of far-right ideologies correlates with rising anti-Muslim hate crimes and violent incidents (Council of Europe, 2020).

4.2. Comparative Patterns beyond Germany

Importantly, Germany is not an isolated case. Similar processes can be identified across other Western democracies, indicating that religious hatred toward refugees reflects broader transnational trends rather than country-specific anomalies.

In Australia, research on refugee well-being reveals that discrimination is experienced as a routine aspect of everyday life. Survey evidence shows that refugees frequently encounter unequal treatment in employment and social interactions, with nearly half reporting labor market discrimination. These findings illustrate how stigmatization translates into material exclusion, limiting opportunities for economic integration. Despite formal anti-discrimination

protections, negative public attitudes toward asylum seekers—particularly those perceived as Muslim—continue to shape institutional outcomes. Research conducted by Fozdar and Torezani (2008) demonstrated that many refugees in Australia reported experiences of discrimination in employment, housing, and everyday interactions. Nearly half of surveyed respondents perceived labor market discrimination as a significant barrier to integration, while many also described feelings of social exclusion and stigmatization linked to religious or ethnic identity.

These findings are particularly important because they reveal that formal legal protections alone do not necessarily eliminate structural barriers affecting refugees and migrants. Instead, discrimination frequently persists through informal institutional practices and negative social perceptions.

In the United States, the nexus between Islamophobia and refugee policy is even more explicit. Anti-Muslim advocacy networks have promoted the idea that Muslim migration constitutes a national security risk, linking refugees to terrorism or “civilization jihad.” These narratives have directly influenced policy decisions, culminating in executive actions such as travel bans targeting Muslim-majority countries and drastic reductions in refugee admissions (Watson, 2009). Analyses of federal practice further indicate that surveillance, “extreme vetting,” and selective border controls disproportionately affect Muslim communities, embedding religious suspicion within the administrative apparatus of the state.

At the cultural level, Islamophobia is reinforced by media and digital ecosystems. Studies of fringe social media platforms show that large volumes of online content portray Islam in derogatory or conspiratorial terms, frequently associating Muslims with violence, demographic replacement, or moral decline.

Across these contexts, similar mechanisms are observable. First, refugees are symbolically constructed as threats to security or cultural cohesion. Second, such constructions justify social and economic exclusion, including labor market discrimination and limited access to services. Third, political actors mobilize demographic or civilizational anxieties to gain electoral support. Finally, these narratives may crystallize into restrictive laws or administrative practices that institutionalize unequal treatment. Scholars describe this pattern as the transformation of Islamophobia into anti-Muslim racism, whereby a dominant group stabilizes power by designating a religious minority as a scapegoat (Acim, 2019).

Taken together, the German, American, and Australian examples demonstrate that the incitement of religious hatred toward Muslim refugees is

not episodic but systemic. Although legal frameworks such as constitutional guarantees, anti-discrimination statutes, and international refugee conventions formally protect rights, these mechanisms often fail to prevent exclusion when political and social narratives depict entire communities as inherently suspect. Consequently, addressing discrimination requires more than formal compliance with international standards. It demands confronting the discursive foundations of Islamophobia itself—namely, the narratives that equate Muslim identity with danger. Without challenging these constructions, legal protections remain largely symbolic.

5. Protection of Migrants from Hate Speech and Discrimination

The protection of migrants and refugees from hate speech and discriminatory expression presents one of the most contested dilemmas in contemporary human rights law. On the one hand, freedom of expression is widely regarded as a cornerstone of democratic societies and enjoys strong constitutional and international protection. On the other hand, states are simultaneously obligated to safeguard equality, dignity, and security for vulnerable populations, including migrants and religious minorities. The resulting tension is neither merely theoretical nor exceptional; rather, it lies at the structural core of modern constitutional orders, where liberty interests in speech frequently collide with equality interests in protection from hostility and exclusion.

Article 21 of the Charter of Fundamental Rights of the European Union (2000) explicitly prohibits discrimination based on religion, ethnic origin, or minority status, reinforcing broader European anti-discrimination standards. The Human Rights Committee emphasized in General Comment No. 34 (2011) that freedom of expression carries special duties and responsibilities, particularly where speech may incite discrimination, hostility, or violence against vulnerable groups. Within EU anti-discrimination law, the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) establish minimum standards of protection against unequal treatment in employment and social life.

From a classical First Amendment perspective, even highly offensive or hateful expression receives broad protection. As Juhan (2012) demonstrates, constitutional doctrine in the United States has historically shielded a wide range of disturbing, profane, or extremist speech on the premise that government must not prescribe orthodoxy or regulate expression merely

because it is offensive. This expansive protection is justified by concerns over viewpoint discrimination and governmental overreach. However, such an approach creates a paradox: speech that is formally protected may nevertheless generate environments of intimidation or exclusion that undermine the effective participation of targeted groups. Juhan therefore identifies the problem of a “hostile speech environment,” in which protected speech can operate cumulatively to restrict the practical freedom and equality of those subjected to it.

Critical legal scholarship further questions whether unrestricted speech truly serves democratic equality. Delgado (1982) argues that absolute free-speech doctrines often ignore the lived realities of subordinated groups, for whom racist or misogynistic speech functions less as abstract opinion and more as a tool of intimidation and social control. From this perspective, protecting hate speech without regard to its effects may entrench rather than challenge existing hierarchies.

Judicial practice has played an important role in defining the balance between freedom of expression and protection from religious hatred. The European Court of Human Rights has consistently emphasized that freedom of expression constitutes one of the foundations of democratic society, but that this freedom may be subject to limitations where speech promotes intolerance, hatred, or violence. In the case of *Norwood v. United Kingdom* (application no. 23131/03, decision of 16 November 2004), the Court considered a complaint involving anti-Muslim expression displayed publicly after the September 11 attacks. The applicant had exhibited a poster depicting the Twin Towers in flames alongside the words “Islam out of Britain – Protect the British People.” The Court declared the application inadmissible, holding that such expression constituted a general and vehement attack against a religious group incompatible with the values of the Convention. Similarly, in *Garaudy v. France* (application no. 65831/01, decision of 24 June 2003), the Court reaffirmed that expressions aimed at promoting hatred or undermining the rights of others do not enjoy unlimited protection under Article 10 of the European Convention on Human Rights. The Court stressed that tolerance and respect for the equal dignity of all human beings constitute the foundation of democratic societies.

The jurisprudence of the Court also demonstrates that states possess positive obligations to combat discriminatory treatment. In *Nachova and Others v. Bulgaria* (applications nos. 43577/98 and 43579/98, judgment of 6 July 2005), the Court emphasized the duty of national authorities to investigate possible discriminatory motives behind acts of violence and institutional

misconduct. Although the case concerned ethnic discrimination, its principles are highly relevant for understanding state obligations regarding religious hatred and anti-Muslim discrimination.

At the international level, the Human Rights Committee has repeatedly interpreted Article 20 of the ICCPR as requiring states to prohibit advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence. The Rabat Plan of Action (2012), adopted within the UN framework, additionally provides criteria for distinguishing protected speech from unlawful incitement. Human rights law attempts to reconcile these competing values through calibrated limitations. The International Covenant on Civil and Political Rights (1966, ICCPR) recognizes freedom of expression in Article 19 but simultaneously permits restrictions necessary for the protection of the rights and reputations of others, and in Article 20 explicitly requires states to prohibit advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence (Ghanea, 2013). This dual framework illustrates that freedom of speech is not absolute but operates within a system of “special duties and responsibilities,” particularly where expression threatens the safety or dignity of vulnerable communities.

Taken together, these perspectives reveal that the protection of migrants from hate speech cannot be reduced to a binary choice between censorship and unrestricted speech. Instead, contemporary legal theory increasingly adopts a contextual and harm-sensitive approach. Freedom of expression remains fundamental, yet it coexists with obligations to protect dignity, equality, and social cohesion. For migrants and refugees, this balance is particularly consequential. As newcomers who often lack political power, linguistic fluency, or social capital, they are disproportionately vulnerable to stigmatizing narratives that portray them as threats or outsiders. Hate speech targeting such groups does not merely offend; it may impede integration, limit access to employment or housing, and foster climates conducive to violence.

Hate speech threatens democratic values, social stability, and peace. It must be fundamentally prevented at all stages, as it can lead to armed conflicts, atrocities, acts of terrorism, violence against women, and other serious human rights violations, and threaten peaceful, inclusive, and just societies. In May 2019, the UN Strategic Plan to Combat Hate Speech was published, highlighting that there is an alarming wave of xenophobia, racism, and intolerance around the world. Social media and other forms of communication are used as platforms for intolerance.

The EU Fundamental Rights Agency's 2020 report states that for many, criminalizing insult to religious feelings is in direct conflict with the

fundamental role of freedom of expression, which can only be limited in exceptional cases, regardless of whether such expression is likely to cause offense, outrage, or anxiety (FRA, 2020). Thus, the response of some states was to remove restrictions on the expression of religion or belief, especially anti-blasphemy laws, which, in my opinion, was a huge mistake, since this fact led to the freedom of hate speech, which made life more difficult for migrants who found themselves in a very difficult situation. It is also worth noting the approach of some states that certain views may be so offensive or misanthropic that they need to be suppressed. Unfortunately, there is certain evidence that the cases of religious and ethnic-based discrimination, violence, and negative stereotyping continue to increase worldwide. States are encouraged to take effective measures against those who call for violence, hostility, and discrimination, or as set out in this resolution, follow their obligations under international human rights law, to combat such cases. The same document calls on states to take appropriate measures to criminalize incitement to imminent violence based on religion or belief (UNHCR, 2014).

6. Conclusion

This paper set out to examine the relationship between religious hatred, discrimination, and the protection of Muslim refugees within contemporary democratic societies. Although modern legal systems formally recognize freedom of religion, equality, and the protection of refugees as fundamental human rights principles, the analysis demonstrates a persistent and troubling gap between normative guarantees and lived reality. The experiences of many migrants reveal that legal recognition alone does not automatically translate into substantive protection or social inclusion.

Across the theoretical, empirical, and legal dimensions explored in this study, discrimination emerges not as an occasional deviation from democratic standards, but as a structural and systemic phenomenon. Rather than taking the form of isolated acts of prejudice, exclusion often operates through routine institutional practices, public discourse, and political narratives that gradually normalize suspicion toward specific communities. In this context, Muslim refugees are not merely perceived as newcomers requiring protection, but are frequently framed as cultural, demographic, or security threats. Such framing transforms vulnerability into liability and redefines humanitarian protection as a matter of national defense.

The comparative case studies illustrate that these dynamics are not confined to a single national setting. Germany's experience following the

refugee influx, the securitized approach to migration governance in the United States, and patterns of everyday discrimination reported in Australia reveal striking similarities despite different legal traditions. In each context, public rhetoric, media narratives, and policy choices converge to produce environments in which refugees face barriers to employment, housing, and full participation in social life. The recurrence of these patterns suggests that religious hostility toward migrants is not an anomaly but part of a broader transnational logic of exclusion that accompanies contemporary migration politics.

Taken together, the findings of this study indicate that effective protection of migrants requires a multidimensional approach. Legal prohibitions against discrimination and incitement are necessary but insufficient. They must be complemented by institutional accountability, inclusive integration policies, responsible political leadership, and sustained efforts to counter stigmatizing narratives in both traditional and digital media. Without addressing the structural and discursive foundations of hostility, formal safeguards risk remaining symbolic.

Furthermore, the normalization of hostile rhetoric carries long-term consequences that extend beyond individual harm. Public discourse that repeatedly associates migrants with danger or incompatibility reshapes collective perceptions and gradually lowers the threshold for restrictive measures. What begins as symbolic stigmatization may evolve into administrative obstacles, intensified surveillance, or reduced access to protection. In this way, language precedes policy. The cumulative effect is the gradual shrinking of the moral and legal space within which refugees are recognized as rights-bearing individuals.

The findings of this research also suggest that protection cannot rely exclusively on reactive legal enforcement. Courts and criminal sanctions play an important role, but they intervene only after harm has occurred. Preventive strategies—such as education, community dialogue, inclusive public communication, and equitable access to social services—are equally essential. Integration policies that promote everyday interaction between newcomers and host societies can reduce the fear and misinformation that often fuel hostility. In this sense, social cohesion and legal protection should be understood as mutually reinforcing rather than competing objectives.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

Conceptualization A. E., G., M. and B., M.; methodology, A. E., G., M. and B., M.; analysis and writing of the original draft, A. E., G., M. and B., M.; review and editing of the manuscript A. E., G., M. and B., M.; All authors have read and approved the final version.

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DISKRIMINACIJA I GOVOR MRŽNJE PREMA MUSLIMANSKIM IZBEGLICAMA – ZAKONODAVSTVO I PRAKSA

APSTRAKT: Ovaj rad analizira diskriminaciju i govor mržnje usmeren prema muslimanskim izbeglicama u savremenim demokratskim društvima, sa posebnim fokusom na jaz između formalno garantovanih ljudskih prava i njihove stvarne primene u praksi. Iako međunarodni i nacionalni pravni okviri garantuju slobodu veroispovesti, jednakost

i zaštitu izbeglica, muslimanski migranti sve češće se suočavaju sa stigmatizacijom, isključivanjem i neprijateljstvom u svakodnevnim društvenim, političkim i institucionalnim sferama. Rad polazi od stava da se ove pojave ne mogu tumačiti kao pojedinačni slučajevi predrasuda ili sporadične ksenofobije, već kao strukturni i sistemski fenomen ukorenjen u političkom diskursu, medijskim narativima i administrativnim praksama. Oslanjajući se na interdisciplinarne teorijske pristupe iz oblasti prava i sociologije, diskriminacija se konceptualizuje kao kumulativna, institucionalna i intersekcionalna pojava koja deluje kroz direktne i indirektne mehanizme. Kvalitativnim metodama, uključujući analizu sadržaja i diskursa, komparativne studije slučaja i pregled sekundarnih empirijskih podataka, ispituju se primeri Nemačke, Sjedinjenih Američkih Država i Australije kako bi se identifikovali ponavljajući obrasci sekuritizacije migracija, isključenosti sa tržišta rada i simboličke stigmatizacije muslimanskih izbeglica. Posebna pažnja posvećena je ulozi govora mržnje i digitalnih platformi u normalizaciji neprijateljstva i opravdavanju restriktivnih migracionih politika.

Ključne reči: *diskriminacija, govor mržnje, islamofobija, upravljanje migracijama, zaštita ljudskih prava.*

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THE CONSTITUTIONAL CONCEPT OF THE RESPONSIBILITY OF THE HEAD OF STATE

ABSTRACT: In addition to its primary jurisdiction, the Constitutional Court also exercises certain specific competences, one of which is its jurisdiction to adjudicate cases involving high-ranking state officials. In this paper, the author analyzes this very particular competence of the Constitutional Court, directed at determining the responsibility of the head of state. The subject of the research encompasses the constitutional and legal grounds for initiating proceedings concerning the responsibility of the head of state, the authorized entities, the required majority, and the procedure for adopting a decision on the indictment against the head of state. The research aims to identify, through the application of the positive-law and comparative-law methods, the similarities and differences in the existing normative solutions of certain European countries. In the final part of the paper, special attention will be devoted to how this issue has been addressed in the Republic of Serbia, as outlined in the 2006 Constitution. By examining existing solutions and their potential shortcomings, the author aims to highlight the need for possible constitutional reform in this matter in the Republic of Serbia.

Keywords: *constitutional court, head of state, responsibility of the head of state.*

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1. Introduction

The constitutional court is an independent body of state authority whose primary competence is the general normative review of law. Wherever a constitutional court exists, it exercises review of the constitutionality of normative acts, while the performance of its other functions depends on the specific constitutional system (Petrov & Simović, 2010, p. 116). It is generally considered that constitutional courts decide on normative acts and do not adjudicate individuals for unlawful conduct. But a closer examination of the competences of the Constitutional Court reveals that it, to a certain extent, departs from the fundamental rule that the Constitutional Court adjudicates norms rather than persons. This is its jurisdiction to try high-ranking state officials (Pajvančić, 2004, p. 121). The responsibility of holders of the highest public offices constitutes, in democratic legal systems, one of the most significant democratic principles and a defining feature of the rule of law and constitutional government (Radovanović, 2024, p. 78). Although it falls within the jurisdiction of constitutional courts with the longest tradition, such as those in Austria, Italy, and Germany, which will be discussed below, adjudicating charges against the highest state officials was, until the early 1990s, a characteristic of a relatively small number of states. It was only the process of adopting new constitutions, prompted by the wave of democratisation in former communist states, that significantly increased the number of constitutional courts empowered to decide on charges against the highest state officials¹ (Simović, 2010, p. 211).

Most frequently, the established responsibility concerns the head of state, i.e. the President of the Republic, then the Prime Minister, ministers, and other high-ranking state officials for serious criminal offences committed while exercising their official duties (Stojanović, 2016, p. 39). Therefore, it is often emphasised that, when deciding on charges against the highest state officials, the Constitutional Court acts as a specific form of criminal court (Simović, 2010, p. 211). Such competence of the Constitutional Court is seen as a special protection of the Constitution, that is, a direct protection of the constitutional order (Stojanović, 2016, p. 39). Holders of state or public office, particularly those exercising executive power, bear multiple forms of responsibility for

¹ Mikić (2025) points out that constitutional courts in Europe decide on the accountability of public office holders for unconstitutional conduct, while also indicating the public offices whose holders may be subject to such responsibility before constitutional courts in certain European states (p. 381).

their work and actions both within and outside the scope of their official duties. Being citizens of their state, holders of executive authority are subject to legal responsibility and may be held legally liable for acts they committed as private individuals outside the scope of their professional competences. On the other hand, guided by national as well as political interests, holders of executive authority are required to make important decisions for which they bear political responsibility (Jovanović, 2018, p. 75). At the core of political responsibility lies the trust granted to holders of political office at the beginning of their mandate. With regard to representatives of the executive branch, namely the head of state and the Government, this means that the head of state is politically accountable to the citizens who elected him directly in general elections (Jovanović, 2018, p. 72). Given that the majority of newly adopted constitutions have omitted the institution of countersignature, based on which the Government assumed political responsibility for acts of the head of state, it became necessary to establish the direct responsibility of the head of state, enabling the sanctioning of any abuse of power (Simović, 2010, p. 211).

The issue of the responsibility of the head of state, although a matter of primary constitutional importance, has been raised only rarely. The reason lies in the centuries-long irresponsibility of monarchs, justified both by theories of the “divine right” and by the functional positioning of the head of state within the constitutional system. It is therefore not surprising that, more than two centuries after the first republican head of state in the world was held accountable in the United States of America (Hereinafter USA) the question of such responsibility is raised only when required by practical necessity (Tripković, 2009, pp. 278–279). The criminal responsibility of the President of the Republic is regulated by the Constitution (2006) in all republics. As Pejić (2025) points out, it represents a form of legal responsibility indicating that the holder of this high office may commit specific criminal offences in the performance of official duties, for which a specific legal procedure and sanction in the form of removal from office are prescribed (pp. 23–24). Legal responsibility may be based either on a violation of legal rules or on a breach of moral obligations. According to Marković (2023), the responsibility of the head of state for a violation of the Constitution (and laws) constitutes a legal-political form of responsibility (p. 25). Therefore, it cannot be regarded as a purely legal or purely political form of responsibility, given that a political or constitutional adjudicative body imposes a political sanction for an unlawful act.

In the continuation of this paper, with the aim of examining the issue of the responsibility of the head of state, attention will be devoted to the most

frequently prescribed constitutional and legal grounds of responsibility, as the bases for initiating and conducting proceedings before the constitutional court.

2. Constitutional and Legal Grounds for the Responsibility of the Head of State

At first glance, comparative constitutional law reveals different grounds of legal responsibility of the President of the Republic. Simplified and viewed from a historical perspective, these may be divided into “criminal-law” and “constitutional-law” grounds. However, closer examination demonstrates that they in fact constitute *sui generis* constitutional categories, i.e. grounds of responsibility whose qualification derives from the competences of the President of the Republic and his duty of loyalty to the Constitution (Marinković, 2021, p. 4). The content of constitutional provisions concerning incriminated acts that may be committed by the President in the exercise of office is typically general and concise. Traditional offences mentioned in constitutions include betrayal of the people or high treason, whereas modern constitutions increasingly employ broader formulations such as violation or breach of the Constitution (Pejić, 2025, p. 24). Such is also the case with the constitutions of the former Yugoslav republics,² including Serbia, which will be analysed subsequently. These constitutions provide that an indictment against the head of state may be initiated if he has violated the Constitution in the performance of official duties. Similarly, the Constitution of Austria provides that a complaint may be filed before the Constitutional Court against the Federal President solely for a violation of the Constitution. (Stojanović, 2016, crp. 38). The term “violation” of the Constitution, as Petrov observes, represents a broad concept encompassing not only the explicit breach of a constitutional provision, but also the violation of what constitutional theory refers to as the “spirit” of the Constitution. Consequently, a distinctly legal question, such as whether the President of the Republic has violated the Constitution, raises the question of the political expediency of his work. It may lead to the issue of politicisation of the Constitutional Court (Petrov, 2008, p. 77, as cited in Simović, 2010, p. 214). Conversely, Stojanović (2016) argues that where the Constitution does not establish another legal ground of

² Among the states of the former Yugoslav republics, it is only the Constitution of Bosnia and Herzegovina that does not provide for the responsibility of high state officials before the Constitutional Court (Pilipović, 2025, p. 81).

responsibility beyond violation of the Constitution, and where such violation is not further qualified, the grounds of responsibility cannot be extended to encompass breaches of the “spirit” of the Constitution. Such an extension of responsibility would render the grounds entirely indeterminate and legally uncertain, ultimately resulting in a conflation of political and legal assessment (pp. 69–70).

In addition to the “classical” violation of the constitution, certain constitutions provide for a “qualified” violation as a condition for initiating proceedings against the head of state. This is the case in Germany, Hungary, and Slovakia, where intentional violation of the Constitution is required as a precondition for raising the issue of responsibility, while in Albania a serious violation of the Constitution is required (Simović, 2010, p. 213). The Constitutional Court of Italy is distinctive, among other things, in adjudicating charges brought against the President of the Republic for high treason or violation of the Constitution (Stojanović, 2016, p. 41). The offence of “high treason,” in its formal elements, may be treated as a ground of criminal responsibility. However, given that political history records no convictions for high treason, different interpretations suggest that this provision conceals an underlying idea of political responsibility of the head of state (Pejić, 2025, pp. 24–25).

The grounds of indictment encompass any violation of the Constitution committed by the head of state in the exercise of competences. In addition to constitutional violations, the Constitution of Macedonia (1991, Article 87, paragraph 1) and the Constitution of Slovenia (1991, Article 109) also provide that violation of the law in the performance of official duties constitutes grounds for indictment, with the Slovenian President being indictable only for a serious violation of the law (Simović, 2010, p. 213). “It means that the grounds of legal responsibility of the President of the Republic, whether framed in the terminology of criminal law or defined more broadly as responsibility for violation of the Constitution, lie in the failure to comply with peremptory constitutional norms, that is, with explicit constitutional obligations – prohibitions and commands – prescribed by the Constitution. These obligations may be divided into two alternative groups. One group arises from presidential competences that belong to the category of bound acts, while another group arises from other constitutional provisions whose observance constitutes an expression of loyalty to the Constitution. The concretisation of peremptory constitutional provisions in criminal and other legislation facilitates a proof of the content of such obligations, but is not alone necessary for their existence” (Marinković, 2021, p. 7).

3. The Role of the Constitutional Court in the Procedure for Determining the Responsibility of the Head of State in Comparative Law

With regard to the role that a constitutional court may assume in proceedings concerning the responsibility of the head of state, comparative constitutional law reveals two principal models. The first model confers the competence on the Constitutional Court to decide on charges against the head of state. The second model allows the Constitutional Court only to participate in the procedure of deciding on the charges against the head of state. Under the first model, the Constitutional Court decides (either independently or in an expanded composition) on an indictment filed by parliament (most frequently the lower house). Under the second model, the role of the Constitutional Court is narrower: it does not decide on the responsibility of the head of state, but merely renders an opinion on whether the head of state has violated the Constitution or the law and whether procedural requirements for initiating proceedings have been respected. The constitutional courts of the former Yugoslav republics may be classified within these two models. The Constitutional Court has full competence to decide on charges against the head of state in Slovenia, Macedonia, and Croatia. However, in Serbia and in Montenegro,³ the role of the Constitutional Court is limited to determining whether the head of state has violated the Constitution in the performance of official duties, while the final decision on the sanction is adopted by parliament – the National Assembly of Serbia or the Parliament of Montenegro (Dmičić & Pilipović, 2013, pp. 31–32). In Romania, for example, removal from office is decided by referendum following suspension by the Parliament and consultation with the Constitutional Court (Nikolić & Manojlović, 2022, p. 372). Specifically, after consulting the Constitutional Court (*The Constitution of Romania*, Article 95), the Chamber of Deputies and the Senate, in joint session and by a majority vote of their members, may suspend the President for serious acts violating constitutional provisions. There are also constitutional systems in which the constitutional court does not participate in proceedings

³ The procedure for determining whether the President of Montenegro has violated the Constitution may be initiated by the Parliament, upon the proposal of at least 25 Members of Parliament. The decision on the existence or non-existence of a violation of the Constitution is adopted by the Constitutional Court, which shall publish it without delay and submit it to the Parliament and the President of Montenegro. The President of Montenegro may be removed from office by the Parliament when the Constitutional Court determines that he or she has violated the Constitution (Constitution of Montenegro, 2007, Article 98, paragraphs 3, 5 and 6).

concerning charges against the head of state. Such was the case under the Constitution of Serbia of 1990, which provided that citizens would decide on the responsibility of the head of state by referendum, and under the Constitution of the Federal Republic of Yugoslavia of 1992, pursuant to which the President of the Republic could be removed from office once the Federal Assembly determined that he had violated the Constitution. Similarly, under the Constitution of the USA, impeachment proceedings against high-ranking state officials may fall within parliamentary competence, with the House of Representatives acting as prosecutor, the Senate as adjudicator, and the Chief Justice of the Supreme Court presiding over the trial (Dmičić & Pilipović, 2013, pp. 28, 31–32).

Given that determining the responsibility of the head of state is a sensitive issue, directly affecting the constitutional status of a key state authority, constitutional courts usually decide such matters by a qualified majority. In constitutional systems where the Constitutional Court does not render the final decision on the head of state's responsibility for a violation of the constitution and other charges, but performs merely an advisory function, no special majority is required beyond that prescribed for other decisions of the Constitutional Court (Pajvančić, 2004, p. 132). Regarding the countries with the longest tradition of the constitutional courts with the competence in determining the responsibility of the head of state, such as Austria, the Federal President may be charged with violation of the Constitution if the Federal Assembly adopts such a decision, upon the request of one of the parliamentary chambers – the Federal Council or the National Council. The decision must be taken in the presence of a majority of members of both representative bodies and by a two-thirds majority of votes cast. A conviction by the Austrian Constitutional Court results in loss of office and, in aggravating circumstances, loss of political rights. However, the Constitutional Court may also confine itself to establishing that a violation has occurred. The complaint may also extend to criminally punishable acts committed in office, in which case ordinary criminal courts are excluded, and exclusive jurisdiction lies with the Constitutional Court (Stojanović, 2016, p. 40). Besides Austria, the Federal Constitutional Court in Germany may adjudicate the case against the Federal President for intentional violation of the Basic Law or another federal law, upon impeachment adopted by a two-thirds majority of the members of the Bundestag or the Bundesrat (*Grundgesetz für die Bundesrepublik Deutschland*, Article 61 paragraph 1). If the Court establishes the Federal President's guilt, it may remove the President from office. The Court may also, before the final decision, issue an interim measure preventing the

Federal President from exercising official duties (Stojanović, 2016, p. 41). In Italy, proceedings for determining the responsibility of the head of state are initiated by Parliament and concluded by a decision of the Constitutional Court (Orlović & Rajić, 2020, pp. 124–125). The President is impeached by the Parliament in a joint session of both chambers, by an absolute majority of all members. A peculiarity of the Italian system is that, along with the 15 regular judges of the Constitutional Court, 16 additional members participate in the trial of the President. These members are elected at the beginning of the parliamentary term, in a joint session of the Houses of Parliament, from citizens eligible for election as senators (Constitution of the Italian Republic, 1947, Article 135). Given this composition of the Constitutional Court of Italy, it may be argued that the President is judged not only by constitutional judges as members of a state institution, but also by the people (Stojanović, 2016, p. 41).

In constitutional systems where the Constitutional Court has full adjudicative competence over the head of state, it renders the final decision. Certain constitutions explicitly regulate the legal effects of such a decision of the Constitutional Court: termination of the mandate of the head of state, cessation of office by virtue of the constitution, removal from office etc. Thus, a constitution may foresee that the mandate of the head of state ceases *ex constitutione* once the constitutional court establishes his responsibility, as in Croatia (Constitution of the Republic of Croatia, 2014, Article 105 paragraph 5) and Macedonia (the Constitution of Macedonia, 1991, Article 87, paragraph 4), or the Constitutional Court itself to impose the sanction, as in Slovenia. Under the Slovenian Constitution (1991), the Constitutional Court may remove the head of state from office if the charge is well-founded. In this system, the determination of the validity of the charge is procedurally distinct from the decision on removal. In contrast to the three specified states, in Serbia and in Montenegro, the Constitutional Court determines only whether a violation of the Constitution has occurred, while the decision on the sanction (removal from office) is adopted by the Parliament (Dmičić & Pilipović, 2013, pp. 35–36).

4. The Role of the Constitutional Court in the Procedure for Determining the Responsibility of the Head of State in Serbia

The 2006 Constitution introduced a new competence of the Constitutional Court concerning the removal of the President of the Republic⁴ (Marković, 2007, p. 37). If one raises the question as to why this competence was entrusted to the Constitutional Court, the answer lies in the very ground of presidential responsibility – violation of the Constitution,⁵ given that the Constitutional Court is the guardian of the Constitution, regardless of who commits the violation (Marković, 2007, pp. 37–38).

Proceedings for the removal of the President of the Republic may be initiated by the National Assembly, upon a proposal submitted by at least one-third of the Members of Parliament (Constitution of the Republic of Serbia, 2006, Article 118). The procedure begins when the Speaker of the National Assembly submits the act to the Constitutional Court, initiating proceedings to determine whether the President has violated the Constitution. Alternatively, if the procedure has been initiated in accordance with the Constitution and the law, the Court shall forward the act to the President of the Republic for a response within a time limit determined by the Court. Upon expiry of that time limit, the President of the Constitutional Court schedules a hearing, and both the President of the Republic and the Speaker of the National Assembly are invited to it. It should be emphasised that, in deciding on the alleged violation of the Constitution by the President of the Republic, the Constitutional Court is limited exclusively to those constitutional provisions specified in the act of

⁴ Under the previous Constitution, the concept of recall, rather than removal from office, was applied to the President of the Republic. Pursuant to the 1990 Constitution, the decision on recall was made by the National Assembly, having been competent to initiate the procedure if assessed that the President of the Republic had violated the Constitution, and also by the citizens, who were required to declare their position in a referendum. As Stojanović (2016) points out, the new Constitution abandons the recall procedure, which combined elements of political and legal responsibility, and establishes instead a procedure for the removal of the head of state that exclusively presupposes his legal responsibility (p. 69). Under the 1990 Constitution, the responsibility of the President of the Republic was characterised as political, since the National Assembly could easily qualify acts of the President with which it disagreed as a “violation” of the Constitution. Under the new Constitution, this responsibility is legal (criminal) in nature, and the sanction for such responsibility is precisely removal from office (Marković, 2022, p. 333).

⁵ In contrast to certain European constitutional arrangements, the Constitution of Serbia provides for a relatively broad and insufficiently precise basis for the removal of the President of the Republic, thereby potentially allowing greater scope for initiating removal proceedings, although such a possibility has remained largely hypothetical in Serbia’s recent constitutional practice (Mikić, 2018, p. 5).

the National Assembly initiating the proceedings. The Constitutional Court is required to render its decision within 45 days from the date of submission of the initiating act (Law on the Constitutional Court, 2007, Articles 93–96). Removal of the President of the Republic on the grounds of constitutional violation occurs if the National Assembly adopts a decision by a two-thirds majority of all Members of Parliament (Constitution of the Republic of Serbia, 2006, Article 118).

As previously noted, Article 118, paragraph 2 of the Constitution of the Republic of Serbia (2006) provides that the procedure for the dismissal of the President of the Republic “may be initiated by the National Assembly upon the proposal of at least one-third of all Members of Parliament.” Although this constitutional provision appears, at first sight, to be entirely clear, it leaves room for different interpretations. First, it could be concluded that a proposal submitted by one-third of all Members of Parliament is, in itself, sufficient to initiate the procedure for the dismissal of the President of the Republic. This interpretation was also adopted by the Venice Commission (2007), although with reservations owing to the lack of clarity of the constitutional provision in question.⁶ Second, the constitutional norm may be interpreted to mean that one-third of all Members of Parliament merely propose the initiation of presidential dismissal proceedings, while the decision on whether such proceedings will actually be initiated is to be taken by the National Assembly in accordance with the general constitutional rules governing decision-making within that body. Following the wording of the constitutional provision, the National Assembly is not obliged to initiate proceedings for presidential dismissal every time such a proposal is submitted by one-third of all Members of Parliament, since the formulation according to which it “may” initiate the procedure indicates that the proposal itself does not compel the Assembly to commence such proceedings. Given that the Constitution (2006) does not prescribe a special qualified majority for deciding this matter (Article 105), the decision to initiate proceedings for the dismissal of the President of the Republic is adopted by an ordinary quorum majority, that is, by a majority vote of the Members of Parliament present at a sitting attended by a majority

⁶ Commenting on Article 118 of the Constitution of the Republic of Serbia (2006), the Venice Commission observed that one-third of the Members of Parliament may request the initiation of impeachment proceedings on the grounds of a violation of the Constitution. The Commission further stated that “the Constitutional Court then decides, or at least this is how the Venice Commission understood this not entirely clearly worded provision, whether such a violation has occurred, and the National Assembly may thereafter dismiss the President by a two-thirds majority” (Venice Commission, 2007).

of the total number of Members of Parliament. In this way, the Constitution distinguishes between the initiative to commence proceedings for bringing charges against the Head of State and the adoption of a decision concerning a violation of the Constitution (Simović & Orlović, 2023, p. 631). In other words, only after the National Assembly has adopted a positive decision may a request be submitted to the Constitutional Court to determine whether a violation of the Constitution has occurred (Dmičić & Pilipović, 2013, p. 33).

However, the fact that the imprecision of the constitutional provision governing the initiation of proceedings for the dismissal of the President of the Republic may create practical difficulties is confirmed by the inconsistencies and errors committed by the National Assembly when elaborating this procedure through legislation (Simović & Orlović, 2023, p. 632). Namely, the Law on the Constitutional Court (2007, Article 93, paragraph 1) stipulates that “the procedure for deciding on a violation of the Constitution by the President of the Republic shall be initiated by the National Assembly upon the proposal of one-third of the total number of Members of Parliament.” The wording of this statutory provision therefore suggests that the National Assembly is obliged to initiate proceedings for the dismissal of the President of the Republic whenever such a proposal is submitted by at least one-third of all parliamentarians. It is noteworthy that the legislature did not reproduce verbatim the constitutional wording, which includes the term “may”. The legislature’s inconsistency is further evidenced by the subsequently enacted Law on the President of the Republic (2007), which provides that the dismissal of the President of the Republic may be proposed by at least one-third of all Members of Parliament if they consider that the President has violated the Constitution, while the procedure for dismissal is initiated by a majority vote of all Members of Parliament (Article 15, paragraph 1). Marković (2007) argues that even if the Law on the President of the Republic (2007) correctly interpreted the constitutional provision on removal of the President, it is inconsistent with the Constitution to require that proceedings are initiated by a “majority vote of all Members of Parliament,” since the Constitution prescribes such a majority only in cases explicitly stated therein⁷ (p. 33). As the initiation of removal proceedings is not listed among those cases, it is evident that the legislator exceeded the normative framework established by the Constitution (Simović, 2010, p. 215).

⁷ In all other cases, the National Assembly adopts decisions by a majority vote of the Members of Parliament present at a session attended by a majority of the total number of Members of Parliament (Constitution of the Republic of Serbia, 2006, Article 105).

The 2006 Constitution introduces the politically neutral Constitutional Court into a political issue arising from the relationship between the legislative and executive branches. The Constitutional Court is tasked with determining whether the President of the Republic has violated the Constitution, whereas the political sanction resulting from such a violation is to be imposed by the National Assembly. Marković (2007) claims that the authority to remove the President should belong to the body that elected him. Since the President is directly elected by citizens, they should likewise decide on his “recall” (pp. 37–38). A similar view is shared by Simović and Petrov, who argue that it is inconsistent with the logic of the institution of a directly elected head of state to be removed by the National Assembly. They raise the question of compatibility with the principle of separation of powers (Dmičić & Pilipović, 2013, pp. 37–38). However, given that the constitutional drafters had already opted to entrust the National Assembly with the political assessment concerning the removal of the President of the Republic, Simović (2010) argues that the entire procedure should have remained exclusively within its competence (p. 222). Marković (2007) further contends that, if such authority is to be entrusted to the Parliament, the entire procedure (initiation, determination of constitutional violation, and removal) should remain within its exclusive competence, as is the case with the responsibility of the President of the USA before the Congress (pp. 37–38).

Particular criticism has been directed at the possibility that, despite the decision of the Constitutional Court establishing that the President of the Republic has violated the Constitution, the National Assembly may fail to dismiss the President because the required two-thirds majority of all Members of Parliament cannot be secured (Marković, 2007, p. 39). Thus, even if the Constitutional Court were, hypothetically, to determine that the President bears legal responsibility for a constitutional violation, the parliamentary majority could still oppose his dismissal. This is why the constitutional mechanism may be regarded as a symbolic “cover” for a system of government that allows the President to act beyond the scope of his or her constitutional powers (Pejić, 2025, p. 30). It is hardly necessary to elaborate on how such an arrangement may undermine the authority of the Constitutional Court as the final and most competent arbiter in matters concerning violations of the principle of constitutionality. Rather than rendering a decision that is binding in practice, the Court effectively issues an opinion that does not formally oblige the National Assembly, which has the final say in the matter (Marković, 2007, p. 39). Furthermore, by declining to dismiss the President of the Republic, the National Assembly violates the constitutional provision stipulating that

decisions of the Constitutional Court are final, enforceable, and universally binding (Constitution of the Republic of Serbia, 2006, Article 166, paragraph 2). At the same time, such conduct weakens the authority and legitimacy of the President of the Republic, who continues to perform the duties of office despite the finding that compromises his constitutional standing (Simović & Orlović, 2023, p. 637). Moreover, given that the final decision rests with a two-thirds parliamentary majority, it may justifiably be argued that a form of political responsibility of the President of the Republic has been introduced through the back door. As Pejić (2019, p. 57) points out, this constitutes an additional argument in favour of restoring this aspect of the separation of powers to its proper legal dimension and entrusting either the Constitutional Court or the Supreme Court with jurisdiction to determine the legal (criminal) responsibility of the Head of State. Conversely, a different effect is produced by a decision of the Constitutional Court finding that the President of the Republic has not violated the Constitution. In such circumstances, the Court's decision is binding upon the National Assembly, since the President may not be removed from office (Simović & Orlović, 2023, p. 635). The proceedings thereby come to an end, as the National Assembly cannot dismiss the President contrary to the findings of the Constitutional Court (Dmičić & Pilipović, 2013, pp. 37–38).

Although the time limit granted to the Constitutional Court for rendering its decision is relatively short, the significance of charges brought against the President of the Republic, which may ultimately result in his or her removal from office, justifies the imposition of such a deadline in order to resolve expeditiously the question of whether the President has violated the Constitution. The Constitution merely requires the Constitutional Court to act within that period; however, it does not prescribe the consequences of the Court's failure to comply with this obligation. In insufficiently consolidated constitutional democracies, the work of constitutional courts is often susceptible to politicisation. In this regard, it should also be borne in mind that the President of the Republic participates in the appointment of ten out of the fifteen judges of the Constitutional Court. Consequently, the Constitutional Court may obstruct initiated dismissal proceedings against the President, since without its decision, the procedure cannot be continued (Simović & Orlović, 2023, p. 633). Therefore, two cumulative conditions are required for the removal of the President of the Republic: a decision of the Constitutional Court establishing a constitutional violation, and a decision of the National Assembly removing the President. Even greater uncertainty would arise if the Constitutional Court adopted a decision establishing a constitutional

violation after the expiry of the 45-day period. If one were to ask whether the National Assembly could then proceed with the removal of the President, the answer would undoubtedly be negative, since removal in such circumstances would be unconstitutional due to violation of the constitutionally prescribed procedure (Simović, 2010, p. 221).

Although the existing constitutional framework leaves room for the potential obstruction of the proceedings by the Constitutional Court, legal theory has pointed out that, given the importance of this institution within the legal system and the fact that it is already involved in the process of determining the responsibility of the President of the Republic, it would be justified to consider entrusting it with the final decision in proceedings concerning presidential responsibility. Such a solution would, of course, presuppose that the grounds for responsibility are defined with sufficient precision to permit adjudication within a procedure of a legal, rather than political, character. It may therefore be concluded that an opportunity was missed during the adoption of the new Constitution (2006) to regulate this issue in a more appropriate manner, taking into account comparative constitutional practice as well as the prevailing theoretical approaches to presidential responsibility (Tripković, 2009, p. 311).

5. Conclusion

Although rarely exercised in practice, one of the most significant competences of a constitutional court is its authority to decide on charges brought against the head of state. The constitutional and legal grounds for the responsibility of the head of state are, in almost all of the analysed countries, broadly formulated and insufficiently precise. It is therefore within the competences of the authorities to decide on such responsibility of the head of state, and to interpret these general provisions.

Comparative constitutional analysis demonstrates that European constitutional systems do not recognise a single, uniform model of constitutional court involvement in proceedings for determining the responsibility of the Head of State. Differences exist both concerning the very presence of a constitutional court in such proceedings and the scope of powers vested in it. It is precisely these powers that determine the extent to which the proceedings possess a legal, rather than political, character, as well as the degree to which they can be insulated from excessive political influence.

Concerning the constitutional framework of the Republic of Serbia, it may be concluded that, notwithstanding the constitution-maker's intention to

establish the legal responsibility of the President of the Republic, the existing mechanism ultimately reduces the issue to a political question. Although the Constitutional Court determines whether the Constitution has been violated, the political sanction of removal from office is imposed by the National Assembly. If the constitution-maker intended that the National Assembly should decide, based on its own political assessment, whether the President should be removed from office, then the entire procedure ought to have remained exclusively within the Assembly's jurisdiction. Such an arrangement gives rise to a normative inconsistency in the relationship between the National Assembly and the Constitutional Court. Instead of the Constitutional Court acting as the exclusive guardian of the Constitution, particularly given that it is entrusted with reviewing the activities of the National Assembly, it is the National Assembly that, in this instance, assumes the decisive supervisory role and has the final word in the dismissal proceedings, notwithstanding the Constitutional Court's prior determination regarding the President's responsibility for violating the Constitution. A positive aspect of the existing model may be found in the fact that an independent Constitutional Court, composed according to professional rather than political criteria, should serve to prevent what is fundamentally a form of legal responsibility from being transformed into a purely political one. Nevertheless, the most logical and legally coherent solution would be a binding decision of the Constitutional Court upon the National Assembly, so that a finding by the Court that the President of the Republic has violated the Constitution would necessarily result in his or her removal from office by the National Assembly. Alternatively, following the example of certain neighbouring states, the mandate of the Head of State could terminate automatically by operation of the Constitution (*ex constitutione*).

Although no proceedings to determine the responsibility of the President of the Republic have yet been initiated in Serbia, and thus the existing constitutional provisions have not been tested in practice, there remains an opportunity to remedy the identified normative shortcomings through a future constitutional revision. Such reform would contribute to the establishment of a more coherent and legally grounded model of presidential responsibility, within which the role of the Constitutional Court would be defined more clearly and exercised more effectively.

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USTAVNI KONCEPT ODGOVORNOSTI ŠEFA DRŽAVE

APSTRAKT: Pored svoje osnovne nadležnosti, ustavni sud raspolaže i određenim posebnim nadležnostima, među kojima je njegova nadležnost da sudi visokim državnim funkcionerima. Autor u radu analizira upravo ovu posebnu nadležnost ustavnog suda, usmerenu na utvrđivanje odgovornosti šefa države. Predmet istraživanja obuhvata ustavnopravne osnove za pokretanje pitanja odgovornosti šefa države, ovlašćene subjekte, potrebnu većinu i postupak donošenja odluke o optužbi protiv šefa države. Cilj istraživanja jeste da se primenom pozitivnopravnog i uporednopravnog metoda utvrde sličnosti i razlike u postojećim normativnim rešenjima pojedinih evropskih zemalja, kako bi se u poslednjem delu rada posebna pažnja posvetila rešavanju ovog pitanja u Republici Srbiji prema Ustavu

iz 2006. godine. Autor će nastojati da, proučavanjem postojećih rešenja i njihovih mogućih nedostataka, ukaže na potrebu za potencijalnom ustavnom reformom ovog pitanja u Republici Srbiji.

Ključne reči: *ustavni sud, šef države, odgovornost šefa države.*

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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:

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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).

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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).

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

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(Dragojlović, 2018a)

(Dragojlović, 2018b)

When citing two or more texts in one citation:

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

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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.

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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.

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Example:

(Criminal Procedure Code, 2011)

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

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Example:

(Criminal Code of the Republic of Serbia, 1977)

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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).

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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
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2. California Secretary of State. Downloaded 2020, December 15 from <https://www.sos.ca.gov/business-programs/>
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5. Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22
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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_-_vodice.pdf

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