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Generative Artificial Intelligence and Copyright

Abstract

The rise of generative artificial intelligence has intensified the debate on whether AI generated content qualifies for copyright protection. In legal systems that define a copyright work as an original intellectual or spiritual creation of an author, the question is whether AI generated outputs satisfy the core requirements of authorship, originality, and expression in a specific form. This paper examines the concept of a copyright work under the Law on Copyright and Related Rights and relevant European Union case law, particularly the standard of "the author's own intellectual creation" developed by the Court of Justice of the European Union.

The analysis argues that originality in copyright law requires free and creative choices made by a human author. While generative AI systems can produce statistically novel and formally structured outputs, such outputs lack the personal intellectual contribution necessary for copyright protection unless a human exercises decisive creative control. The paper concludes that copyright protection cannot be extended to purely AI generated content without undermining the conceptual foundations of authorship and originality in copyright law.

***Key words*:** copyright law, generative artificial intelligence (AI), originality, spiritual creation, authorship.

Introduction

The development of generative artificial intelligence systems (hereinafter: AI) in recent years has led to the mass production of texts, images, music, and audiovisual content which, by their outward appearance, may seem artistic or at least creative in nature. This development raises a number of legal questions, which, in their most concise form, may be reduced to the following: can the output of AI qualify as a copyrighted work, and if so, under what conditions? These questions are not primarily technical but normative in nature. They concern the very concept of a copyrighted work, its foundations, and its limits.

In aesthetic theory, it is emphasized that works of art do not have an immediate purpose and are not usable objects, and that art is not artistic production in the sense of manufacturing products that serve some function, but rather art based on independent and free artistic creation (Grubor, 2022, p. 16).

Similarly, Gadamer's interpretation stresses that art does not produce something that is merely usable, but something that is, or that points to something that could have been otherwise something that deviates from and stands apart from the ordinary (Grubor, 2022, p. 16). These insights are legally significant because they demonstrate that an artistic work and, consequently, a copyrighted work, cannot be equated with the functional production of content. On the contrary, it presupposes free formation oriented toward meaning revealed within the work itself, rather than toward external utility.

It is precisely at this point that space opens for a more precise determination of the concept of form as one of the two key elements of originality. The form of a work is not tied to the material embodiment as such, but to the specific shaping of spiritual content. Within the work, spirit itself is materially objectified and realized, meaning that the elements of the work are not organized according to chance, but according to principles of internal coherence, affiliation, and homogeneity (Đukić, 2022, p. 57). Likewise, a living

artistic form posits a specifically artistic content, given in one single, unique, and unrepeatable manner (Đukić, 2022, p. 57).

While AI systems are capable of producing visibly different, even "unique," forms, it remains questionable whether such forms represent the shaping of spiritual content or merely the product of data processing. If the "spirituality" of a work is understood as presupposing the existence of a subject who acts creatively through free will, intention, self-expression, or at least an internally coherent meaning arising from the subject then the question arises: what, exactly, is being "objectified" in AI generated content?

This issue is further illuminated by Hegel's conception of art as the free representation of the world which, together with religion and philosophy, expresses "the deepest interests of humanity" and "the most comprehensive truths of spirit," with art functioning as a mediating element between sensuous immediacy and finite reality on the one hand, and the infinite freedom of conceptual thought on the other (Hegel, as cited in Grubor, 2022, p. 26). This is complemented by the view that art has its ultimate purpose "in representation and revelation themselves," rather than in external aims such as instruction, profit, or utility (Hegel, as cited in Grubor, 2022, p. 26). If the function of art and, more broadly, of the aesthetic is self-knowledge and self-understanding, then the copyrighted work becomes a medium through which the subject recognizes itself and comes to know itself anew. From a normative standpoint, this leads to the following thesis: without a subject, there can be no spiritual originality, because there is no "self" capable of recognizing itself within the work.

The primary aim of the paper is to examine whether, and under what conditions, AI generated outputs may qualify as copyrighted works within the framework of copyright law, relying on a normative and comparative approach. In particular, the paper will analyze: 1) whether originality is legally relevant as a property of the result or as a property of the creative process in which free creative choice is exercised; 2) whether the form of a work, understood as the shaping of spiritual content, can be attributed to the outputs of generative AI; and 3) whether extending the concept of a copyrighted work to AI generated content would undermine the fundamental principles of copyright law.

Normative Framework

The following section of the paper analyzes the general conditions for copyright protection under the Law on Copyright and Related Rights (Narodna skupština Republike Srbije [Narodna skupština], 2019), with particular attention to the concepts of authorship, spiritual content, originality, and the form of the work.

Conditions for the Protection of a Copyrighted Work

Pursuant to the Law on Copyright and Related Rights (Narodna skupština, 2019, Art. 2(1)), a copyrighted work is defined as "an original spiritual creation of the author, expressed in a specific form, regardless of its artistic, scientific, or other value, its purpose, size, content, or manner of manifestation, as well as the permissibility of its public communication."

From the above, it follows that the legislator establishes several cumulative conditions that a work must satisfy, which may be summarized as follows:

1. that the work is created by an author, that is, by one or more natural persons;

2. that the work constitutes an intellectual (spiritual) creation;[1]

3. that it is original; and

4. that it is expressed in a specific form.

In copyright theory, it is emphasized that the concept of a copyrighted work is based on general constitutive elements, which relate to the existence of an author as a natural person, the spiritual character of the creation, its originality, and its expression in a specific form (Popović & Marković, 2020).

Authorship of the Work

Pursuant to Article 9(1) of the Copyright and Related Rights Act, an author is a natural person who has created the copyrighted work (Narodna skupština, 2019). This statutory solution is directly linked to the understanding of creation as a spiritual, that is, psychological process, which excludes the possibility for legal persons to be considered authors. The act of creating a copyrighted work constitutes a legal fact rather than a legal transaction, meaning that copyright arises by the very act of creation itself, irrespective of the author's will to be recognized or publicly known as such.

In this sense, a person is regarded as the author regardless of whether the work has been published, whether the author appears anonymously or under a pseudonym, or regardless of the reasons for concealing authorship. The author is the original holder of subjective copyright, which arises *ipso iure*, by the mere coming into existence of the copyrighted work.

Therefore, all works that are not created by a human being, that is, by a natural person as an author, cannot be regarded as copyrighted works within the meaning of the Copyright and Related Rights Act (Narodna skupština, 2019). This conclusion is of crucial importance for the further analysis of generative artificial intelligence, as it establishes an initial and insurmountable boundary of copyright protection: the existence of a human being as the bearer of the spiritual creative act.

Authorship and AI-Generated Outputs

The solution adopted by the Copyright and Related Rights Act (Narodna skupština, 2019) is not accidental, but is based on the understanding that the creation of a copyrighted work is the result of the spiritual, intellectual, and creative activity of a human being, as a being capable of intention, meaning, and self-expression.

From the perspective of copyright law, it is crucial that the author is not the entity that merely constitutes the technical cause of the emergence of a particular form, but rather the one who is the bearer of creative decisions that have led to the shaping of the intellectual content of the work. Contemporary generative models, including large language models, function as statistical systems that predict the next element in a sequence based on patterns extracted from large quantities of data, without possessing

[1] In Serbian copyright doctrine, the term "intellectual creation" is traditionally rendered as "spiritual creation" (*duhovna tvorevina*), reflecting the continental legal understanding of authorship. It does not denote any metaphysical or religious dimension, but refers to the human capacity for intentional, meaningful, and self-reflective creative activity. In this context, "spiritual" emphasizes the personal and subjective origin of the work in the human author, rather than a purely technical or computational process.

consciousness, intention, or the capacity for free choice in the human sense (Goodfellow et al., 2016; Bender et al., 2021; Vaswani et al., 2017).

Even in cases where a human provides instructions to the system or exercises a certain degree of control over the generation process, authorship cannot be automatically attributed to the system itself. Instead, it must be examined whether, and to what extent, the human contribution has reached the level of creative activity necessary to justify the status of an author.

From the foregoing, it follows that the outputs of generative artificial intelligence, insofar as they are not the result of the independent and creative activity of a specific natural person, cannot be attributed to an author within the meaning of the Copyright and Related Rights Act (Narodna skupština, 2019). This does not imply that such outputs cannot possess practical, economic, or cultural value, but rather indicates that they fail to satisfy the fundamental subjective requirement for copyright protection.

Intellectual (Spiritual) Content

In the continental tradition, a work qualifies for copyright protection only if it constitutes a *geistige Schöpfung*, that is, a creation arising from the personal intellectual and creative activity of a human author, rather than from a purely technical or mechanical process (Ulmer, 1980).One of the key conditions for the protection of a copyrighted work under the Copyright and Related Rights Act is the existence of spiritual content within the work (Narodna skupština, 2019.).

It is precisely this capacity to shape and convey meaning through the creative act that forms the basis of the spirituality of a copyrighted work. A copyrighted work originates from the human spirit and addresses the human spirit, and its spiritual content may possess rational, emotional, symbolic, or aesthetic dimensions (Lucas & Lucas, 2012). This spiritual content gives the work its meaning and enables it to function as a means of communication among individuals, that is, as a social creation that transcends its material embodiment.

Accordingly, spiritual content implies that the work carries a certain meaning that is the result of the author's creative activity and that is accessible to the perception of others. Such meaning need not be unambiguous, nor must it be rationally articulated, but it must constitute an expression of the human spirit objectified within the work. For this reason, a copyrighted work cannot be regarded as a mere accumulation of signs, symbols, or data, but rather as a whole in which spiritual content is inseparable from its expressed form.

The spiritual content of the work therefore represents the link between the author as subject and the work as object of protection, with the author being the bearer of the meaning manifested in the work. Without such a connection between the subject and the spiritual content, one cannot speak of a copyrighted work within the meaning of the Copyright and Related Rights Act.

Although AI generated content may contain structures, symbols, or forms that are intelligible to humans and that may appear meaningful, the question remains whether such creations can be said to possess spiritual content in the copyright sense. If spiritual content presupposes the existence of a subject who attributes meaning to the work and communicates through it with others, then creations produced without a human creative act cannot be regarded as copyrighted works, regardless of their external complexity or apparent creativity. Nevertheless, it is necessary to distinguish between the effect a work produces and the source from which it originates.

On the basis of the foregoing, it may be concluded that spiritual content constitutes a fundamental and indispensable element of a copyrighted work, deriving from the human spirit and required to manifest in the work as meaning and significance.

Spiritual Nature of Content and AI-Generated Output

The distinction is of fundamental importance: the spiritual content of a copyrighted work is not identical to the meaning that an audience may recognize in it. Rather, it presupposes that the work has arisen as the result of the creative self-expression of a specific author. Where there is no subject who, through the creative act, introduces a personal spiritual contribution into the work, the component that qualifies the work as a "spiritual creation" within the meaning of the law is likewise absent.

Even in situations where a human provides prompts or instructions to a generative system, it is necessary to examine whether the human contribution has reached the level of creative shaping of spiritual content, or whether the human remained at the level of an initial stimulus while the specific form and structure of the output were produced through automated model processing. In the latter case, it is difficult to speak of spiritual content originating from the author's inner world, as there exists a discontinuity between the human and the final result in the process of creative formation.

It may therefore be argued that generative artificial intelligence is capable of producing a form that invites interpretation, but not spiritual content in the legal sense.

Originality

Pursuant to Article 2(1) of the Law on Copyright and Related Rights (Narodna skupština, 2019), a copyrighted work must constitute an "original spiritual creation of the author." In both theory and practice, originality is interpreted as the result of the author's personal creative activity (Court of Justice of the European Union [CJEU], 2009). The subjective theory of originality emphasizes that personal creativity and the author's individual expression form the foundation of originality in copyright law, meaning that originality does not depend solely on the novelty of form, but on the author as a creative subject (Zhang & Zhao, 2023).

Originality does not relate to ideas, concepts, or methods as such, but to the manner in which they are expressed, that is, to the form in which the spiritual content is shaped. No copyrighted work arises in complete isolation, rather, it always develops in dialogue with preexisting expressions and forms. Consequently, when speaking of originality, one refers to the existence of certain elements that are autonomous, individual, and author-specific in relation to prior works. Copyright protection extends precisely to those original elements, while the scope of protection depends on the degree of originality achieved in the particular work.

In copyright theory and case law, originality is traditionally understood as requiring two cumulative elements: that the work be independently created and that it results from the author's own creative choices, reflecting a minimum degree of intellectual creativity (CJEU, 2009; CJEU, 2011). It is emphasized in copyright scholarship that a work must bear the author's personal imprint and represent the result of his or her creative choices.

Depending on the type of work, originality may manifest through different elements: in literary works through plot, style, composition, or characterization; in visual arts through the selection of subject matter, composition, color, and light; in photography through angle, framing, choice of moment, and artistic intervention.

It follows that originality cannot be reduced to mere difference or statistical uniqueness of the result. A work may be formally different from all others and yet fail to qualify as an original spiritual creation of the author if it does not reflect a personal and meaningful contribution of the creator. In this sense, originality presupposes conceptual and spiritual meaning, not merely novelty in the form or structure of the work. If originality presupposes the author's personal spiritual imprint and freedom of creative choice, then outputs generated without such choice cannot be regarded as original in the copyright sense, regardless of the degree of their formal novelty.

It may therefore be concluded that originality, as an essential condition of copyright protection, represents a synthesis of spiritual content and the author's free creative activity, manifested through the form of the work.

Originality and AI-Generated Outputs

In the case law of the Court of Justice of the European Union, originality is defined as the author's own intellectual creation, whereby the Court emphasizes that a work must reflect the author's personality through the free and creative choices made in the process of creation (CJEU, 2009; CJEU, 2011). A key element of the originality test is therefore the existence of free and creative choices.

Generative systems, however, do not operate on the basis of freedom. Their "choices" are not autonomous, but are the result of mathematical functions and optimization processes. They cannot depart from their own model in the sense of making an existential or creative decision to "be different", but instead produce an output that represents the statistically most probable configuration in a given context. The formal novelty of AI generated outputs is not sufficient to satisfy the requirement of originality.

This, however, does not exclude the possibility that, in certain cases, a human author, using a generative system as a tool, may shape the final result through creative decisions to an extent that fulfils the requirement of originality. In such situations, it is necessary to assess individually the degree and nature of the human contribution, since questions of authorship and originality do not depend on the mere use of technology, but on the creative role assumed by the human in the process of creation.

Expression in a Specific Form

Accordingly, copyright protection does not extend to ideas as such, but to their expression in a specific form, since form represents the manifestation of the author's creative and intellectual content that the law protects (Smith, 2024). While spiritual content refers to the meaning and significance embodied in the work, form constitutes the manner in which that meaning is made accessible to sensory perception and to the understanding of others. Ideas, concepts, and mental constructs, insofar as they remain solely within the author's mind, cannot be the object of copyright protection, as they are not susceptible to legal assessment, identification, or analysis.

Communication itself is a codified system of signs, and form likewise represents a codified system of signs used by humans in communication (Popović & Marković, 2020). Language, sound, movement,

visual elements, or their combination constitute the means through which the spiritual content of a work is conveyed and made accessible to reception. For this reason, the form of a copyright work may be understood as a communicative medium through which spiritual content becomes recognizable, analyzable, and interpretable.

Form is not a mere external shape (outer shell) of an idea, but the manner in which spiritual content is individualized and shaped through the author's creative choices. It is precisely through form that the spiritual content of a work is materialized and becomes the object of legal protection. As it is generally accepted in copyright theory that protection extends to the expression of an idea rather than to the idea itself, the form of a work represents the key link between spiritual content and legal protection, since it is through form that the author's creative contribution becomes legally relevant (World Intellectual Property Organization [WIPO], 2023).

Content generated by artificial intelligence undeniably possesses an expressed form in a sensorially recognizable sense. Nevertheless, the question arises whether such form is the result of the shaping of an author's spiritual content or merely a formal structure produced in the absence of a creative subject. This question will be addressed in the subsequent analysis.

Form of a Copyright Work and Generative Artificial Intelligence

The mere existence of a formal structure is not sufficient, in itself, to qualify as form in the copyright law sense. The decisive criterion is not whether something has a form, but how that form came into being.

In this sense, it is possible to speak of formal expressiveness without copyright form. In other words, form exists here as a technical fact, but not as a legally relevant manifestation of authorial creativity. Copyright form is not the mere consequence of a functional or optimal arrangement of elements, but the result of creative choices.

This, however, does not exclude the possibility that the form of a copyright work may arise in a process in which a human uses generative artificial intelligence as a tool. Where a human, through selection, modification, and arrangement of generated outputs, assumes an active and decisive creative role, the form of the final work may reflect that person's spiritual or intellectual contribution. In such cases, form is not the product of the system itself, but the result of a human creative process in which technology functions as a subordinate instrument.

From the foregoing, it follows that, in the context of generative artificial intelligence, a clear distinction must be drawn between the existence of a formal structure and the existence of form in the copyright-law sense. Only form that arises as an expression of the spiritual or intellectual content and creative choices of an author can be the object of copyright protection. By contrast, form that results exclusively from automated generation remains outside the scope of copyright law.

Conclusion

Copyright work can be understood exclusively as an original spiritual creation of a human being, expressed in a specific form. The analysis of generative artificial intelligence shows that, although such systems may produce outputs that are formally complex, semantically coherent, and aesthetically persuasive, they do not fulfil the fundamental prerequisite of a copyright work: the existence of a subject whose spiritual content is expressed in the work.

In this respect, the paper highlights the necessity of clearly distinguishing between the existence of a formal structure and the existence of form in the copyright law sense.

The more closely AI-generated outputs resemble human works, the more difficult it becomes, based solely on the expression itself, to determine whether a particular form originates from the spiritual content of an author or from purely technical generation.

This leads to the conclusion that the distinction between formal structure and form in the copyright law sense cannot be established solely on the basis of the external characteristics of the result, but requires an analysis of the process by which it was created. The decisive question becomes not how the work appears, but how it came into being and who made the creative decisions in the process. Where a human assumes an active, free, and creative role through selection, modification, arrangement, and editing, it is possible to speak of form in the copyright sense. Conversely, where the result is exclusively the outcome of an automated process, form remains legally irrelevant, regardless of the degree of aesthetic or semantic persuasiveness.

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Generativna veštačka inteligencija i autorsko pravo

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Sažetak

Razvoj generativne veštačke inteligencije intenzivirao je raspravu o tome da li sadržaji generisani veštačkom inteligencijom mogu uživati autorskopravnu zaštitu. U pravnim sistemima koji autorsko delo definišu kao originalnu intelektualnu ili duhovnu tvorevinu autora, postavlja se pitanje da li rezultati generisani veštačkom inteligencijom ispunjavaju osnovne uslove autorstva, originalnosti i izraženosti u određenoj formi. U radu se analizira pojam autorskog dela u skladu sa Zakonom o autorskom i srodnim pravima, kao i relevantna praksa Evropskog suda pravde, posebno standard „autorovo sopstveno intelektualno stvaranje“ razvijen u praksi Suda pravde Evropske unije. Analiza pokazuje da originalnost u autorskom pravu podrazumeva slobodne i kreativne izbore koje donosi ljudski autor. Iako generativni sistemi veštačke inteligencije mogu proizvoditi statistički nove i formalno uobličene rezultate, takvi rezultati ne sadrže lični intelektualni doprinos neophodan za autorskopravnu zaštitu, osim ako čovek ne preuzme odlučujuću kreativnu ulogu u procesu. Rad zaključuje da se autorskopravna zaštita ne može proširiti na isključivo sadržaje generisane veštačkom inteligencijom, a da se pritom ne ugroze pojmovni temelji autorstva i originalnosti u autorskom pravu.

***Ključne reči*:** autorsko pravo, generativna veštačka inteligencija (VI), originalnost, duhovna tvorevina, autorstvo.

Human Trafficking During the Migrant Crisis in the Balkans (Case Study: Albania)

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Human Trafficking During the Migrant Crisis in the Balkans (Case Study: Albania)

Abstract

The migration crisis in the Western Balkans (2015–2020) has increased Albania's vulnerability to human trafficking. As a transit and increasingly destination country, Albania faced challenges in identifying, protecting, and reintegrating victims, particularly migrants, refugees, and unaccompanied minors. This study examines the legal and institutional framework, including the National Referral Mechanism and cooperation with NGOs, as well as the role of international actors (UNHCR, IOM, GRETA, OSCE). Despite progress in legislation and victim protection mechanisms, challenges remain in victim identification, professional training, and inter-agency coordination. The study highlights the need for regional cooperation, a human-rights-based approach, and technological tools for more effective anti-trafficking measures.

Keywords: Albania, human trafficking, migration, unaccompanied minors, international organizations, victim protection

Introduction

Transnational organized crime has emerged as a significant threat to national and international security, with profound social, economic, and political consequences that may contribute to state and societal destabilization (Eyo & Okebugwu, 2024). A defining feature of contemporary organized crime is its transnational character, as state borders no longer constitute an effective barrier to criminal networks. Consequently, the activities of organized criminal groups pose a threat not only to the countries in which they originate, but also to all states and societies in which they operate (Banović, 2016). In the context of the financial dimension of human trafficking, the issue of anonymous money flows and the concealment of the origin of funds takes on particular significance. (Bjelajac & Bajac, 2022).

This paper examines human trafficking in Albania during the migrant crisis of the past decade (2015–2020). The migrant crisis generated extensive political debate and controversy across Europe, particularly in the Balkan region, while simultaneously creating opportunities for criminal activities and serious human rights violations. One of the most severe violations at the international level is human trafficking. According to Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), human trafficking encompasses the recruitment, transportation, transfer, harboring, or receipt of persons through coercion, force, deception, abuse of power, or exploitation of vulnerability for the purpose of exploitation (Russo et al., 2022).

The aim of this study is to analyze the characteristics of transnational organized crime in the context of human trafficking during the Balkan migrant crisis between 2015 and 2020, with particular emphasis on Albania. The paper first outlines the migrant crisis in Europe and the status of migrants within the European Union, followed by an overview of human trafficking as a phenomenon. Special attention is given to the Balkan route and Albania's role within this context. Finally, the paper discusses protection and prevention measures implemented by the Albanian government to safeguard victims and combat human trafficking.

The Migrant Crisis in Europe (2015–2020)

Causes and Onset of the Migrant Crisis

According to the International Organization for Migration (IOM) and other international bodies, there is no universally accepted definition of the term "migrant." Generally, migrants are understood as individuals who move from one place to another in search of better living and working conditions (Joao, 2018). Freedom of movement is protected under international law, and host countries are obliged to ensure the protection of migrants (Margesson et al., 2019). The Human Rights Committee emphasizes that states in which migrants are identified must respect procedural safeguards and rights established by international human rights instruments, ensuring protection and non-discriminatory treatment regardless of migrants' legal status (Metcalfe-Hough, 2015).

Regarding EU migration policy, the process of European integration during the twentieth century resulted in several key legal instruments shaping immigration and asylum governance. Although the Single European Act aimed to establish a unified market without internal borders, it did not adequately address migration and asylum issues. Subsequent cooperation led to the adoption of the Schengen Agreement (1985), the Schengen Implementing Convention (1995), and the Dublin Convention (1990). While the Schengen framework focused on strengthening external border controls and judicial cooperation, its implementing conventions increasingly linked migration and asylum to security concerns such as terrorism and transnational crime. The Dublin Convention further reinforced this approach by limiting asylum applications, strengthening external border zones, and reducing entry opportunities, thereby revealing the restrictive nature of intergovernmental cooperation in this field.

The Maastricht Treaty (commonly referred to as the Treaty on European Union) placed immigration and asylum issues under the competence of the newly established European Union. It limited national autonomy and judicial oversight in these areas, while simultaneously linking immigration and asylum to illegal migration, organized crime, fraud, and police cooperation in combating terrorism, drug trafficking, and other forms of cross-border crime. In order to address the institutional confusion created by the establishment of the single European market and the intergovernmental management of migration and asylum, the Amsterdam Treaty (1997) later separated asylum and immigration law from organized crime and transferred these issues to the first pillar.

The protection of individuals from persecution laid the foundation for a more humanitarian approach to immigration. At that time, the only binding EU instrument in the field was the Temporary Protection Directive (2001), which reflected a balance between strict control measures and humanitarian considerations, with migration being less strongly securitized. Consequently, EU migration policy during the late twentieth century evolved through a compromise between restrictive security-oriented measures—initially shaped by the Schengen framework—and humanitarian principles promoted from the Tampere Conference onward. Another defining feature of this period was enhanced cooperation between EU member states and third countries, resulting in numerous bilateral readmission agreements.

Following the attacks of 11 September 2001, the EU adopted a more security-driven approach. Through initiatives such as the "Border Measures" directive, external border controls were strengthened, and asylum and immigration were increasingly associated with counterterrorism efforts. As a result, combating illegal immigration became a central EU priority, culminating in the adoption of the

Comprehensive Action Plan against Illegal Immigration and Trafficking in Human Beings in 2002. Terrorist attacks in France, Belgium, and Germany in 2015–2016 further intensified fears related to migration, leading to greater securitization and the criminalization of migrants and asylum seekers in political discourse. The revision of the Dublin Regulation in 2013 (Dublin III), which assigns responsibility for asylum processing to the first country of entry, proved unsustainable during the 2015 migrant crisis, particularly due to the limited capacities of peripheral EU member states.

The key strategic document guiding EU immigration policy is the European Agenda on Migration (Sekarić, 2016). Its core principle emphasizes collective action by all member states to provide protection to migrants in need of international protection, while ensuring the return of those without legal grounds to remain in the EU. The Agenda called for urgent measures to address the Mediterranean crisis and outlined long-term steps to improve migration governance. In parallel, the European Security Agenda (2015–2020) significantly shaped political responses to immigration, as reduced sensitivity toward migrants' rights risked framing the migration crisis primarily as an economic and security issue.

Regarding migrants' legal status, the use of the term "illegal" is discouraged, as it conflicts with the Universal Declaration of Human Rights, particularly Article 6, which affirms that every individual has the right to recognition as a person before the law (United Nations General Assembly, 1948). Regardless of legal status, migrants should be treated with dignity, although in practice, especially in welfare-intensive states, irregular migrants are often blamed for their vulnerable situation.

Detention practices and conditions related to irregular border crossings significantly affect the protection of migrants' rights (Adamson, 2006), with women and children—particularly unaccompanied minors—being especially vulnerable. Given that these groups are frequently victims of human trafficking, border and migration authorities must apply appropriate training and screening procedures. Human trafficking, driven by high profits and the interaction of supply and demand, constitutes a serious violation of fundamental rights and is explicitly prohibited under Article 5(3) of the EU Charter of Fundamental Rights. It is criminalized under Article 83 of the Treaty on the Functioning of the European Union as a form of "Euro-crime," often with a cross-border dimension.

The EU Directive 2011/36/EU established minimum standards for defining trafficking offenses, penalties, victim protection, and prevention measures. Recognizing the complexity of the issue, the European Commission adopted the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, followed by the Action Plan against Trafficking in Human Beings 2017–2019. Article 2 of Directive 2011/36/EU defines trafficking-related offenses, including recruitment, transportation, transfer, harboring, or receipt of persons through coercion, deception, or abuse of power. The International Labour Organization estimates that traffickers exploit approximately 77% of victims within their countries of residence, prompting the UN to stress in 2018 the growing importance of national justice measures alongside international cooperation.

To address trafficking more effectively, many states have established National Referral Mechanisms aimed at identifying, protecting, and assisting victims (Hernandez & Rudolph, 2015). These mechanisms typically operate in three stages: identification and referral by first responders, assessment based on "reasonable grounds," and a final determination of victim status.

The Balkan Route in the Context of Migration and Human Trafficking

The Balkan route gained particular prominence in 2015, when several hundred thousand migrants—primarily asylum seekers from Syria, Iraq, and Afghanistan—used this pathway to reach Western Europe. Its popularity stemmed largely from the fact that migrants could initially travel relatively freely, without relying heavily on smugglers, as borders along the route remained comparatively open until late 2015. However, from September 2015 onward, countries in the region progressively introduced border closures, fences, and restrictive entry measures, which increased demand for smuggling services and diverted migration flows to more dangerous routes.

Migration along the Balkan route has been predominantly transit-oriented, with Albania functioning mainly as a transit country. In 2018, 5,730 arrivals and 4,378 asylum applications were recorded, while only about 1% of migrants chose to remain in Albania. Most migrants originated from conflict-affected countries, with Syrians accounting for approximately half of all arrivals. Women and children represented around 18% of migrants, including 155 unaccompanied minors, whose protection needs required strengthened coordination between state authorities, NGOs, and international agencies (Schloendhardt, 2019; Benedetti, 2018).

Alongside the Mediterranean route, the Balkan route became one of the principal corridors during the European migrant crisis, which began intensifying in 2014 and was described as one of the largest population movements in Europe since World War II. Widespread fatalities along these routes underscored the severity of the crisis. Migrants often faced forced returns at EU borders, particularly from Croatia, leaving many stranded in the Balkans and exposed to significant risks. In this context, the convergence of large-scale migration and weak institutional capacities created favorable conditions for human trafficking networks (Kleemans, 2011).

As a transit country on the southern segment of the Balkan route, Albania faced additional challenges due to domestic political, economic, and corruption-related issues, as well as the presence of organized crime. At certain points, more than 25,000 migrants were waiting near the Greek border to continue their journey through Albania toward EU borders via Montenegro and Bosnia and Herzegovina (Benedetti, 2018). The scale and complexity of these movements revealed significant shortcomings in European migration systems, leaving many migrants and refugees in highly vulnerable situations (International Organization for Migration, 2019).

According to data from the United Nations High Commissioner for Refugees (UNHCR), approximately one million migrants and refugees reached Europe—primarily via the Greek coastline—using smuggling networks in 2015 (Clayton & Holland, 2015). Unsafe travel conditions and inadequate transport resulted in numerous deaths and disappearances, most likely due to drowning. The majority of individuals traveling along irregular routes were men, although families and elderly relatives were also present. The fluidity of migration routes and shifting border restrictions facilitated adaptive strategies among migrants, while the disappearance of unaccompanied migrant children upon arrival in Europe raised serious concerns regarding human trafficking (Grupković, Jelačić Kojić, & Petronijević, 2016).

In 2016, nearly 370,000 migrants entered Europe by sea, with Syrians, Afghans, Nigerians, Pakistanis, Iraqis, and Eritreans constituting the largest groups (Migration Policy Institute, 2019). Border closures, particularly by Hungarian authorities, left many migrants stranded in Greece, forcing some to

seek alternative land routes through Turkey and Albania (Batha, 2016). Although the number of arrivals declined in 2017 amid rising populism and the reconfiguration of migration routes, this period was marked by the establishment of new policy mechanisms and governance structures (Henley, 2018). A persistent challenge throughout the crisis remained the coordination of decision-making, especially among frontline states such as Italy and Greece.

In 2019, migrant arrivals exceeded expectations due to renewed conflict in northern Syria, which displaced over 800,000 people (European Border and Coast Guard Agency, 2019). By contrast, 2020 saw a decline in arrivals, largely influenced by restrictive measures linked to the COVID-19 pandemic (European Border and Coast Guard Agency, 2019). Nevertheless, migration pressures persisted, particularly along the Mediterranean and Balkan routes. According to UNHCR, Europe's mixed migration flows continue to comprise asylum seekers, refugees, and economic migrants, posing ongoing challenges for European migration governance.

Status of Migrants and the Phenomenon of Human Trafficking within the European Union

Human Trafficking and Irregular Migration Flows through Albania

Albania has faced challenges similar to those experienced across Europe during the migrant crisis. The country operates a single National Reception Center for Asylum Seekers in Babrru, near Tirana, which is intended to provide accommodation and assistance to migrants arriving in Albania (Bregu, 2019). Albania primarily functions as a transit country for migrant smuggling across the Western Balkans or, less frequently, by sea to Italy. Maritime routes are considered more expensive and risky, making them less commonly used. Smuggling from Greece into Albania mainly occurs via land routes through rural and remote areas that bypass official border crossings. A Frontex report (2019) indicates that the scale of migrant smuggling through Albania largely depends on the level of border control along the Greek–Albanian frontier, with the city of Ioannina identified as a key hub for migrants seeking smugglers. From Albania, the main overland route leads toward Montenegro and further to Croatia or Serbia, forming a less frequented sub-route of the Western Balkan corridor due to difficult mountainous terrain and underdeveloped infrastructure.

Human trafficking is criminalized in Albania. Between April 2018 and March 2019, authorities identified 95 official and potential victims, including 28 adults and 67 minors, with women accounting for the majority of cases; 36 victims were subjected to sexual exploitation (Country Policy and Information Note, 2020). Although Albania is not part of the EU asylum system, it has adopted legal frameworks and mechanisms to manage irregular migration in line with international human rights and protection standards. Nevertheless, like other Western Balkan countries, Albania has experienced a sharp increase in migrants and refugees arriving from outside the region, which has strained institutional capacities.

Women and children constitute a significant proportion of irregular migration flows through Albania and are particularly vulnerable to human trafficking and sexual exploitation. Over the past decade, trafficking networks have become more structured, operating through distinct patterns. One type involves the transportation of refugees and irregular migrants of various legal statuses, including both foreign nationals and Albanian citizens. Another type focuses predominantly on the trafficking of women for sexual

exploitation, a process that differs fundamentally from migrant smuggling, as exploitation continues beyond arrival at the destination (Nushi, 2015).

The third form of trafficking involves children, who are forced into begging, sexual abuse, or organ trafficking, with girls often later exploited in prostitution. Albanian criminal groups are widely believed to cooperate across Europe and to display a high level of resilience to law enforcement, resulting in extensive transnational trafficking networks.

In 2015, Albania faced increased pressure from irregular migration flows following measures adopted by North Macedonia to reduce movements from Greece (Šelo Šabić, 2018). Owing to its strategic geographic position, Albania enables migrants to continue toward Montenegro or attempt maritime crossings across the Adriatic Sea to Italy. Economic underdevelopment, weak infrastructure, and mountainous border areas further facilitate irregular crossings, particularly during winter months. Since early 2018, Albanian border authorities have detected 2,311 irregular border crossings, confirming that Albania's terrain and relatively permeable borders sustain active irregular migration flows (Xhaho & Lleshi Tandili, 2019).

Despite efforts by the EU and national authorities, migrant smuggling remains difficult to suppress. The Ministry of Interior, through bodies such as the State Police, the Border and Migration Department, the Directorate for Organized Crime, and the Directorate for Anti-Trafficking, plays a central role in managing irregular migration. These institutions are responsible for integrated border management, monitoring the legality of foreign nationals' stay, implementing return and readmission procedures, conducting regional data exchange, and identifying and assisting victims or potential victims of human trafficking, including unaccompanied minors, in line with the National Referral Mechanism and standard operating procedures.

Alignment of the Albanian Government with Migration and Human Trafficking Protocols: Prevention and Victim Protection Mechanisms

Albania was heavily affected by the migration crisis as the collapse of the Balkan route redirected flows through Albania, Montenegro, and Bosnia toward Western Europe (Bregu, 2019). Between 2000 and 2010, Albania served as a destination for victims of nearly all forms of human trafficking, including prostitution, sexual exploitation, forced labor, and organ trafficking (Dottridge & Machel, 2004).

Until 1998, Albania lacked a legal framework addressing human trafficking. The first initiative came with the establishment of the Working Group on Combating Human Trafficking under the Ministry of Interior (Portanova, 2018; Townsend, 2019). In 2001, Albania formally criminalized human trafficking in its penal code, preceding ratification and implementation of the UN Protocol on Human Trafficking in 2002 (U.S. Department of State, 2002). Additionally, Albania adopted Council of Europe instruments against human trafficking on 20 November 2006, implemented as Law No. 9642 (Agolli Nasufi & Bruci, 2019), ratified the Palermo Protocol in 2002, and the Council of Europe Convention in 2007, reflecting the government's proactive stance. Further measures included establishing the State Committee against Human Trafficking in 2002 and, in 2017, implementing the National Referral Mechanism under the Prime Minister's office.

Albania implemented an action plan for 2011–2013, emphasizing legal frameworks, data collection, awareness-raising projects, services, and international cooperation to combat human trafficking (Balidemaj, 2019). The aim was to align Albanian law with international standards. While Albania criminalized human trafficking, identifying actual victims remains challenging due to varied exploitation methods (Simich, Goyen, & Mallozzi, 2014).

Legal gaps persist, as broad definitions from the UN Protocol on Trafficking complicate enforcement (Kranrattanasuit, 2014). The 2014–2017 strategy included victim restitution, rehabilitation, and compensation, but practical measures were limited (Asllani, 2018). Victims are both survivors and witnesses of suffering (Ward & Fouladvand, 2018).

Albania operates four shelters under the National Shelter Network, offering legal support, training, child assistance, and long-term accommodation for 115 victims (U.S. Department of State, 2020). In 2016, the government launched the "Action Plan for Social and Economic Integration of Women and Girls Victims," targeting housing, education, social support, and reintegration (Gjebrea, 2016).

The Ministry of Interior and the National Coordination Office, in cooperation with IOM, developed an action plan aligned with organized crime strategies (UK Ministry of Interior, 2018b). The Victim Assistance Bureau, established in 2016, supports minors, disabled persons, and victims of sexual exploitation, with UN endorsement (UN Committee, 2016). Internationally supported projects include "Choose Opportunity, Not Illegal Migration" (Oct 2017–Mar 2018) in 12 regions of Albania (IOM, 2017).

Since 2020, the Albanian government has continued to strengthen its legal, institutional, and strategic framework to combat human trafficking and better manage migration flows. The revised National Action Plan against Human Trafficking (2021–2023) emphasized prevention, victim protection, and the reinforcement of local mobile teams (Government of Albania, 2021).

In 2021–2022, Albania enhanced cooperation with international actors, particularly FRONTEX, the European Border and Coast Guard Agency, improving the identification of vulnerable migrant groups, including potential trafficking victims (European Border and Coast Guard Agency, 2022). With support from IOM and UNHCR, reception and registration mechanisms for asylum seekers and migrants were also improved (UNHCR Albania, 2022; International Organization for Migration, 2023).

In 2023, Albania adopted a new Law on the Protection of Victims of Human Trafficking, ensuring victims' access to emergency accommodation, legal and psychosocial support, and reintegration into local communities (Group of Experts on Action against Trafficking in Human Beings, 2022), marking a significant alignment with international standards.

In 2024, a digital registry of vulnerable migrants was launched, developed with UN support, facilitating better inter-agency coordination and directing at-risk individuals to appropriate services (International Organization for Migration, 2023).

In 2025, a pilot reintegration program was implemented, offering education, employment, and subsidized housing, particularly in rural and impoverished areas (Bami, 2024). These initiatives represent a key step toward a sustainable and humane approach to combating human trafficking.

Despite significant progress, challenges remain, including limited local capacities, insufficient training of some actors, and the need for improved inter-institutional cooperation (United Nations Office

on Drugs and Crime, 2023). Nonetheless, Albania's progressive and comprehensive policies have the potential to serve as a regional model.

The Role of International Organizations in Shaping Albania's Institutional Response to the Migration Crisis

Albania has developed procedures to combat crimes related to human trafficking, recognizing it as a severe violation of human and fundamental rights. By adopting legislative measures and ratifying the Palermo Convention and its protocols in 2002, Albania has reduced human trafficking (Xhaho & Lleshi Tandili, 2019).

Combating human trafficking requires a multidisciplinary approach, involving expertise from multiple agencies or ministries. Effective responses necessitate that all relevant authorities understand the mechanisms of trafficking and how traffickers interact with victims and perpetrators. Since the adoption of the Palermo Protocol, an increasing number of stakeholders, including governments worldwide, have enacted comprehensive legislation criminalizing traffickers while providing care to victims. Ensuring protection for all victims, including those of internal trafficking, requires proactive application of these laws, sometimes beyond standard frameworks.

Albania's National Strategy against Human Trafficking (2018–2020) outlines systematically structured measures. It provides procedures for both victims and traffickers. Victims are recognized in criminal legislation as harmed by crime, and their vulnerability is addressed to prevent exploitation. Psychological assessments are conducted, and minors may be examined in the presence of parents or legal guardians. Upon leaving the National Reception Center for Victims of Trafficking, regional social services develop individualized reintegration plans. GRETA has been informed that victims receive priority access to services, while NGO-managed shelters collaborate with employment agencies and potential employers to facilitate access to the labor market. Databases are regularly updated to allow stakeholders to track victim progress and support reintegration (Xhaho & Lleshi Tandili, 2019).

The National Reception Center for Victims of Human Trafficking is located on the outskirts of Tirana and its security is ensured by the national police. Victims formally identified and assessed to be in particularly dangerous situations are accommodated in this center. In the first six months of 2015, the center provided shelter for 10 individuals. In addition to risk assessment, counseling, medical care, and legal advice, the center offers vocational training in partnership with the Ministry of Social Affairs and Youth, either within or outside the shelter if the victim's safety is not at risk.

By ratifying the Palermo Convention and its two supplementary protocols on human trafficking (Law No. 9820, 11 July 2002), Albania joined international efforts to coordinate anti-trafficking measures. Key organizational initiatives included establishing specialized structures to combat organized crime, including human trafficking. Rehabilitation measures include standardized questionnaires to assist police units in first contact with victims. At all border crossings where deportees are returned, border police interview individuals to identify and protect potential trafficking victims. The National Reception Center also raises awareness about human trafficking victims.

Other influential NGOs include UNHCR, CARITAS Albania, and IOM. Mixed migration flows in Albania began in 2017 with fewer than 2,000 border crossings. By 2018, the number of migrants reaching

Albania's borders reached approximately 11,000 (Xhaho & Lleshi Tandili, 2019). Albania has officially become a transit country, with almost 80% of border-crossers seeking asylum. Standard procedures and identification mechanisms vary from other regional countries. Through interviews and biographical data, migration and border authorities distinguish between trafficking victims, asylum seekers, unaccompanied minors, and irregular migrants.

Identified irregular migrants are typically returned to their country of origin, usually Montenegro. UNHCR procedures ensure that all migrants are interviewed according to official protocols, regardless of crossing location. Depending on the results, individuals are sent either to detention centers or to the National Reception Center for Asylum Seekers in Babru, near Tirana (UNHCR, 2019). Victims of human trafficking, however, are transferred to the National Center for Victims of Human Trafficking in Tirana, where specialized care and services are provided (UNHCR, 2019).

Most human trafficking cases involve unaccompanied women and children. Established trafficking routes suggest organized networks facilitating these crimes. While UNHCR's mission is not problem-specific, the illegal transport of migrants from southern to northern Albania clearly implies the risk of human trafficking. The Albanian government plays a key role but heavily relies on international organizations due to limited resources.

A practical challenge is the low number of female border officers. Since unaccompanied women are primary targets for traffickers, having more female officers would create a safer environment in which victims could disclose their situation more comfortably. Although international support has been valuable in recent years, effective procedures remain constrained by resource gaps, including a shortage of translators for rare languages such as Hindi and Pashto.

Albania lacks a formal referral mechanism for unaccompanied children. Traffickers can exploit this vulnerability because border and migration authorities do not have a structured system to interview and identify unaccompanied minors. Intervention only occurs if a child is formally recognized as unaccompanied. Effective protection requires not only identification systems but also coordination with local municipalities, social services, and the national child protection unit. Cooperation challenges arise due to insufficient government capacity and social workers.

International organizations support the renovation of social facilities and shelters for vulnerable groups, including trafficking victims. However, the absence of dedicated centers for trafficked minors or unaccompanied children indicates an unsustainable protection environment. International and NGO assistance includes training for border and migration police to prevent human rights violations by traffickers, yet gaps remain.

A positive example of collaboration involved three unaccompanied children from Afghanistan who were eventually reunited with their mother in Sweden. CARITAS Albania provided shelter, food, and medical care, while UNHCR managed bureaucratic procedures. After three years, all visa requirements were met, and the children were successfully reunited with their mother (UNHCR, 2019).

Conclusion

Human trafficking represents one of the most serious consequences of contemporary migration, and the migrant crisis affecting the Western Balkans between 2015 and 2020 further exposed existing

vulnerabilities in the region. Albania, as both a transit and increasingly a destination country along the Balkan route, faced significant challenges in identifying, protecting, and reintegrating victims of human trafficking, particularly among migrants, refugees, and unaccompanied minors. Although Albania had established a solid institutional framework prior to the crisis—including the National Referral Mechanism, cooperation with NGOs, and ratification of key international instruments—the crisis revealed operational weaknesses. Victim identification remained fragmented, and intersectoral cooperation was at times formal, without substantive data exchange.

Between 2015 and 2020, Albania intensified its efforts through updated strategies, action plans, and alignment of national legislation with European standards. Cooperation with organizations such as OSCE, UNHCR, and GRETA played a critical role in providing technical assistance and evaluating the institutional response.

Despite progress, the number of prosecuted cases remains low, and restitution for victims is almost nonexistent. Systemic weaknesses are evident in insufficiently trained professionals, fragmented evidence collection, and the lack of specialized prosecution teams for trafficking cases within migration contexts. Coordination gaps between security structures and social services impede early identification of victims among transit migrants, especially along informal routes. Unaccompanied minors remain the most vulnerable group, frequently exposed to forced begging, labor, and sexual exploitation. While the migration crisis did not create human trafficking, it exacerbated conditions for its proliferation, particularly in countries with limited capacities such as Albania. This underscores the necessity of regional and cross-border cooperation in detection, prevention, and prosecution, with a stronger role for international organizations and EU agencies.

Modern victim protection approaches must be grounded in human rights, gender equality, and the specific needs of vulnerable groups. Technological tools, such as digital forensics and risk databases, offer new opportunities for more effective anti-trafficking measures. Political will and institutional sustainability remain key factors for long-term success. Albania has demonstrated readiness to reform its system, but further progress depends on consistent law enforcement, adequate budgeting, and transparent monitoring.

Human trafficking within the context of the Albanian migration crisis is a complex phenomenon, rooted in socio-economic vulnerability, institutional deficiencies, and the country's geostrategic position. Addressing this issue requires not only national reforms but an integrated regional approach that links security, justice, and human rights.

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Trgovina ljudima tokom migrantske krize na Balkanu (studija slučaja: Albanija)

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Sažetak

Migrantska kriza na Zapadnom Balkanu (2015–2020) povećala je ranjivost Albanije u kontekstu trgovine ljudima. Kao tranzitna i sve češće destinacijska zemlja, Albanija se suočila sa izazovima u identifikaciji, zaštiti i reintegraciji žrtava, posebno migranata, izbeglica i maloletnika bez pratnje. Rad analizira pravni i institucionalni okvir, uključujući Nacionalni mehanizam za upućivanje i saradnju sa nevladinim organizacijama, kao i ulogu međunarodnih aktera (UNHCR, IOM, GRETA, OSCE). Iako su postignuti napreci u zakonodavstvu i mehanizmima zaštite, ostaju izazovi u identifikaciji žrtava, obuci profesionalaca i koordinaciji institucija. Naglašava se potreba za regionalnom saradnjom, ljudskim pravima zasnovanim pristupom i primenom tehnoloških alata za efikasniju borbu protiv trgovine ljudima.

Ključne reči: Albanija, trgovina ljudima, migracije, maloletnici bez pratnje, međunarodne organizacije, zaštita žrtava.

Market Share Thresholds and Legal Certainty in the Draft Revision of the EU Technology Transfer Block Exemption

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Market Share Thresholds and Legal Certainty in the Draft Revision of the EU Technology Transfer Block Exemption

Abstract

In this paper, the authors analyze the proposed amendments contained in the draft new block exemption regulation on technology transfer agreements in comparison with the currently applicable Commission Regulation (EU) No 316/2014. Particular attention is devoted to the market share thresholds applicable to the contracting parties and to the extended transitional ("grace") period.

The methodology is based on a critical analysis of the proposed normative solutions and a comparative assessment vis-à-vis the existing regulatory framework and the relevant doctrine in the field of technology transfer and EU competition law. The findings indicate that the retention of the nominal market share thresholds limits the practical scope of application of the block exemption and increases reliance on self-assessment under Article 101 TFEU. Conversely, the extension of the grace period enhances the stability of the exemption's application in situations of temporary market fluctuations.

Keywords: TTBER 2025; technology transfer; market share thresholds; block exemption; grace period; Article 101(3) TFEU

Introduction

Commission Regulation (EU) No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (Regulation 316/2014) constitutes a key instrument of European Union competition law in the field of licensing of intellectual property rights. By establishing a "safe harbour" system, the Regulation enables certain categories of technology transfer agreements, subject to the prescribed conditions, to benefit from an exemption from the prohibition of restrictive agreements laid down in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU, 2012).

After more than ten years of application of Regulation 316/2014, the European Commission (2025) adopted Communication C/2025/6189 approving the draft Commission Regulation on the application of Article 101(3) TFEU to categories of technology transfer agreements (hereinafter: Draft TTBER 2025) and the draft Commission Guidelines on the application of Article 101 TFEU to technology transfer agreements (hereinafter: Draft Guidelines 2025).

The revision is motivated by the need to adapt the existing framework to developments in technology markets, which are characterized by rapid technological change, increased contractual complexity, and heightened economic interdependence, as well as by the need to ensure greater consistency with the case law of the Court of Justice of the European Union.

Although Draft TTBER 2025 does not introduce radical structural changes compared to Regulation 316/2014, certain amendments have significant practical implications. The nominal market share thresholds applicable to the contracting parties, as a key condition for the application of the block exemption, remain formally unchanged. However, more precise rules concerning their calculation are

introduced, together with an extension of the grace period from two to three years (European Commission, 2025). These amendments are intended to enhance the legal certainty of contracting parties, particularly in circumstances of temporary market fluctuations and technological volatility.

This paper examines selected proposed amendments contained in Draft TTBER 2025 in comparison with Regulation 316/2014, with particular emphasis on the role of market share thresholds as a condition for the application of the block exemption. The analysis focuses on issues relating to the determination of market shares, the distinction between horizontal and vertical licensing agreements, and the legal and economic implications of the extended grace period. The aim is to assess whether the proposed solutions contribute to achieving a more appropriate balance between legal certainty and flexibility in the application of Article 101(3) TFEU to technology transfer agreements. . In this context, the central question addressed in this paper is whether the market share thresholds retained in Draft TTBER 2025 adequately reflect the economic realities of technology markets and ensure an appropriate scope of application of the block exemption.

The analysis builds upon earlier research conducted in the field of licensing agreements in EU competition law, including the doctoral research of one of the authors, while focusing specifically on the proposed amendments introduced in Draft TTBER 2025.

Market Share Thresholds in the Draft Revision of the Technology Transfer Block Exemption

A market share may be defined as the proportion of a producer's supply or sales of a given product in relation to the total supply or sales of that product on the relevant market (Marković-Bajalović, 2000, p. 98). For that reason, market shares are typically expressed as percentages. The level of market shares held by the contracting parties constitutes one of the key instruments for assessing whether a concluded technology transfer agreement may produce appreciable restrictive effects on competition in the relevant market. Consequently, the availability of the block exemption from the prohibition laid down in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU, 2012) is conditioned upon the market shares of the contracting parties on the relevant market. Draft TTBER 2025 retains this concept as the central criterion for the application of the "safe harbour," thereby confirming the continuity of the approach established under Regulation 316/2014.

The introduction of market share thresholds into the block exemption regime marked a shift away from the earlier formalistic approach, which failed to sufficiently take into account economic realities and the actual market power of the contracting parties (Vasić, 2024, pp. 124–125).[1] Although the historical development of this solution is important for understanding the evolution of competition policy in the field of technology transfer, the present analysis focuses on the applicable rules and their reflection in Draft TTBER 2025.

Draft TTBER 2025 retains the concept of market share thresholds as the primary condition for the application of the block exemption. The prescribed threshold levels under Regulation 316/2014 are based on the assumption that licensing agreements concluded between undertakings holding high market

[1] Earlier technology transfer block exemption regulations were based on a predominantly formalistic approach, relying on predefined lists of permitted and prohibited clauses. Such an approach did not sufficiently take into account the economic realities of the market or the actual market power of the contracting parties (Bechtold, Bosch, & Brinker, 2014, pp. 571–572). The introduction of market share thresholds into the block exemption regime therefore marked a shift towards a more economically oriented assessment of licensing agreements.

shares have a greater potential to restrict competition on the relevant market (Lugard, 2014, p. 48). Pursuant to Article 3 of Regulation 316/2014 (2014), technology transfer agreements may benefit from the block exemption provided that the market shares of the contracting parties on the relevant market do not exceed the prescribed limits. In this respect, Draft TTBER 2025 (European Commission, 2025), following the structure of Regulation 316/2014, draws a clear distinction between agreements concluded between competitors and those concluded between undertakings that are not competitors on the market.

Where the contracting parties are competitors, the block exemption applies on condition that their combined market share does not exceed 20% on the relevant market or markets. This threshold applies in situations where the parties are actual or potential competitors on the product market and/or actual competitors on the technology market, whereas potential competition on the technology market is not taken into account (European Commission, 2025, para. 106). Draft TTBER 2025 retains the nominal value of this threshold and provides that the exemption continues to apply to agreements between competitors provided that their combined market share does not exceed 20% on the relevant market or markets (European Commission, 2025).

However, as under Regulation 316/2014, Draft TTBER 2025 leaves unresolved the interpretation of the wording "on the relevant market or markets." The question arises whether the block exemption is excluded where the prescribed threshold is exceeded on any relevant market, or whether it may still apply on the market where the threshold has not been exceeded. The prevailing view in the literature holds that exceeding the combined market share threshold of 20% on any relevant market—whether the product market or the technology market—precludes the application of the block exemption (Pellmann, 2022, p. 150; Bechtold et al., 2014, p. 544; Busche & Röhling, 2016, p. 1275; Berg & Mäsch, 2018, p. 2125). This interpretation is confirmed in the Guidelines accompanying Regulation 316/2014, which clarify that the safe harbour applies only where the combined market share of the contracting parties does not exceed the prescribed threshold on any relevant market (European Commission, 2014, para. 82). Draft TTBER 2025 does not resolve this ambiguity at the normative level, and the same approach is reflected in the accompanying 2025 Guidelines. In particular, the 2025 Guidelines clarify that the exemption under Article 2 of Draft TTBER 2025 applies to technology transfer agreements between competing undertakings only where their combined market share does not exceed 20% on any relevant market (European Commission, 2025, para. 106). In our view, this solution in Draft TTBER 2025 does not contribute to legal certainty. The revision of Regulation 316/2014 presented an opportunity for the Commission to take account of doctrinal views on this issue and to formulate Article 3(1) of Draft TTBER 2025 in clearer terms, explicitly providing that where the contracting parties are competitors, the exemption applies only if their combined market share does not exceed 20% on any relevant market.

Where the contracting parties are not competitors, Draft TTBER 2025 provides that the block exemption applies on condition that the market share of each of the parties does not exceed 30% on the relevant market or markets (European Commission, 2025). Draft TTBER 2025 retains the same wording as Regulation 316/2014 and does not introduce substantive changes in this respect. It follows from this provision that there is no aggregation of market shares, unlike in situations where the contracting parties are competitors. The reason lies in the absence of a competitive relationship between the parties. For example, one party may hold a market share on the relevant technology market, while the other may hold a market share on the relevant product market, provided that the individual market shares of each party

do not exceed 30%. German doctrine emphasizes that, in agreements concluded between undertakings that are not competitors, the application of market share thresholds is based on an individual assessment of the position of each contracting party on the relevant market (Busche & Röhling, 2016, p. 1275; Bechtold et al., 2014, p. 544).

Article 3(2) of Draft TTBER 2025 employs the wording "on the relevant technology and product markets" (European Commission, 2025). In our view, this indicates that, as in the case of horizontal technology transfer agreements, the exemption under Article 2 of Draft TTBER 2025 cannot apply where the market share of any contracting party in a vertical technology transfer agreement exceeds the 30% threshold, whether on the relevant product market or on the relevant technology market. Accordingly, the exemption under Article 2 of Draft TTBER 2025 cannot be applied even on a market where the relevant market share threshold has not been exceeded (Bechtold et al., 2014, p. 544).

The Adequacy of Market Share Threshold Levels

Draft TTBER 2025 retains the nominal market share thresholds of 20% for competitors and 30% for non-competitors, thereby maintaining continuity with the approach established under the previous regulation. However, substantial criticism persists regarding the relevance and practical operability of these thresholds. Academic literature predominantly argues that the currently proposed thresholds are relatively low and may easily be exceeded in practice, particularly in the case of horizontal licensing agreements where the parties' market shares are cumulative (Dolmans & Piilola, 2003, pp. 551–552; Marquis, 2007, pp. 271-272). Such a situation considerably limits the practical scope of the block exemption. Where the parties' market shares exceed the thresholds set out in Article 3 Draft TTBER 2025, they are required to conduct a self-assessment of the agreement pursuant to Article 101(3) TFEU and in accordance with the analytical framework provided in the 2025 Guidelines.

Relatively low market share thresholds under the block exemption regime for technology transfer agreements significantly narrow its practical scope when viewed in light of the *de minimis* rule. According to the Commission Notice on agreements of minor importance, Article 101(1) TFEU does not apply to horizontal agreements where the parties' combined market share does not exceed 10%, nor to vertical agreements where the market share of each party does not exceed 15%. Viewed in this context, the practical relevance of the block exemption under Draft TTBER 2025 is confined to a relatively narrow category of agreements (Bishop, 2007, p. 35; Pellmann, 2022, p. 138). In practice, only technology transfer agreements concluded between competitors whose combined market share lies between 10% and 20% may derive tangible benefit from the block exemption, given that agreements below the 10% threshold are already considered agreements of minor importance and fall outside the scope of Article 101(1) TFEU. Consequently, undertakings with market shares exceeding 20% (or 30% in the case of non-competitors) are required to conduct an individual self-assessment pursuant to Article 101(3) TFEU, applying the analytical framework set out in the 2025 Guidelines.

Empirical analyses that would allow a reliable assessment of how many technology transfer agreements are capable of meeting such restrictive market share thresholds remain scarce (Bishop, 2007, p. 35). As a result, a considerable number of these agreements are likely, in practice, to fall outside the scope of the block exemption. This issue is particularly pronounced in the context of high-technology transfer agreements, where licensors may hold market shares of up to 100%, thereby automatically

excluding the possibility of benefiting from the block exemption (Bishop, 2007, p. 35). For instance, licensors may enjoy a full market share where the licensed subject matter constitutes a new technology that effectively creates a new market (Bechtold, Bosch, & Brinker, 2014, p. 573).

In our view, relatively low market share thresholds contribute to an increasing reliance on self-assessment in the context of technology transfer agreements. As a consequence, a progressively smaller number of licensing agreements may effectively benefit from the block exemption under Draft TTBER 2025. In such circumstances, the parties would be required to assess their agreements individually under Article 101(3) TFEU, guided by the principles set out in the TTBER Guidelines (Marquis, 2007, pp. 272-273).

Conversely, some authors consider the nominal thresholds proposed in Draft TTBER 2025 to be acceptable. They argue that there is no need to amend the market share thresholds laid down in Regulation 316/2014 and suggest that the European Commission should refrain from modifying them in the 2025 revision (Drexl, Conde Gallego, & Kim, 2025, p. 743). Exceeding these thresholds does not result in the automatic prohibition of the agreement; rather, it triggers the obligation to conduct a self-assessment. In such cases, the possibility remains that the agreement may satisfy the conditions for individual exemption under Article 101(3) TFEU, provided that it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and avoiding unnecessary restrictions of competition.

The “4+” Test as an Alternative Indicator

An argument supporting the view that the market share thresholds in Draft TTBER 2025 are set at an unduly restrictive level may be derived from the position expressed by the European Commission in the 2025 Guidelines in situations involving multiple independent technologies. The Commission takes the view that an agreement which does not contain hardcore restrictions is unlikely to fall within the scope of Article 101(1) TFEU where there are four or more independently controlled technologies, in addition to those controlled by the parties to the agreement, that may be substitutable for the licensed technology at a comparable cost to the user (European Commission, 2025, para. 181). In the literature, this approach is commonly referred to as the “4+ test” (Meier, 2021, p. 163). The existence of several independently controlled alternative technologies capable of substituting the licensed technology significantly reduces the likelihood of anti-competitive effects. Where, in addition to the technologies controlled by the contracting parties, at least four comparable technologies are present on the relevant market, the licensed technology may be considered to face sufficient competitive pressure. In such circumstances, the conclusion of a technology transfer agreement will, as a rule, not result in an appreciable distortion of the competitive market structure (Klawitter, 2015, p. 35).

Moreover, certain working drafts of Draft TTBER 2025 contemplated the possibility of replacing the “4+” rule with a “3+” rule. Although the 4+ rule may be regarded as an indirect mathematical indicator of a 20% market share threshold (in the case of agreements between competitors), the European Commission considered the option of relaxing this approach by introducing a “3+” test. In the literature, this proposal was assessed positively. Some commentators emphasized that there is room for greater flexibility in relation to the 4+ rule, given that market shares cannot always be regarded as particularly reliable indicators of market power in technology markets, which are often highly dynamic (Drexl, Conde Gallego, & Kim, 2025, p. 743). This concern is particularly relevant in relation to decentralized and

blockchain-based technologies, where traditional indicators of market power and regulatory control may prove less reliable, raising broader questions of legal certainty in innovation markets (Bjelajac & Bajac, 2022). Conversely, commentators have pointed out that the 4+ rule is not without its shortcomings. First, the requirement that at least four additional technologies be present on the market and capable of substituting the licensed technology may, in many instances, render the application of the block exemption practically unattainable. Moreover, the actual number of substitutable technologies may be difficult to determine in practice, as evidence of their existence is often incomplete, particularly where technologies are based primarily on know-how (Drexl, Conde Gallego, & Kim, 2025, p. 743).

In the literature, the 4+ rule has been described as a form of "second safe harbour" (Jones & Sufrin, 2016, p. 868). Some authors consider this solution to reflect the Commission's awareness that the market share thresholds laid down in the TTBER are relatively restrictive in nature (Klawitter, 2015, pp. 35–36). The Commission has thus demonstrated a certain degree of flexibility, particularly in the context of dynamic markets such as technology markets, by accepting the number of alternative competing technologies as a supplementary indicator of market power.However, given that this approach is formulated in the Guidelines rather than in the block exemption regulation itself, its contribution to legal certainty may be questioned. The positions expressed in the Guidelines do not limit the power of the Court of Justice of the European Union to interpret Article 101 TFEU and the block exemption regulation independently, nor are they binding on national competition authorities (Vasić, 2024, p. 226).

Methodology for Determining Market Shares

The application of the block exemption under Article 3 Draft TTBER 2025 depends on the correct determination of the market shares of the contracting parties. Article 8 Draft TTBER 2025 lays down the rules for calculating market shares, both on the technology market and on the product market (European Commission, 2025, Art. 8).

The primary criterion for determining the market shares of the contracting parties is the value of sales on the relevant market. In technology transfer agreements, market shares are calculated on the basis of sales value data. Where such data are not available, estimates based on other reliable information, including sales volumes, may be used. Market shares are determined on the basis of data relating to the preceding calendar year, unless that year is not representative, in which case the market share is calculated as an average over the three preceding calendar years (European Commission, 2025, Art. 8(1)).

This solution constitutes one of the most significant innovations in Draft TTBER 2025. Regulation 316/2014 provides that market shares are determined exclusively on the basis of data relating to the preceding calendar year. This provision has been subject to criticism in the literature, as the calendar year often does not coincide with the financial year, potentially leading to inaccurate data being used for the calculation of market shares (Schröter et al., 2014, p. 742; Bechtold et al., 2014, p. 571). Determining market shares solely on the basis of a single year may fail to accurately reflect the actual market position of the parties, particularly in dynamic technology markets (Dolmans & Piilola, 2003, p. 552; Busche & Röhling, 2016, p. 1273). This concern is especially pronounced in cases involving newly introduced products (Busche & Röhling, 2016, p. 1263).

In our view, the proposed solution—by introducing temporal flexibility—enhances the representativeness of the data and reduces the risk of inaccurate results, particularly when determining

market shares in dynamic technology markets. Some commentators have emphasized that this approach constitutes a qualitative improvement over the one-year criterion of the previous regulation, as it allows for adaptation to sector-specific characteristics and enhances legal certainty for contracting parties (Drexl et al., 2025, p. 743).

The Extended Grace Period and Legal Certainty

The concept of a transitional period, known as a "grace period," represents one of the key instruments of legal certainty within the block exemption regime for technology transfer agreements. Regulation 316/2014 provides that where the market share of the contracting parties under Article 3(1) or Article 3(2) of Regulation 316/2014 is initially not higher than 20% or 30%, respectively, but subsequently increases above those thresholds, the exemption under Article 2 of Regulation 316/2014 continues to apply for a period of two consecutive calendar years following the year in which the 20% or 30% threshold was first exceeded (Regulation 316/2014, Art. 8(1)(e)). This concerns situations in which the market shares of the contracting parties in the initial phase remain below the thresholds laid down in Article 3 of Regulation 316/2014, but over time, as a consequence of changes on the relevant market, those thresholds are exceeded. Such a solution was motivated by the need to provide legal certainty to contracting parties and to enable the continued use of the benefits of the block exemption in circumstances of short-term market fluctuations (Rab, 2014, p. 445).

The aforementioned grace period may be regarded as a compromise solution that allows technology transfer agreements which temporarily exceed the prescribed market share thresholds to retain their exempted status for a defined period of time. According to competition law theory, this constitutes a practical mechanism that protects contracting parties from the unexpected loss of the benefits of the block exemption as a result of temporary market fluctuations, particularly in dynamic and innovation-driven markets (Busche & Röhling, 2016, p. 1263-1264). The importance of this instrument is even greater in view of the fact that market shares in such markets may be subject to significant changes within short time intervals due to seasonal movements, technological cycles, or temporary fluctuations in demand.

Draft TTBER 2025 introduces a significant modification with regard to the grace period by extending the duration of the exemption from two to three consecutive calendar years following the year in which the market share was first exceeded (European Commission, 2025, Art. 8(1)(e)). This amendment represents one of the few material expansions of the scope of the block exemption in the proposal for the new regulation and aims to enhance the legal certainty of contracting parties. The extended period allows contracting parties to continue benefiting from Draft TTBER 2025 for a longer time even in cases where they temporarily exceed the prescribed thresholds, without the need to immediately resort to the self-assessment procedure under Article 101(3) TFEU.

In our view, *ratio* of the extended grace period lies in allowing contracting parties time to adapt to a new market situation and to avoid losing the exemption due to temporary and short-term deviations. Through this approach, the Commission acknowledges the dynamic nature of technology markets and the need for greater flexibility in the application of the regulatory framework, while preserving the basic structure of the block exemption. Although the extended period does not alter the fundamental logical framework of Draft TTBER 2025, we consider that this solution has a significant effect on the stability and

predictability of the application of the exemption, particularly in situations where market shares are subject to seasonal or short-term fluctuations.

It is important to emphasize that, as under the previous regulation, the extended period does not affect situations in which the contracting parties permanently exceed the prescribed thresholds. In such cases, it is necessary to conduct a self-assessment of the agreement in accordance with Article 101(3) TFEU, which means that the grace period operates exclusively as a temporary safeguard in situations of transitory exceedance of the threshold. Accordingly, the extended period serves as a mechanism that reduces legal uncertainty for technology transfer agreements that initially satisfied the conditions for exemption under the criteria proposed in Draft TTBER 2025 but where the contracting parties exceeded the prescribed market share thresholds within a short period of time. In our view, the extended transitional period of three years ensures greater legal certainty and a more stable application of the block exemption. It enables contracting parties to ensure that a temporary exceedance of market share thresholds does not result in undesirable consequences for their competitiveness and business strategies. This mechanism demonstrates how legal instruments may be adapted to dynamic markets. It also illustrates the evolution of the European Commission's approach to the application of Article 101(3) TFEU to technology transfer in conditions of rapid technological development.

Conclusion

The analysis of the proposed amendments in the draft revision of the Technology Transfer Block Exemption demonstrates that the European Commission seeks to strike a balance between legal certainty and flexibility in the application of the block exemption to technology transfer agreements. The draft revision retains the nominal market share thresholds (20% for competitors and 30% for non-competitors), thereby confirming continuity with the approach established under Regulation 316/2014. Although the nominal threshold levels remain unchanged, the introduction of more precise rules for their calculation, together with the extended grace period, constitutes significant practical innovations that enhance the predictability of the application of the block exemption in dynamic market conditions.

While the retention of these thresholds contributes to regulatory continuity and predictability, it is rightly observed in the literature that their relatively low level may considerably limit the practical scope of the block exemption, particularly in the case of horizontal technology transfer agreements. In this respect, the importance of self-assessment under Article 101(3) TFEU increases, as a substantial number of agreements will not be able to rely on the "safe harbour" of the block exemption.

The "4+" rule represents an attempt to mitigate the rigidity of the market share threshold system by introducing an alternative indicator of market power based on the number of independently controlled substitutable technologies. Although this approach reflects a degree of flexibility in the interpretation of Article 101(1) TFEU in the context of technology transfer, the fact that it is formulated in the Guidelines rather than in the regulation itself limits its contribution to legal certainty.

A particularly significant innovation concerns the methodology for determining market shares, allowing the use of average data over the preceding three calendar years where data for a single year are not representative. This solution contributes to greater accuracy and a more realistic assessment of the market position of the contracting parties, especially in dynamic technology markets.

The extension of the grace period from two to three years represents one of the few material expansions of the scope of the block exemption in the proposed revision. This amendment strengthens legal certainty for contracting parties in situations of temporary exceedance of the thresholds, while not altering the fundamental logic of the system, given that permanent exceedance of the thresholds still requires an individual self-assessment.

Overall, the proposed revision does not constitute a radical shift in competition policy in the field of technology transfer, but rather an evolutionary adjustment of the existing framework to the conditions of dynamic markets. The central challenge remains the search for an appropriate balance between legal certainty and flexibility, as well as between structural rules and economic market realities. In this context, the role of self-assessment under Article 101(3) TFEU remains of fundamental importance.

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Pragovi tržišnih udela i pravna sigurnost u nacrtu revizije Uredbe EU o grupnom izuzeću sporazuma o transferu tehnologije

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Sažetak

U radu se analiziraju predložene izmene u nacrtu nove uredbe o grupnom izuzeću sporazuma o transferu tehnologije u poređenju sa važećom TTBER 316/2014, sa posebnim osvrtom na pragove tržišnih udela ugovornih strana i produženi prelazni period („grace period“). Metodologija obuhvata kritičku analizu predloženih normativnih rešenja i poređenje sa važećom uredbom i doktrinom u oblasti transfera tehnologije i prava konkurencije EU. Rezultati pokazuju da zadržavanje nominalnih pragova tržišnih udela ograničava mogućnosti praktične primene grupnog izuzeća i povećava zavisnost od postupka samoprocene. Produženi grace period, s druge strane, doprinosi većoj stabilnosti primene izuzeća u uslovima privremenih tržišnih kolebanja.

Ključne reči: TTBER 2025, transfer tehnologije, tržišni udeli, grupno izuzeće, „grace“ period, član 101(3) UFEU

The Protocol on Protection of Children from Parental Abuse and Neglect and Consequences for Children's Integrity and Personality Development

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Abstract

The paper summarizes the legal regulations regarding child protection in case of parental abuse and neglect. The current protection system was analyzed, and gained insight are presented alongside explaining all steps for ensuring the well-being of the child. An attempt was made to point out the importance of the current protection system implemented by the guardianship authority and other amenable authorities, but also to examine the issue critically by presenting a case from practice that illustrates opportunities for continuous improvement. The methods used in writing this paper are: theoretical analysis of available content from legal acts and relevant scientific papers, normative method, synthesis of relevant information within various fields, such as law and psychology, and concretization based on the presented case from practice. The aim of this paper is to introduce the protection measures, the basic rights of the child and the principle of its best interest in all procedures, as well as to point out the work methods of Center for Social Work. Despite the lack of adequate data on the extent of these actions against children, the paper emphasizes the need for establishing a more efficient reporting system and changing people's awareness regarding the correctness of such behavior. Due to aforementioned difficulties in obtaining sufficient and relevant data on the topic, there is a lack of statistics that would expedite the development of prevention measures and the system improvements.

Keywords: child abuse, child neglect, parents, consequences

Introduction

Child abuse and neglect represent a major problem on a global level, even though every country is striving to find an adequate solution to protect child rights and integrity. Numerous legal acts have been adopted on the international, as well as on the regional and state level, in order to prevent the violation of children's rights. Several questions therefore arise—firstly, what would be an adequate solution to this global problem that manifests itself in different forms. Secondly, whether it is possible to regulate every specific situation in which the child's rights are violated or has a negative impact on its well-being. Abuse and neglect, as the two primary forms that will be discussed further in the paper, inevitably contribute to the disruption of the human being's emotional components and create long-term consequences for the later development of a person.

Children represent the basis of every society and it is necessary to provide them with an opportunity to grow up without being faced with life struggles inappropriate for their age. However, in the case of imposing a negative impact on childhood, adequate measures must be taken to ensure the greatest possible welfare of the child. In these cases, various organizations are available to step in and protect it in the best possible way. In this paper, an overview of the Center for Social Work and the currently valid regulations will be presented.

Children represent the most vulnerable part of the society and recognizing their pain in case of physical or emotional violence and neglect is crucial for their protection. Any form of aggression perpetrated against a child or denial of its basic rights greatly affects the future behavior of the individual and its emotional, mental, and social intelligence, and thus affect the entire society altogether. As Nelson Mandela said: "Safety and security don't just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear" (Sinnshaw, 2014, p. 1). No form of violence against a child, nor against an adult human being, can be considered justified in any case. It should be demanded from every community at the global level to regulate this issue as the highest priority, because our future depends on children and we owe them an untroubled life and childhood.

The Implementation of the General Protocol for the Protection of Children from Abuse and Neglect

Despite the efforts made by the international and regional organizations with the intention to standardize the regulation of the issue of child abuse and neglect, as well as the numerous acts that were implemented to regulate this issue, it is considered that this issue is not properly acknowledged in many cultures and that many communities do not agree on the concept of abuse (Pejović-Milovančević, Išpanović-Radojković, Vidojević, Minčić & Radosavljev, 2001). The difference in cultures slows down the unification of the rules for behaving when providing child protection. Therefore, in some countries there is a higher level of protection, whereas there is a lower level of protection in other. Nevertheless, great strides are certainly made and the importance of this issue is constantly emphasized. The issue of neglect and abuse of children in our country is primarily regulated by the Constitution of the Republic of Serbia from 2006 on a framework level, while the specification of this issue is handled by subordinate legislation such as the Family Law and the Criminal Code from 2005, as well as other regulations. Children are entitled to human rights appropriate to their age and mental maturity and should be protected from any psychological, physical, economic or other exploitation or abuse (Constitution, 2006).

The National Action Plan for Children, adopted by the Government of the Republic of Serbia in 2004, foresees the goal of establishing a mechanism for the protection of children from abuse, neglect, exploitation and violence. In order to achieve this goal, several protocols were established: the General Protocol for the Protection of Children from Abuse and Neglect and several special protocols, such as the protocols for the protection of children in homes for children without parental care, for children with developmental disabilities, and for children with behavioral disorders.

Definitions of child abuse and neglect are given in the General Protocol. According to the above-mentioned, child abuse is generally defined as any form of physical and/or emotional abuse, sexual abuse, neglect or careless treatment, commercial or other exploitation, which leads to the child's health, survival, development or dignity impairment within a relationship that includes responsibility, trust and power (General Protocol for the Protection of Children from Abuse and Neglect, 2005).

The goal of the General Protocol from 2005 is to contribute to the improvement of reporting and registering all cases of child abuse and neglect, to influence the establishment of enhanced protection of children, to ensure uniform application of the rules and to serve informing the public about whom citizens should contact when they are concerned about the welfare of a child. The following are the basic principles

of the General Protocol: the child's right to life, existence and development, non-discrimination, the child's best interest and child participation.

According to the provisions of this document, all principles integrated in the United Nations Convention on the Rights of the Child from 1989, which our country ratified by law in 1990 (Law on the Ratification of the United Nations Convention on the Rights of the Child, 1990), are respected. The General Protocol applies to all children, inside and outside of the family, if there is a situation in which their well-being is threatened, if they are in imminent life danger, if they are victims of abuse and neglect or when there is a risk of this. The best interest as a basic principle implies that in any case the interest of the child takes precedence over the interest of the parents, guardians, institution or community, while the child participation refers to providing the opportunity for the child to be asked, to receive adequate information and the opportunity to express its views in a way that corresponds to its age and understanding of the situation.

The child's best interest as a principle is provided by legal provisions, and includes the duty of every person to be guided by the best interests of the child in all activities that concern it, as well as the state's obligation to take all necessary measures if there is neglect of the child or a certain type of abuse, whereby physical, sexual and emotional abuse and any form of exploitation are specifically mentioned (Family Law, 2005). Furthermore, this principle is confirmed by numerous decisions of the courts, as illustrated in the following citation part of the explanation provided in the ruling judgment of the Supreme Court of Cassation in a dispute over exercising or deprivation of parental rights: "The best interests of the child is a legal standard that is assessed according to the circumstances of each specific case. The elements of assessing the best interests of the child are the age and sex of the child, its wishes and feelings, considering age and maturity, need for upbringing, regarding the inhabitancy, nutrition, clothing, health care and other, and the parent's ability to meet the identified needs of the child" (Judgment VKS, Rev. 713/16).

Parental right represents the absolute and personal right of the parent towards the child and represents a set of rights and duties entrusted to parents by the norms of objective law in order to protect the interests of the child and take care of its personality. Acting in the best interest of the child is intended for parents, but also for all other people, institutions and courts (Stojanović & Delić, 2015). In order to establish an adequate child protection mechanism, it is necessary that different institutions participate in the process and that there is good cooperation and clearly defined roles among them. The process is divided by the General Protocol into four elements: the first step is the recognition of cases of abuse and/or neglect; the second, reporting suspected child abuse or child neglect to the competent authority; the third includes an assessment of the risk, conditions and needs of the child and family; and the last includes the planning and provisioning of child protection services and measures.

Recognizing child abuse and neglect begins with the detection phase of this action, which is the most sensitive part of the protection process. Detection is done by recognizing the signs of injury on the child or its behavior, or the behavior of family members that may indicate that the abuse or neglect happened, or it can be the case when the child or another person who has knowledge or suspicion that the child has been abused confides to another trusted person. The trusted person then passes the information to the authorized Center for Social Work or the police and Public Prosecutor's Office. The General Protocol then recommends consultations within the service itself at the Center for Social Work or

with other services, such as educational and health institutions, which are assumed to have knowledge about the child and family, in order to gather enough information and correctly assess the risk of abuse or neglect, in order to decide on the next step which will be taken to protect the child. All information about the child's condition and the circumstances of the act of abuse or neglect should be documented in order to serve as evidence in further child protection proceedings.

Reporting suspicion of child abuse and neglect is an obligation of all children's, health, educational, social protection, and judicial institutions, as well as other state bodies, associations and citizens. Suspicion can be reported to the Center for Social Work or the Public Prosecutor's Office, in writing or verbally, including phone calls, but the report should contain all information about the child and the family that is known at that time. In cases when the life or health of a child is endangered by actions or omissions, and when there are elements of a criminal offense, anyone who has knowledge of this is obliged to file a report with the Public Prosecutor's Office or the internal affairs authority. Stating the evidences, such as items upon which a criminal offense was committed, or items that were used to commit a criminal offense and similar evidence, are important for further proceedings and the person submitting the report should provide them if possible.

The next step in the child protection process is the review of the complaint and assessment of the risk, conditions and the needs of the child and family, which implies the initial assesment that is carried out by the Center for Social Work. Consideration of the complaint is also called a triage assessment and represents the obligation of the Center for Social Work employee whom received it to check whether the case was previously recorded in the database and to make an official note. Based on the available data from the complaint and potential data from the database, a decision is made regarding the suspicion of abuse or neglect and whether urgent protection of the child is required.

After the triage assessment, the initial assessment phase begins, which should be conducted by an expert worker of the Center for Social Work, who is responsible for conducting the assessment, with the help of a professional team. As part of this action, it is necessary to observe and talk with the child, family members and other people who know the situation of the child and family well, and then it is necessary to collect and analyze relevant data from experts of other services with which the child and family were in contact, such as health institutions, educational institutions, and similar. The next step is to assess the injuries caused to the child or assess the risk to which the child was exposed and afterwards, the measures and services that can be adequately applied in the specific situation are identified. The person leading the assessment, together with the expert team, can reach one of three possible conclusions after the initial assessment: there is a need to protect the child from abuse; there is no need for protection, but other types of support and assistance are needed for the child and the family; there is no need for child protection or other services. When the assessment is carried out, the person who filed the complaint is provided with feedback and notified about the taken measures and the made decisions in the specific case within ten days from the date of report submission, except in the case of an anonymous report. Respect for privacy and confidentiality of data must be maintained in every situation.

The last important step in the entire process of protecting a child from abuse or neglect according to the General Protocol is planning and securing services and measures for the protection of the child. In cases when there is a well-founded suspicion that a child is at risk, the person leading the assessment schedules a consultation between the Center for Social Work, internal affairs authorities and other relevant

services, during which a decision will be made regarding the protection measures that should be taken, and an agreement should be reached regariding a joint strategy for assessment and investigation as well as synchronization of the services' work.

According to Art. 31 of the Rulebook on Organization, Norms and Standards of Work of the Center for Social Work (2008), the case manager represents the expert in charge of a specific case. He/she evaluates and coordinates the case through the process of assessing the needs of the specific user, takes measures and coordinates the taking of measures to protect and support the user, using the potential of the Center and other services and resources in the local community. On the other hand, the General Protocol also specifies the duty of the manager to convene, schedule and coordinate a meeting in specific cases (I) when the cooperation of community services is necessary to ensure the child's safety, (II) when it is necessary to perform a complex or specialized assessment (e.g., psychiatric examination), (III) when it is necessary to secure and collect evidence for the court procedure, along with a necessary protection of the child from additional traumas that may occur due to inadequate or multiple repetition of examinations. The purpose of the meeting is to design a plan for child's protection, to determine who bears which role in the protection process, to appoint responsible experts who will implement and coordinate the plan, to identify further needs for assessment and to determine the deadline for holding a review meeting, as well as to plan backup protection measures in case it is impossible to implement the original ones.

The fifth chapter of the General Protocol is dedicated to urgent interventions if it is necessary to undertake them when the child's life and health are in immediate danger or when there is a reason to believe that this may happen, in order to ensure the child's safety. The institution or the service that first comes into contact with the child should notify the Center for Social Work in whose territory the child resides as soon as they learn that immediate intervention is necessary. In case the child's place of residence is not known or if the child is in immediate danger and it is necessary to react immediately, the information must be submitted to the nearest Center for Social Work. The Center for Social Work holds the right to appoint a temporary guardian for the child immediately, and no later than twenty-four hours after the need to separate the child from the family has become known, if the circumstances of the case dictate that the parents' right to keep, raise and educate the child should be immediately suspended, until a court decision, according to the provisions of the second part of the fifth chapter of the General Protocol.

The General Protocol also regulates the issue of monitoring and evaluating the child and family and closing the case. The deadlines for the re-evaluation are determined in cooperation with all relevant services, and decisions are made at joint meetings, in order to adequately come to the correct solution in the best interest of the child. A case evaluation is conducted three to six months after the assessment is completed, but it is possible to conduct it earlier if the circumstances dictate it. The evaluation and re-examination should be carried out in cooperation with the child and allow it to express its opinion, and also with the parents, guardian or other significant family members. Communication with the child should be in accordance with its age and maturity (Išpanović-Radojković et al., 2011). If, after the assessment, it is established that the parents have ensured a safe life for the child focused on child's development and well-being, the Center for Social Work can make a decision to close the case and return the child to the family.

The system of child protection in practice and the question of (in)adequate treatment by guardianship authority

Making a decision on the complete or partial deprivation and restoration of parental rights is within the jurisdiction of the court, and according to the Family Law, parents are deprived of one, more or all rights and duties, except for the duty to support the child, if the parent negligently exercises rights or duties from the content of parental rights. Along with this decision, the court is given the opportunity to determine one or more measures to protect the child from domestic violence, if the child has suffered it. Civil proceedings in this case are characterized by urgency, and in the case of disputes for the protection of children's rights, the court is not bound by the claim, despite the fact that this is the rule for civil proceedings, but can make a decision outside the limits of the claim.

The possibility of making mistakes when determing whether a child is being abused or neglected in any way creates additional consequences and negatively affects the child's development and represents a great danger to its personality. Given that the borderline cases often occur, either due to a lack of objective facts or due to a specific subjective component, an inadequate solution could permanently endanger the child. Separating a child from its parents in the absence of abuse or neglect is a decision made on the basis of wrong information, which inevitably affects the well-being of the child. The inability to achieve security in the nuclear family and distancing the child from it leaves a certain psychological mark, in a similar way that abuse or neglect does. On the other hand, great consequences arise when there is no reaction from people or competent authorities, if actions are indeed carried out against a child. Since it presents a sensitive topic, one case will be attached further in the paper which attracted a lot of public attention and called in question the correctness of the actions of the Center for Social Work.

According to the publicly shared information, it is a case of child neglect carried out by a mother against her sons aged three, six and nine. In November 2023, there was a fire in the apartment of their residence, which the residents of the building reported to the police after seeing the unsafe living conditions of the children and the parents. It was established that there was no one in the apartment at the time of the fire, and that the fire was caused by the burner on the stove, which the mother's father accidentally left behind. It is considered that the fire was of a small scale and that its spread was prevented in time (Judgment VS, NPŽ-181/23). However, based on the police and the public prosecutor's office report, and after the officers of the Center for Social Work went to the field at the request of the police to verify the condition of the aforementioned housing, the Center for Social Work takes over the case and undertakes all necessary measures to protect children from abuse and neglect as its legal obligation, in accordance with the Family Law, the Convention on the Protection of Children's Rights, concerning the General Protocol for the Protection of Children from Abuse and Neglect and the Rulebook on the Organization, Norms and Standards of the Center for Social Work.

According to the statements of the director of the Center for Social Work in his addressing the public, it is considered that there was negligence done by the children's mother in providing adequate living conditions within the reasonably available means. Failures in children's health are stated, such as hygiene neglect, failure to vaccinate children, but also leaving children unattended, failure to take the child to preschool, failure to provide adequate nutrition, living in unhygienic conditions, which impairs the child's development and health, and the danger of continuation is emphasized. Given that it is a matter of gross

neglect of parental duty based on the assessed living conditions, the guardianship authority undertakes measures of urgent temporary guardianship protection of the children and urgent provision of housing by separating them from the family and placing them in the safe house at the Center for Social Work.

In addition to neglecting the children and failing to provide adequate living conditions, there was a suspicion that violence had been committed against the children, and the parent was ordered to prohibit contacting the victim for forty-eight hours by order of the criminal police department at the police department of the Ministry of Internal Affairs in Novi Sad. The Basic Court in Novi Sad issues decision no. NP-1415/2023 which defined the extension of the measure for the next thirty days according to the proposal of the Basic Public Prosecutor's Office no. NPT-2190/23. Based on the submitted appeal, the High Court in Novi Sad overturns the decision of the Basic Court and rejects the proposal of the Basic Public Prosecutor's Office to extend the emergency measure on banning communication and approaching the victims by decision no. NPŽ-181/23. In the explanation, the High Court states that the appeal was founded after considering the disputed decision of the Basic Court and the case file of this case, and that the mother did not contribute to the immediate danger of violence by her actions nor did she apply violence to her children, which was the basis for the determination of an emergency measure (Judgment VS, NPŽ-181/23).

The explanation of court decision also mentions the report of the Center for Social Work, which provided insight into the life circumstances of the mother and children. According to the decision of the High Court: "...it is concluded that she lives in complex social and economic circumstances, because she is unemployed, forced to change her place of residence together with her children, very often also forced to do so by collecting things that other citizens have discarded, alongside the observation that in that apartment there is not a single chair that could be used for sitting or a table at which can be eaten, that there is accumulated garbage, that the children are hygienically neglected" (Judgment VS, NPŽ-181/23). With this explanation and pointing out that the conversation was not conducted between the Center for Social Work and the mother, nor the children, as well as that there is no record of the mother's previous violent behavior towards the children, it is emphasized that there is no reliable evidence of the act of violence and that it is all about acts of neglect and abandonment. After the emergency measure of banning communication and establishing contact with children is abolished, the procedure continues within the framework of social protection in order to assess the adequacy of the performance of parental duties, and the mother is provided with the conditions for establishing contact with the children.

The mentioned case caused a great reaction from Serbian citizens which constituted of holding peaceful but also violent protests in front of the Center for Social Work in Novi Sad. Part of the citizens believed that the Center for Social Work did not act lawfully, in accordance with legal regulations, and that the children were improperly separated from their family. However, the Center for Social Work continues to act according to the provisions of the Family Law and introduces corrective supervision over parenting. The Center for Social Work has the possibility of preventive and corrective supervision, which represents a kind of a social control. Corrective supervision is important for the issue of child abuse and neglect, and it is determined in cases where it is necessary to correct the parents in how they exercise their parental rights. On such occasion, the guardianship authority makes decisions by which: it warns parents about deficiencies in the exercise of parental rights, refers parents to a family counseling center or an institution specialized in mediation in family relations, or requires parents to submit an account of the management

of the child's property. The first two decisions are of consultative nature, while the third refers to property relations (Kovaček-Stanić, 2007).

It is stated in publicly available sources that the mother refused to sign the documents for the above-mentioned supervision and that she failed to provide the necessary conditions for the children's return to the family environment. Soon after the situation changed and an acceptable arrangement for the housing of the children was made. The Center for Social Work makes a decision then to return the children to the nuclear family after establishing cooperation with their mother, with supervision for the next three months. With that action, the court proceedings for the deprivation of parental rights over the children are suspended.

Numerous speculations arose in connection with this case and the intensity of spreading correct and incorrect information did not subside during the entire procedure. The question arises whether the set of incorrect information and doubts about the work of the Center for Social Work occurred because of the great media attention at the national level, or whether there was a wrong assessment of the guardianship authority in this case. Considering the limited availability of information, the conclusion will be drawn only on the basis of the enclosed living conditions in the High Court decision, according to which inadequate living conditions are stated, both for adults and especially for children.

On the other hand, the inadequacy of the actions of state authorities and the Center for Social Work can be seen more clearly through another case, namely the case of Milovanović v. Serbia. In 2019, the European Court of Human Rights issued a verdict resolving the case that began in 2002. After the divorce, the applicant's ex-husband conducts an abduction of children under the threat of violence and systematically works to prevent contact between the mother and the children. The defendant's neighbor filed a complaint about child abuse in 2005, but the police department refused to investigate the circumstances stating that there were formal deficiencies in the complaint. The procedure continues and a year later, the judicial body issues a verdict that entrusts the care of the children to the mother and prohibits contact with the father for three months in order to enable the restoration of the emotional relationship with the mother. However, the verdict remains unexecuted due to the defendant's refusal to comply with the court's decision and hand over the children to the applicant. The following year, considering the elements of child abuse and abduction, the Center for Social Work initiates procedure against the father demanding that his parental rights be revoked, in which the applicant joins as an intervener. Despite the decision of the competent court to deprive the father of parental rights, the set of circumstances led to the subsequent annulment of that decision and the withdrawal of the request of the Center for Social Work. The court and the Center for Social Work see basis for this action in the explanation that the defendant was the only guardian with whom the children were used to living, regardless of the mentioned violence, abuse and kidnapping. The inconsistent behavior of state authorities and the Center for Social Work in this case is clearly demonstrated through subsequent decisions. In 2010, the Basic Court in Belgrade issued a verdict awarding the father the exercise of parental rights, but the Court of Appeal in Belgrade revoked the verdict and sent it back to the first instance court for re-decision, after which the procedure was suspended because the mentioned father did not appear at the scheduled hearing. In the meantime, the applicant submits a constitutional appeal to the Constitutional Court requesting the execution of the judgment on guardianship and a temporary measure on the exercise of parental rights, at the same time complaining about the length of the criminal proceedings in connection with the abduction of children, whereby the Constitutional Court only determines the violation of the right to a trial within a reasonable time regarding to the

duration of the enforcement proceedings in connection with the final judgment on the exercise of parental rights. The European Court, on the other hand, determines numerous omissions of the defendant state - Serbia: (1) inadequate and ineffective efforts in undertaking coercive measures and implementing the pronounced measures; (2) violation of the applicant's right to respect for family life (Milovanović v. Serbia, 2019). In this case, we observe the inadequate action of state authorities and the defendant's ability to use the judicial system and delays to his advantage, which leads to a change in the factual situation in the specific situation, without adequate protection of the applicant and the best interest of the child as the main principle that should be respected.

According to the Constitutional provisions in Art. 23 and 24, human life and human dignity are inviolable. Therefore, it is necessary to enable every human being to live with dignity, protection and in appropriate conditions, and any discussion in the opposite direction is impermissible, especially when it comes to children. Children have the right to feel safe, the right to health, to a peaceful childhood and to conditions that will encourage their development. Everything that affects these basic components of a life should be promptly taken into the hands of the amenable authorities, as it was done in the first mentioned case, while in the second case we can notice inadequacy, untimeliness and inconsistency of actions. Certainly, the separation of children from their family remains a difficult moment in their lives, and it will take patience to overcome the consequences on a psychological level.

Emotional and psychological consequences of child neglect and abuse

Regulating the issue of child abuse and neglect in an adequate manner and acting in accordance with prescribed procedures is of great importance for the best interest of the child, which is a priority in all procedures. A developing child still does not possess a fully formed personality and perceives any form of abuse or neglect as trauma meaning that certain consequences on its psycho-physical condition inevitably remain. Given that this is a category of people who cannot defend themselves and stand up for a better life, and often do not perceive the danger of the situation through the prism of reality, the help of the system and the community is necessary to overcome the consequences that occur. As Račić (2021) points out: "A child—an innocent, unprotected and dependent being, is not a thing or a toy, which only satisfies the parent's need for reproduction on paper, but a child seeks and expects love, care, and attention like any human being, because a child is made of emotions and feelings, much more sincerely than adults, it also requires renunciation, making promises, giving rewards, as well as fulfilling those promises and rewards, providing love and care and attention" (p. 279).

Psychologically speaking, the consequences of abuse depend on its intensity and severity, and it is possible to classify them into early and late consequences. In addition to the mentioned factor that affects the child the most, increasing or reducing the effect of abuse or neglect also depends on the support of the other parent who does not abuse the child, the child's ability to understand the situation and other factors that would affect the correct insight of the situation and response. Early consequences are defined as consequences that occur in the period of childhood and early youth, while the child's personality has not been formed yet. These include consequences such as death, permanent physical handicap or psycho-somatic disorder, emotional disturbances, altered self-perception, cognitive impairment and social functioning disorders (Pejović-Milovančević et al., 2001). Abuse and neglect affects generating the feelings of fear, anxiety, depression, aggressiveness, anger and similar negative emotions and often

makes a person unable to fight against these emotions independently and to form a correct judgment. It is believed that in the early period of life, due to abuse and neglect, negative consequences develop primarily on neurological, intellectual, social and emotional development, success in school, social relationships, behavior, and on life expectations as well (Mošković, 2015). In the early stage of childhood, the child perceives such behavior towards itself as normal, despite the fact that it causes negative feelings, and it needs help in redefining its thinking and perception of life.

Late consequences, on the other hand, represent consequences that occur in adulthood and include depression, borderline personality organization, as well as transgenerational transmission of behavior (Pejović-Milovančević et al., 2001). Borderline personality disorder is reflected in the difficulty of regulating emotions, impulsivity, self-harm or suicidal thoughts, inability to control anger or aggression towards others or towards oneself, incorrectly developed social intelligence characterized by unstable functioning of a person in interpersonal relationships, and leads to a feeling of emptiness. All these types of emotions often lead to the use of alcohol and psychoactive substances, which represents a certain escape from reality and prevent a person from adequately facing problems and solving them.

Transgenerational transmission of behavior patterns means that the children learn according to the model presented to them, and often they retain certain ways of behavior, attitudes, values and beliefs in adulthood and transfer them to their own new family. Abuse and neglect that the child experiences, he or she consciously or unconsciously applies later, either in the function of the person who abuses or neglects, or again in the function of the victim. This type of influence on the child's personality defines the position of the person in the family and reflects on the child's perception of the role of the mother or father, and is guided accordingly when forming a new family. Any other behavior would seem wrong, given that the child did not have a proper role model to learn from and form its own beliefs.

For the child's development and its personality, the most influential factor is the feeling of security in the community where it grows up. This implies the child's awareness that it is loved and accepted by its parents above all. Given that the child goes through the stages of identification and generalization during childhood and builds its own personality, learning by modeling is one of the basic aspects of a child's behavior. Generalization implies the adoption of general conclusions about correct behavior in the community based on individual experiences in the family and the relationship of parents to the child, which are later transferred to other environments (Počuča & Matijašević, 2023). The potential consequence of any type of violence is the victim's incorrect reaction in specific situation, and therefore often also denial that the violence was suffered in general together with seeking out justifications for the behavior of the abuser. A part of the victims give themselves up to the violence in the hope that the situation will change if the abuser notices that the victim does not object (Krstinić, Počuča & Sančanin, 2023). All of the above represents certain defense mechanisms and a wrongly formed portrayal of reality, and inevitably does not contribute to improving the victim's life. Every act that does not resolve the mentioned situation leads the victim further into the vicious circle.

In addition to dividing consequences of abuse and neglect into early and late consequences, they can also be divided into immediate and long-term consequences. The criterion for the latter division is whether they appear immediately after the previous abuse or neglect, or whether they appear in a long-term form during the later years of the child's life. The immediate consequences primarily lead to the defense mechanism of denial and suppression of the traumatic event from memory. It is believed that in

this case children feel guilty and withdraw from the environment. In addition, emotions such as anger, occasional aggression, habit disorders and other developmental disorders are expected. Long-term consequences also include depression, alcohol or drug abuse, self-harm, suicidal behavior, inability to control, just like in the previous division, but it is believed that abuse and neglect also lead to panic disorder, eating disorders, reduced self-esteem, and difficulty establishing intimacy with other people (Mošković, 2015). It should be noted that despite these divisions that can be made, it is commonly widespread that consequences of different kinds are intertwined, often occuring together. Isolated cases without a single consequence or with only one consequence rarely occur. Each type of violence is characterized by power and control that is established over the victim and leads to injury and endangerment of the domain of safety and trust (Krstinić & Vasiljković, 2019).

Conclusions

Based on the analysis of the current regulations and the review of cases of abuse and neglect of children by parents in both the legal and psychological spheres, it can be concluded that this topic is if high importance,-and that there is a necessity to continuous work on improving the system related to this topic. A precise way of determining the actions of competent bodies inevitably shows the need for proper functioning. Every mistake creates even greater consequences and indirectly affects the entire system, so it is necessary to avoid them and follow the legal and bylaw regulations.

Children represent a sensitive category of people who need help and support at all times. If safety is not achieved on the premises of one's own home, there is a necessity for the guardianship authorities and the authorities of the Ministry of Internal Affairs to react in a timely manner. Any delay or neglect of the problem will affect the development of the child or lead to even more fatal consequences. For the successful functioning of a society, it is necessary for individuals to feel protected and not to repeat learned negative patterns. Therefore, any impact on the child that would protect it and affect its functional growth in the community is of great importance for the entire collective.

The principle of the best interest of the child, which pervades every part of the protection process, also implies the limitation of information provided to the public. Given that this applies to a minor, it is necessary to protect its integrity and personality. However, in the event when there is an error in the work of the guardianship authority, the lack of information that is available can negatively affect the outcome and the child can suffer significant consequences. As stated in the attached case started in November 2023, a complete lack of understanding of the situation led people to organize protests. The reaction is considered correct if it is a case with the incorrect implementation of legal provisions, but in this case, a lot of inaccurate data was spread in the community. Certainly, the best interest of the child still remains constituted in keeping certain information as a secret, while the obligation of the guardianship authority still is constituted in devoting themselves to every case to the best of their ability and in a careful manner.

Improving the awareness about child abuse in any form should be continuously done in the entire population, both on the national level, here in Serbia and at the global level. It is a problem that transcends all borders and cannot be uniformly influenced. The views about abuse, but also views about reporting child abuse to the competent authorities, differ within each community. Given that this is an act that is not reported often, the current statistics on the number of children who experience this kind of treatment on an annual basis do not provide the most accurate insight, and therefore their importance in this paper is

not emphasized. In subsequent amendments to the law and other acts, attention should be focused on finding the right protection mechanism for those who report child abuse and on improving the entire protocol for reporting and managing cases. Also, it is of great importance to familiarize children with the types of abuse and neglect and provide them with the security to turn to a close person for protection. Making efforts to protect and promote the welfare of children affects our immediate future and is not an issue that can wait. Our life today depends, as it always will depend, on children of tomorrow.

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Protokol zaštite dece od zlostavljanja i zanemarivanja od strane roditelja i posledice koje izaziva na integritet i razvoj ličnosti deteta

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Sažetak

Rad predstavlja sažetak regulacije pravnih propisa o zaštiti dece u slučaju zlostavljanja i zanemarivanja od strane roditelja. Predstavljen je analiziran uvid u trenutni sistem i pojašnjeni su svi predviđeni koraci radi osiguranja dobrobiti deteta. Izveden je pokušaj da se ukaže na značaj trenutnog sistema zaštite koji sprovode organ starateljstva i drugi nadležni organi, ali i da se pitanje osmotri sa kritičke strane predstavljanjem slučaja iz prakse radi kontinuiranog poboljšanja. Metodi koji su korišćeni u pisanju ovog rada su: teorijska analiza dostupnog sadržaja iz pravnih akata i relevantnih naučnih radova, normativni metod, sinteza relevantnih informacija u okviru različitih oblasti, kao što su pravo i psihologija, i konkretizacija na osnovu predstavljenog slučaja iz prakse. Cilj rada je da se upozna za merama zaštite, osnovnim pravima deteta i principom njegovog najboljeg interesa u svim postupcima, kao i da ukaže na metode rada Centra za socijalni rad. Uprkos nepostojanju adekvatnih podataka o obimu vršenja ovih radnji nad decom, kritički se ističe potreba uspostavljanja efikasnijeg sistema prijavljivanja i menjanja svesti ljudi o ispravnosti takvog postupanja. Trenutne statistike, usled nemogućnosti prikupljanja potpunih podataka, u velikoj meri usporavaju razvijanje mera prevencije i poboljšanje sistema.

Ključne reči: zlostavljanje deteta, zanemarivanje deteta, roditelji, posledice

Duties of Directors of Commercial Companies Facing the Likelihood of Insolvency

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Duties of Directors of Commercial Companies Facing the Likelihood of Insolvency

Abstract

Following the adoption of EU Directive No. 1023/2019 on preventive restructuring frameworks and its implementation into the national legislation of EU Member States, as well as beyond the EU, specific statutory duties have been introduced for directors of commercial companies facing the likelihood of insolvency. In the course of regular business operations, directors owe specific duties to the company and its shareholders. Until recently, special duties towards the company's creditors arose only upon the occurrence of a ground for insolvency. The moment at which such special duties towards creditors arise has now been shifted to the pre-insolvency stage, thereby expanding the scope of responsibilities inherent in responsible corporate governance. In such circumstances, directors of a debtor company primarily owe particular consideration to the interests of creditors, shareholders, and other stakeholders. Furthermore, they are obliged to take appropriate steps to prevent the insolvency of the company. Finally, they must refrain from actions or omissions that, either intentionally or through gross negligence, jeopardize the sustainability of the company's business operations. These duties represent the minimum standard established by the provisions of the Directive, allowing Member States to introduce a broader range of obligations. However, the Directive does not define what constitutes the likelihood of insolvency, nor does it specify the content of the duty of care. Moreover, it fails to clarify which other stakeholders are encompassed by this duty of care. This gives rise to numerous questions, such as the precise moment at which special duties of care arise, the substance of such duties and their potential breach, and the identification of the persons who are beneficiaries of these duties. The aim of this paper is to analyse the newly introduced special duties of directors, the manner and scope of their implementation into national legal systems, and the practical consequences of their application. The research is based on the normative method, complemented by a comparative legal analysis of the implementation of the Directive's provisions, while case studies provide insight into practical application.

Keywords: directors' duties, commercial company, corporate governance, likelihood of insolvency, EU.

Introduction

Article 19 of Chapter 5 of Title II of Directive (EU) No. 1023/2019 on preventive restructuring frameworks (hereinafter: the *Directive*) (EU Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks) lays down the duties of directors of commercial companies in situations where there is a likelihood of insolvency. These provisions establish a minimum standard which EU Member States are required to observe when adopting legislation implementing the Directive into their national legal systems. Directors are required to take into account the interests of creditors, shareholders, and other stakeholders, to take appropriate steps to avoid insolvency, and to refrain from intentional acts or acts of gross negligence that may jeopardize the sustainability of the company's business operations.

Together with early warning tools and access to relevant information, as well as out-of-court and judicial instruments for preventive restructuring and mechanisms facilitating negotiations on a restructuring plan, these duties form a comprehensive legal framework for companies opting to preserve business continuity and safeguard employment through preventive restructuring. The newly introduced duties constitute a significant extension of the responsibilities inherent in responsible corporate governance.

However, the provisions of the Directive do not specify what exactly constitutes the likelihood of insolvency, nor do they clarify the point in time at which such a likelihood arises. Furthermore, the content of the duty of care owed to creditors, shareholders, and other stakeholders remains undefined. Given that the interests of these groups may be conflicting, the question arises as to which interests should take precedence in directors' decision-making. Finally, it is unclear which persons fall within the category of "other stakeholders" to whom directors owe a duty of care.

Such an approach leaves considerable discretion to national legislators to regulate these issues in divergent ways, which may result in uneven legal treatment rather than harmonisation. In all EU Member States, the provisions of the Directive were transposed into national legislation by the end of 2022. Outside the EU, Ukraine has implemented the Directive through amendments to its Insolvency Law adopted in 2024 (Law on Amendments to the Code of Ukraine on Bankruptcy Procedures, No. 3985-IX), while North Macedonia prepared a draft comprehensive Insolvency Law as early as 2021 (North Macedonia, Draft – Insolvency Law, 2021). The Republic of Serbia, by contrast, has not undertaken legislative action in this respect; consequently, all duties of company directors in the pre-insolvency phase are currently grounded in the provisions of the Law on Business Companies. Accordingly, the first part of this paper analyses the concept of the likelihood of insolvency. The second part addresses the notion of the special duties of directors in situations where such a likelihood exists. The third part is devoted to the subjects upon whom these special duties are imposed, while the fourth part examines the beneficiaries of directors' special duties, in particular creditors. Finally, the fifth part discusses the forms of breach of these special duties and the possible legal remedies available to affected stakeholders.

Likelihood of Insolvency

With regard to insolvency and the likelihood of insolvency, Article 2(2) of Directive (EU) No. 1023/2019 on preventive restructuring frameworks does not provide a definition, but instead refers to the provisions of national law. Consequently, depending on the approach adopted by national legislators, the concepts of insolvency and the likelihood of insolvency may be regulated either separately—within legislation governing preventive restructuring and insolvency law—or jointly within a single insolvency statute or commercial code. In this manner, the Directive leaves room for divergent definitions and interpretations of the crucial moment at which the special duties of company directors arise. This may have a negative impact on the harmonisation of directors' duties across EU Member States, and beyond. In this respect, judicial practice will play a particularly important role.

The most commonly recognised grounds for insolvency are persistent inability to pay, imminent inability to pay, and over-indebtedness. This approach is adopted by the German Insolvency Code (Insolvenzordnung 1994). The same insolvency grounds are prescribed by the Serbian Bankruptcy Law (Serbian Bankruptcy Law, 2009). The German Act on the Stabilisation and Restructuring Framework for Enterprises (StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020), which

transposed Directive (EU) No. 1023/2019 into national law, does not define imminent inability to pay. Nevertheless, Section 30 provides, in the context of applying restructuring instruments, that any insolvency debtor is capable of restructuring. The French Commercial Code, in Book VI, Articles L. 620-1 et seq., provides that, for the purposes of judicial safeguard proceedings (*sauvegarde*), a debtor who is not unable to pay must demonstrate that it is facing difficulties which it is unable to overcome (Art. L. 620-1 Code de commerce). For judicial reorganisation proceedings (*redressement judiciaire*), the debtor must be unable to pay, that is, unable to meet its due obligations with its available assets (Art. L. 631-1 Code de commerce). From a legal perspective, insolvency proceedings are initiated when the debtor ceases to meet its obligations, namely when it no longer has sufficient funds to discharge its debts. A cessation of payments occurs when a company is unable to satisfy its due obligations with its available assets.

In practice, the point at which the likelihood of an insolvency ground arises is often referred to as the "twilight zone" (Coverdale, 2022), since the company has not yet become unable to pay, but signs of crisis or financial distress have become apparent. This stage is distinguished from the "zone of darkness", which begins upon the occurrence of a specific insolvency ground. The term also reflects the necessity for directors to balance the interests of stakeholders, with the particular challenge of preserving the company's business operations and avoiding insolvency.

Following the amendments introduced by the Act on the Further Development of Restructuring and Insolvency Law of 22 December 2020 (*Das Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz*), the German Insolvency Code provides that a debtor is deemed to face imminent inability to pay if it is likely that it will be unable to meet its existing monetary obligations as they fall due. As a general rule, a forecast period of 24 months is applied. However, the mere indication that an obligation falls due within a 24-month period is not in itself sufficient to justify the existence of such a ground (§ 18 Insolvenzordnung). Accordingly, it may be concluded that, under this standard, insolvency is likely if signs emerge in the company's operations indicating that, within that period from their occurrence, the company will be unable to discharge its obligations. The Draft Insolvency Law of North Macedonia provides that preventive restructuring proceedings are conducted in order to enable a debtor who is likely to become unable to pay within one year to undertake, on the basis of a financial restructuring agreement concluded with creditors, measures to restructure its liabilities and other financial restructuring measures necessary to overcome the causes of impending insolvency (Art. 3, par. 1 of the Draft Insolvency Law of the Republic of North Macedonia).

With regard to determining the moment at which directors' special duties arise, a significant decision was delivered by the Supreme Court of the United Kingdom in the *Sequana* case. Although it is no longer an EU Member State, the United Kingdom has implemented Directive (EU) No. 1023/2019 into its national legal framework. The Supreme Court held that directors are required to consider the interests of creditors where the company is approaching insolvency, whether on a balance-sheet basis or due to an inability to meet its due obligations as a result of cash-flow insolvency; where the company is on the verge of bankruptcy; where insolvency proceedings or the appointment of an insolvency practitioner are probable; or where a particular transaction would lead the debtor company into one of those states (UK Supreme Court, *Sequana*, 2022).

As the only non-EU country to have implemented the Directive to date, Ukraine has, through the Law on Amendments to the Code of Ukraine on Bankruptcy Procedures and Certain Other Legislative

Acts concerning the implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council and the introduction of preventive restructuring procedures, provided that, upon the occurrence of signs of insolvency or imminent inability to pay, or where the debtor receives a notice from an auditor or accountant, the debtor's management is obliged, no later than 30 days from the receipt of the relevant information, to notify the founders (members or shareholders) of the debtor, the debtor's equity owner, and other governing bodies competent to resolve such matters. The executive body of the debtor—and, in cases prescribed by law, the founders (members or shareholders) and equity owners—is required to take measures to prevent insolvency, including the conclusion of an out-of-court debt settlement, the initiation of preventive restructuring proceedings, the initiation of financial restructuring proceedings, or the adoption of a decision to file a petition with the commercial court for the opening of insolvency proceedings. Failure to implement, or improper implementation of, these measures gives rise to liability on the part of the persons concerned (Ст. 4.3. Закона про внесення змін до Кодексу України з процедур банкрутства).

Once the moment at which special duties arise has occurred, directors are required to act with regard to the interests of creditors; however, those interests do not take precedence until inability to pay (or an insolvency ground) has materialised. Until that point, directors are required to strike a balanced approach between the interests of shareholders and creditors. In other words, the greater the certainty of a company's inability to pay, the greater the weight that must be accorded to the interests of creditors (Coverdale, 2022).

The Concept of Special Duties

The reason why these duties are considered "special" lies in the fact that they relate to the conduct of directors of a company that is in a particular condition. Specifically, the company remains solvent and continues to operate on a *business-as-usual* basis, yet it is facing signs of crisis or has already encountered financial difficulties that may lead to the occurrence of a specific ground for insolvency. These are statutory duties, as they are established by the Directive and have been incorporated into the national legal systems of EU Member States. From a substantive law perspective, these duties do not belong to insolvency law, since the company remains solvent, whereas insolvency rules may only be applied once an authorised person files a petition and the court establishes the existence of an insolvency ground. On the contrary, these duties clearly fall within the scope of company law. Confusion regarding their substantive legal nature may arise from the fact that, in most EU Member States, they are regulated either by insolvency legislation or by special regulations on preventive restructuring (Đurić, Jovanović et al., 2024, p. 56).

The special duties of directors of companies facing the likelihood of insolvency (Art. 19 EU Directive 2019/1023 on preventive restructuring frameworks) include:

– the duty to take into account the interests of creditors, equity holders, and other stakeholders;
– the duty to take steps to avoid insolvency; and
– the duty to refrain from intentional acts or acts of gross negligence that may jeopardise the sustainability of the business.

Since Directive (EU) 2019/1023 on preventive restructuring frameworks does not provide a more precise definition of the duty of care owed by directors to specific categories of stakeholders, it is necessary

to turn to the provisions of national laws in EU Member States, particularly company law and insolvency law regulations. In the absence of clear statutory provisions and standards of conduct, there is no predetermined set of obligations that directors must comply with, nor a clearly defined range of measures they must undertake when insolvency becomes likely.

With regard to the content of these duties, reference may be made to the legal mechanisms established by the Directive. Accordingly, at the first signs of a business crisis or financial distress, company directors should make use of early warning tools and access to information. Without filing a petition with the court, as well as prior thereto, they may approach the company's creditors and other stakeholders in order to initiate negotiations and reach an agreement aimed at resolving the crisis and implementing restructuring. For the purpose of facilitating negotiations and subsequent restructuring, directors may request the court to allow the debtor, that is, the directors themselves, to remain in control of the company (*debtor in possession*) (Art. 5, EU Directive 2019/1023 on preventive restructuring frameworks), or to order a stay of individual or all enforcement actions in support of negotiations on the restructuring plan (moratorium), provided that such a decision does not prejudice the creditors concerned (Art. 5, EU Directive 2019/1023 on preventive restructuring frameworks). As regards the duty to avoid intentional acts or acts of gross negligence that jeopardise business sustainability, its content should not differ from the general duty of care owed by directors to the company under company law. Directors are required to perform their duties conscientiously, with the care of a prudent business person, and in the reasonable belief that they are acting in the best interests of the stakeholders (Radosavljević, Anđelković et al., 2024, p. 362). These are, therefore, fiduciary duties. The standard of the care of a prudent business person refers to the level of care that would be exercised by a reasonably diligent person possessing the knowledge, skills, and experience that may reasonably be expected of a director of a company (Art. 63 of the Serbian Law on Business Companies). Where directors possess specific knowledge, skills, or experience, these should be taken into account when assessing the required standard of care. Furthermore, directors may rely on information and opinions provided by persons competent in the relevant field, whom they reasonably believe to have acted in good faith. If damage arises from their actions, directors who can demonstrate that they acted with due care should not be held liable for the damage caused to stakeholders.

Thus, the German legislator, in the Act on the Stabilisation and Restructuring Framework for Enterprises, which implemented Directive (EU) 2019/1023 and introduced the preventive restructuring framework into German law, provides that directors are obliged to ensure that preventive restructuring proceedings, where insolvency is likely, are conducted by the debtor with the care of a reasonable and diligent manager and in a manner that safeguards the interests of all creditors (§ 43 StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020), or all creditors as a collective.

The purpose of the special duties of directors of companies facing the likelihood of insolvency derives from the definition of preventive restructuring laid down in the Directive, namely, to enable debtors in financial difficulty to prevent the occurrence of an insolvency ground and to ensure the sustainability of their business (Art. 1(1)(a) EU Directive 2019/1023 on preventive restructuring frameworks), and, where possible, to increase the value of the debtor company.

Primarily, the interest of creditors, especially unsecured or ordinary creditors, lies in the company emerging from the crisis without jeopardising either the satisfaction or the amount of satisfaction of their claims. Secured creditors, naturally, enjoy a more favourable position, as their claims are satisfied from the

value of the collateral. Furthermore, if the company enters preventive restructuring proceedings, it is likely that the amount in which the claims of some or all creditors are satisfied will be reduced. Moreover, by introducing the instrument of imposing a restructuring plan on dissenting creditors (*cross-class cram-down*), a number of creditors may become bound by the plan against their will (Art. 11, EU Directive 2019/1023 on preventive restructuring frameworks). Ultimately, the worst outcome for creditors would be insolvency proceedings, in which they would have to settle for proportional satisfaction in accordance with the statutory order of priority. As regards equity holders, their interest likewise lies in the company overcoming its financial difficulties, while ensuring that the size of their equity participation is not reduced through measures altering the capital structure, either within or outside preventive restructuring proceedings. Finally, with respect to other stakeholders, their interests include the preservation of jobs, the regular payment of taxes and contributions, economic stability, and, in general, the sustainable operation of the company. Given the negative connotations associated with the likelihood of insolvency, the Directive allows for confidential proceedings, in which facilitated negotiation or mediation may contribute to the successful conduct and conclusion of negotiations with creditors (Đurić, Jovanović, 2023, p. 449).

Furthermore, directors are obliged to take steps to avoid insolvency. In accordance with the Directive, directors must implement internal measures within the company, make use of early warning tools and access to information, and initiate negotiations with creditors. They may apply to the court for the opening of preventive restructuring proceedings. In order to facilitate negotiations, directors may apply to the court for the debtor to remain in possession of the company (*debtor in possession*) or for the imposition of a stay on individual or all enforcement actions. For the successful completion of the proceedings, directors should strive to prepare an effective restructuring plan capable of securing the support of a sufficient number of stakeholders and court confirmation, containing measures that are feasible and conducive to achieving the restructuring objectives.

Finally, with respect to avoiding intentional acts that jeopardise business sustainability, it is essential that directors act conscientiously in performing their management and representation duties. Where acts of gross negligence are concerned, in addition to good faith, directors must possess sufficient professional knowledge and experience to manage a company in the relevant sector (Radosavljević, Đurić et al., 2024, p. 23). Both preventive and remedial solutions may include professional training of directors, particularly in micro, small, and medium-sized enterprises (Perry, Shikha, 2025). However, this is often associated with costs that such enterprises cannot bear. Without calling into question managerial powers, and in order to ensure oversight of directors' conduct in situations of likely insolvency, the Directive allows courts to appoint a restructuring practitioner. Such a practitioner may be tasked with: (1) assisting the debtor or creditors in drafting the restructuring plan or negotiating its terms; (2) supervising the debtor's activities during negotiations and reporting to the court or administrative authority; and (3) partially taking over the management of the debtor's assets or business during negotiations (Art. 2(1)(12), EU Directive 2019/1023 on preventive restructuring frameworks). Acts committed with ordinary negligence are not addressed by the provisions of the Directive.

The purpose of the special duties of directors is primarily determined by the state in which the debtor company finds itself and by whether judicial proceedings have been initiated. Accordingly, as long as the company remains within the sphere of consensual decision-making and voluntary arrangements, and as long as its management and assets are not subject to mandatory legal rules, directors retain the

ability to express the company's will and to balance the interests of creditors, equity holders, and other stakeholders. This remains possible in preventive restructuring proceedings as regulated by the Directive. Although such proceedings address the likelihood of insolvency and are often regulated by insolvency legislation, they do not constitute insolvency proceedings. Preventive restructuring encompasses measures aimed at reorganising the debtor's business, which may include changes in the composition, conditions, or structure of the debtor's assets and liabilities, or any other part of the capital structure, such as asset sales or the sale of parts of the business, and, where provided for by national law, the sale of the business as a going concern, as well as any necessary operational changes or a combination thereof (Article 2(1)(1), EU Directive 2019/1023 on preventive restructuring frameworks). In this way, the duties of corporate governance have been significantly expanded.

The duty to exercise special care with regard to the interests of creditors, equity holders, and other stakeholders arises when insolvency becomes likely. This phase precedes the stage at which the debtor is threatened with inability to pay or becomes insolvent or over-indebted. Since directors must then take into account a broader range of interests beyond that of the company alone, they are no longer required to adhere strictly to the *business judgment rule*. Rather, this situation calls for a duty to adopt a balanced approach to competing interests. The interest of the company is no longer the exclusive management standard. However, creditors' interests do not yet dominate; they become paramount only upon the opening of insolvency proceedings. Conversely, the interests of equity holders must also be taken into account, since the company remains solvent, meaning that they retain ownership rights over their equity interest and entitlement to profits.

Nevertheless, the interests of the company, creditors, and equity holders are not necessarily divergent. Where directors of a company facing likely insolvency seek to increase profits and preserve the value of the debtor and its business, they do not act to the detriment of creditors' interests. On the contrary, such conduct aims to preserve the assets from which creditors' claims will ultimately be satisfied. In other words, such conduct is consistent with the "*best-interest-of-creditors*" or "*no creditor worse off*" standard. This standard is explicitly introduced by the Directive in the court's assessment of preventive restructuring plans and in the context of imposing plans on dissenting stakeholders through *cross-class cram-down* (Art. 10 and 11, EU Directive 2019/1023 on preventive restructuring frameworks). It also serves the interests of equity holders, as the company may continue operating profitably without diminishing the value of their equity, while remaining capable of meeting its obligations to creditors. For other stakeholders, such as employees, this may result in the preservation of jobs and wage income, unless measures involving workforce reductions are adopted. For the state, territorial autonomy, or local self-government, this may contribute to economic stability, employment levels, tax revenue, and reduced social expenditure. This approach finds its foundation in the 2019 UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide on Insolvency Law 2019).

However, once restructuring proceedings are initiated, or where insolvency grounds of reorganisation or bankruptcy arise, the interests of the aforementioned stakeholders inevitably become conflicting. Insolvency proceedings, bankruptcy, or reorganisation are conducted primarily for the purpose of satisfying creditors' claims.

Holders of Special Duties

Directive (EU) 2019/1023 on preventive restructuring frameworks refers to directors; however, since its provisions apply to all companies, it may be concluded that it addresses the management of companies more broadly, that is, corporate governance. In this respect, reference may be made to Article 61 of the Serbian Law on Business Companies, which is aligned with EU company law.

Depending on the range of legal forms of companies recognised under national company law, the following persons may be identified as holders of the special duty of care towards creditors, equity holders, and other stakeholders in situations where a company is facing the likelihood of insolvency:

– in a general partnership – the partners;

– in a limited partnership – the general partners;

– in a limited liability company – members holding a significant participation in the company's share capital or a member who exercises control over the company;

– in a joint-stock company – shareholders holding a significant participation in the share capital or a controlling shareholder;

– directors, members of the supervisory board, legal representatives, and holders of procuration; and the liquidator.

This list is not exhaustive, as a company may, through its articles of association, authorise other persons to perform management and representation functions, thereby subjecting them to the duty of care towards stakeholders.

In the above-mentioned *Sequana* case, the Supreme Court of the United Kingdom took the position that directors do not owe duties to individual creditors, nor do they directly discharge their duty to act in the interests of the company towards its members; rather, they are required to consider the interests of creditors as a whole (Sheler, Kaplan et al., 2020).

In practice, compliance with special duties of care towards creditors and other stakeholders—and to a lesser extent towards equity holders—poses a significant challenge, particularly for directors of micro, small, and medium-sized enterprises. On the one hand, such directors often lack the necessary market knowledge and experience, especially in the case of start-up companies, as well as the financial resources required to engage professional advisers. In this context, conscientious conduct by directors does not necessarily ensure the successful fulfilment of the prescribed duty of care. Accordingly, appropriate professional training programmes would be of considerable importance. On the other hand, micro, small, and medium-sized enterprises are characterised by a particularly high rate of business failure (Perry, Shikha, 2025).

Comparative law reveals two principal approaches to the concept of directors' duties. On the one hand, there is the approach characteristic of common law systems. Under this approach, where a company operates on a *business-as-usual* basis, that is, where it remains solvent, directors do not owe a special duty of care to creditors (UK Supreme Court, *Sequana*, 2022). Their duty of care (*due regard*) is primarily owed to the interests of the company they manage. In this regard, the case law in the United States has adopted a particularly firm position, as reflected in the *Gheewalla* doctrine (Del. Supr., *Gheewalla*, 2007). Even when a company encounters financial difficulties, the interests of the company remain paramount.

Thus, illiquidity, understood as a temporary inability to pay, does not alter the content of directors' duties (Sheeler, Kaplan et al., 2020). Only when the insolvency of the company becomes inevitable are directors required to give primary consideration to the interests of the debtor's creditors. From the emergence of the first signs of financial distress or crisis until the filing of a petition for the opening of insolvency proceedings and the establishment of an insolvency ground, directors retain full discretion to conduct the company's affairs in a balanced manner, reconciling the interests of the company with the interests of the categories of stakeholders defined by the Directive and national legislation. Naturally, this presupposes that the financial difficulties were known to the stakeholders and that, due to delayed or defective performance of obligations, the stakeholders—acting as creditors of the duty of care—have suffered damage. Directors must ensure that they are regularly informed, maintain up-to-date information flows, and secure timely knowledge of any reduction in cash flow or available assets to a level at which obligations to creditors can no longer be met. Furthermore, directors are required to keep proper records of their decisions and the reasons underlying them, and it is advisable to seek professional advice when making significant decisions (Coverdale, 2022).

On the other hand, in continental European jurisdictions, that is, systems of the *civil law* tradition—particularly in EU Member States and candidate countries—the implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks has shifted the duty of care towards creditors beyond the confines of insolvency law. The focus has thus moved away from the moment of the opening of insolvency proceedings to an earlier stage preceding insolvency, in which a crisis may still be prevented and, consequently, the likelihood of the occurrence of an insolvency ground avoided.

Creditors of the Special Duties

The Directive identifies the following categories as beneficiaries of the special duties owed by directors of a company facing the likelihood of insolvency:

– the company's creditors;

– equity holders of the company; and

– other stakeholders.

As previously noted, these duties are owed to creditors as a collective rather than to individual creditors. This means that, in the event of a breach of directors' duties, any creditor may seek judicial protection; however, when assessing whether a breach has occurred and whether damage has arisen, the court must take into account the interests of creditors as a whole. Accordingly, a decision of the directors that dissatisfies a particular creditor cannot be declared ineffective if it has not been detrimental to the collective interests of creditors.

With respect to equity holders, the Directive adopts a general approach and does not differentiate among them. This category therefore includes, in partnerships, partners, general partners, and limited partners, and in capital companies, members and shareholders. From this it may be inferred that majority and minority equity holders formally enjoy an equal position. From a legal perspective, this conclusion is valid; however, given that the company remains solvent, it is legitimate for majority equity holders to exercise decisive influence through directors acting as the company's management and legal representatives. Minority equity holders are afforded protection under company law. In practice, however,

the interests of the majority equity holder(s) will predominantly prevail. In micro and small enterprises, and in some cases medium-sized enterprises, the role of director is often performed by the equity holders themselves (Đurić, Jovanović, 2024, p. 139), leaving little scope for the practical application of this duty.

Finally, with regard to other stakeholders, this category encompasses all other persons who may be affected by the company's financial difficulties or its insolvency. This includes employees and the state, as well as territorial autonomy or local self-government units. In the case of multinational companies operating across multiple jurisdictions, and in the context of corporate groups, this category may further include subsidiary and parent companies, as well as their associated creditors and equity holders, all of whom may qualify as stakeholders.

Breach of Directors' Special Duties and Legal Protection

Since the Directive does not prescribe specific mechanisms for the enforcement of protection in the event of a breach of special duties, it is necessary to seek answers in the rules of company law and the law of obligations of the relevant national legal system.

The above-mentioned German Act on the Stabilisation and Restructuring Framework for Enterprises provides that, where directors breach their statutory duty of care towards creditors as a whole, they give rise to an obligation of the debtor company to compensate creditors for the damage suffered, up to the amount of the loss incurred. Directors may be relieved of liability if they prove that they are not responsible for the breach of duty. Any decision taken by directors on behalf of and for the account of the debtor company that infringes creditors' interests—such as a waiver of debt or a settlement relating to claims—shall be ineffective to the extent necessary to satisfy creditors' claims. However, this rule does not apply where the company itself was the party obliged to pay compensation and concluded a settlement with its creditors for the purpose of preventing insolvency proceedings in respect of its assets. Likewise, the rule does not apply where the obligation to pay compensation is governed by a reorganisation plan or where an insolvency administrator concludes a settlement while acting on behalf of the creditors entitled to compensation. With regard to the protection of creditors' rights, claims for damages arising from a breach of the duty of care towards creditors' interests are subject to a limitation period of five years, or ten years where, at the time of the breach, the company was listed on a stock exchange (§43 StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020).

What constitutes a breach of the special duties of directors of a company facing the likelihood of insolvency? In general terms, a breach may be identified where directors act without the care of a reasonable and diligent manager (Vasiljević, 2013, p. 194) and without due regard to the protection of the interests of all creditors or other categories of stakeholders identified by the Directive and national law. Further breaches may consist in the failure to take measures to prevent insolvency, particularly where business reports clearly indicate a state of crisis and insolvency is likely. Directors must, in particular, refrain from actions that give rise to conflicts of interest (Lepetić, 2015, p. 241). Other acts jeopardising business sustainability, committed intentionally or as a result of gross negligence, may include the absence of, or failure to maintain, adequate accounting records; the failure to prepare interim balance sheets despite imminent over-indebtedness; delays in filing for preventive restructuring or in initiating insolvency proceedings in cases of over-indebtedness; investing a substantial portion of the debtor company's assets in highly speculative investments; withdrawing assets from the company without providing adequate

consideration; obtaining bank loans or credit by using falsified balance sheets or false information; and the failure to pay social security contributions. In the *Sequana* case, the Supreme Court of the United Kingdom adopted a position contrary to that of the Court of Appeal, holding that where directors take a decision that is unlawful or constitutes a breach of the duty of care towards creditors, such a decision cannot be approved or ratified by the company's members, as this would undermine the company's ability to pay or cause harm to creditors. In the case at hand, the company was operating in the ordinary course of business and distributed profits in the form of dividends from available funds. Thus, even where a company is solvent, directors may, through their actions or omissions, breach these special duties. Consequently, the duty of care towards creditors in situations of likely insolvency constitutes an additional obligation, applicable both when the company is threatened with such inability to pay and when it continues to operate normally and has distributable profits (Coverdale, 2022).

Although this concerns the breach of serious statutory duties of directors, the Directive primarily seeks to provide a second chance to conscientious but unsuccessful debtors through restructuring measures and the preservation of business operations. Particular emphasis is placed on supporting micro, small, and medium-sized enterprises, which typically lack professional management and where the role of director is often performed by the equity holders themselves (Mokal, Davis et al., 2018, p. 68-69). Despite acting in good faith, such directors frequently fail due to a lack of market experience and the burden of financial distress, which is when breaches of special duties towards creditors and other stakeholders most commonly occur. Consequently, breaches of duties towards equity holders tend to become particularly relevant in the context of large corporations.

The protection of creditors, equity holders, and other stakeholders may be pursued through different legal avenues, depending on the category of persons in relation to whom the directors have breached their special duties. Thus, the protection of the interests of creditors and other stakeholders may be sought through contractual claims for damages and through the avoidance of the debtor's legal acts (*actio Pauliana*). The protection of equity holders is further afforded through company law actions for the breach of special duties, including individual actions. In addition, one or more equity holders may bring a derivative action in their own name but on behalf of the company. Beyond compensation for damages or the declaration of decisions or legal transactions as ineffective vis-à-vis the protected category of persons, additional measures may include the disqualification of directors, the appointment of an additional director, or the removal of directors.

Conclusion

By establishing special duties of directors in situations where a company is likely to face insolvency, the Directive has taken an important step towards disciplining corporate management in times of financial distress. These duties are aimed at protecting creditors, equity holders, and other stakeholders, preventing insolvency, and deterring intentional acts or acts of gross negligence that may jeopardise the sustainability of the company's business. A significant number of EU Member States have merely transposed the provisions of the Directive verbatim, without undertaking a more detailed regulation of these duties in national legislation. As a result, the concept and content of these duties, the precise moment of their emergence—namely, the notion of the likelihood of insolvency—and the scope of other stakeholders have often remained insufficiently defined.

The Directive itself only indirectly delineates the framework within which directors are expected to act. Upon becoming aware of the first signs of a business crisis, directors should resort to early warning tools and access to information, and engage with creditors in negotiations aimed at restructuring. For this purpose, upon the request of the company, the court may allow the debtor to remain in possession or order a stay of enforcement actions, in order to support negotiations and further measures directed at reorganising the debtor's business. Such measures may include changes in the composition, conditions, or structure of the debtor's assets and liabilities or other parts of the capital structure, the sale of assets or parts of the business or the business as a going concern, as well as other operational changes or a combination thereof.

In the absence of more specific national provisions, judicial practice will play a crucial role. Shortly before its withdrawal from the European Union, case law in the United Kingdom provided an important interpretation of directors' duties in situations of likely insolvency. In addition, the German legislator, by implementing the Directive through the Act on the Stabilisation and Restructuring Framework for Enterprises, offered further clarification regarding the framework within which courts should interpret these duties, particularly with respect to the timing of their emergence and their substantive content.

While a company remains solvent, breaches of these duties are not precluded. Given that insolvency grounds are typically identified at a relatively late stage, it is all the more important for companies to appoint directors who conscientiously and professionally monitor business operations and potential signs of crisis. In this regard, specialised training or the engagement of professional advisers may prove beneficial. However, this poses a particular challenge for micro, small, and medium-sized enterprises, which often lack the necessary financial resources.

With the emergence of financial difficulties, directors no longer owe duties solely to the company, but also to creditors and other stakeholders as a collective. As long as the company remains solvent, directors retain the authority to adopt a balanced approach towards the interests of the company, creditors, equity holders, and other stakeholders. By breaching these duties, directors cause harm not only to the interests of creditors and other stakeholders, but also to the company itself, which becomes liable for compensation of such damage.

Serbian legislation provides a solid starting point for the recognition of special duties of directors within the provisions of the Law on Business Companies. However, their regulation *de lege ferenda* will likely be addressed either through a dedicated law on preventive restructuring or through amendments to the Law on Business Companies and the Law on Bankruptcy.

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Sažetak

Po usvajanju Direktive EU br. 1023/2019 o okvirima preventivnog restrukturiranja i njenim sprovođenjem kroz nacionalna zakonodavstva država članica, kao i van njih, uvedene su za direktore privrednih društava suočenih sa verovatnoćom stečaja posebne zakonske dužnosti. U redovnom poslovanju, direktori imaju posebne dužnosti prema privrednom društvu i vlasnicima kapitala. Donedavno, tek nastupanjem stečajnog razloga rađala se posebna dužnost prema poveriocima društva. Tako se trenutak nastanka posebnih dužnosti prema poveriocima pomera u stanje koje prethodi stečaju i proširuje krug dužnosti odgovorne korporativne uprave. U navedenoj situaciji, direktori privrednog društva dužnika duguju pre svega posebnu pažnju interesima poverilaca, vlasnika kapitala i drugih zainteresovanih lica. Dalje, oni su dužni da preduzmu korake kako bi se sprečio stečaj društva. Najzad, oni su dužni da izbegavaju radnje kojima namerno ili krajnjom nepažnjom ugrožavaju održivost poslovanja društva. Te dužnosti predstavljaju minimum postavljen odredbama Direktive, tako da države članice mogu uvesti širi krug dužnosti. Ipak, Direktiva nije utvrdila šta predstavlja verovatnoća stečaja niti dužnost pažnje. Takođe, nije utvrđeno koja su to druga zainteresovana lica, prema kojima direktori imaju dužnost pažnje. Time se otvaraju brojna pitanja, poput onih kada tačno nastaju posebne dužnosti pažnje, u čemu se sastoji ta dužnost odnosno njena povreda, koja su sve lica poverioci takve dužnosti itd. Cilj ovog rada je da analizira nove, posebne dužnosti direktora, način i obim njihovog uvođenja u nacionalna zakonodavstva i posledice primene u praksi. U radu se polazi od normativnog metoda, zatim se uporednopravnim metodom sagledava sprovođenje odredbi Direktive, a kroz studije slučaja se pruža uvid u praktičnu primenu.

Ključne reči: dužnosti direktora, privredno društvo, korporativna uprava, verovatnoća stečaja, EU.

The Legal Character of the Subjective Time Limit under Article 515 of the Law on Obligations: Between Good Faith and Formalism

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The Legal Character of the Subjective Time Limit under Article 515 of the Law on Obligations: Between Good Faith and Formalism

Abstract

The legal nature of the subjective time limit set forth in Article 515 of the Law on Obligations of the Republic of Serbia, which regulates the buyer's right in cases of eviction, raises a number of theoretical and practical issues. Although prevailing legal doctrine and case law regard this time limit as preclusive, such interpretation becomes problematic in situations where the seller was aware of a third party's right and failed to disclose it. The paper particularly examines the limits of contractual exclusion of the seller's liability, viewed through the lens of the principle of good faith and fair dealing. By analyzing relevant judicial decisions and comparative legal solutions in German, French, Anglo-American, and international commercial law (CISG), the study argues for a clearer legislative determination of the nature of the time limit under Article 515 and for the introduction of exceptions in cases of the seller's bad faith. It concludes that such a reform would enhance legal certainty, safeguard contractual equilibrium, and align Serbian contract law with modern European standards.

Keywords: eviction, legal defect, contractual liability, preclusion, good faith and fair dealing.

Introduction

Eviction, as an institution of the law of obligations, serves to safeguard legal certainty in contractual relations by protecting the buyer against legal defects that may restrict or entirely exclude the buyer's right of ownership or use of the thing sold. The institution of eviction represents one of the classical mechanisms for the protection of the buyer in a contract of sale, whose primary function is to preserve legal certainty in transactions and ensure the full realization of the buyer's rights in relation to the purchased item. In this context, the seller's liability for legal defects serves as a corrective to the principle of autonomy of will, as it limits the possibility of transferring a right that is not complete or that is burdened by the rights of third parties. The stability of legal transactions requires not only that the seller deliver the thing free from third-party rights, but also that the legal system provide mechanisms enabling the buyer to secure effective protection where such rights exist and are asserted. Legal theory offers varying definitions of eviction—ranging from a broad understanding, which encompasses any legal disturbance of the acquirer by a third party, to a narrow approach, which links eviction exclusively to the loss of a dispute before a court (Slakoper, p. 2; Džipković, p. 163).

The Law on Obligations of the Republic of Serbia (ZOO), in Articles 508–515, regulates the seller's liability for legal defects. Both the statute and domestic legal scholarship treat the concepts of "legal defects" and "eviction" as synonymous (Džipković, p. 165). Particular importance is attributed to Article 515, which introduces a subjective time limit for the exercise of the buyer's rights in cases of eviction. These rights lapse if they are not exercised within one year from the day on which the buyer became aware of the existence of a third party's right. The legal nature of this time limit—whether it should be classified as a preclusive period or as a limitation period—remains theoretically controversial and practically

significant, since it directly affects procedural consequences and the very survival of the underlying subjective right (Šobot, p. 35).

The paper first examines the legal basis of liability for legal defects, emphasising its dispositive character. It then analyses the permissibility of contractual exclusion or limitation of the seller's liability in light of domestic and foreign case law, as well as relevant international instruments. Special attention is devoted to the conditions under which such derogation may be upheld, particularly the restrictions arising from the principle of good faith.

The central part of the paper addresses the interpretation of the time limit prescribed by Article 515 of the ZOO, with particular reference to domestic doctrine, judicial practice, and comparative approaches in both continental and common law systems, as well as within the framework of the United Nations Convention on Contracts for the International Sale of Goods (CISG). The paper concludes by assessing Serbian case law and proposing a more precise normative determination of the legal nature of this time limit, including the introduction of exceptions in cases involving the seller's bad faith.

The aim of the research is to highlight the need for clearer normative and theoretical clarification of the time limit under Article 515 of the ZOO, thereby enhancing legal certainty, preserving the balance between contractual parties, and ensuring consistency with contemporary European and international standards.

1. Legal Basis and Nature of Liability for Legal Defects

The seller's liability for legal defects in Serbian contract law is grounded in the principle that the seller must enable the buyer to enjoy the purchased thing without legal disturbance. A legal defect exists where a third party holds a right in respect of the thing that excludes or limits the buyer's ownership, use, or power of disposition, provided that the buyer was neither informed of such right nor agreed to accept it.

Pursuant to Article 508 of the Law on Obligations (ZOO), the seller is liable where a third party's right prevents the buyer from exercising the rights arising from the contract. In the event of eviction, the buyer may seek rescission of the contract, restitution of the price paid, compensation for damages, as well as other legal consequences provided by law (Article 510).

Unlike liability for material defects, liability for legal defects is assessed according to an objective standard. The seller is liable irrespective of fault, once it is established that a third party's right restricts the buyer's entitlements. At the same time, this regime is dispositive: the parties may contractually exclude or limit the seller's liability, except where the seller knew of the third party's right or concealed it (Article 513). As noted in the literature, the dispositive nature of this framework does not preclude the operation of limits derived from the protection of the equivalence of performances and the interest in proper performance, which ultimately serves to maintain a fair balance between the contractual parties (Karanikić Mirić, 2024, pp. 388–389).

Article 512 of the ZOO is of particular relevance, as it extends the seller's liability to situations where actual eviction has not yet occurred but the third party's right is manifestly well-founded. This enables the buyer to respond preventively, rather than awaiting the final outcome of litigation. In parallel, Article 511 imposes on the buyer a duty to notify the seller in due time of the third party's claim, in order to preserve the buyer's right of recourse.

Within this system, the buyer's right of recourse plays a central role. After suffering the consequences of eviction, the buyer may claim restitution of the price and/or compensation for damages from the seller. This mechanism ensures that the buyer is compensated for the loss caused by the legal defect. Importantly, the buyer's failure to notify the seller of a third party's disturbance does not extinguish the seller's liability. Rather, it weakens the buyer's procedural position, since the buyer—if unsuccessful in litigation against the third party—may only subsequently invoke the seller's liability (Gorenc, 1993, p. 72).

The eviction regime under the ZOO therefore provides a structured and balanced framework of protection. At the same time, it leaves room for contractual modification of the parties' obligations, including limitations on the buyer's rights. This issue becomes particularly sensitive where the subjective time limit for exercising such rights is not respected, which is addressed in the following section.

2. Contractual Exclusion of Liability for Legal Defects: Legal Basis and Limits of Permissibility

The parties' right to determine the scope of the seller's liability for legal defects represents one of the most complex issues arising from the application of the principle of freedom of contract in the law of obligations. Although the law allows derogation from this liability regime, such contractual autonomy is subject to strict conditions and limitations, aimed at preserving legal certainty and maintaining the balance between the contractual parties.

The positive-law framework of the Republic of Serbia, as set out in Articles 508–515 of the Law on Obligations (ZOO), establishes the seller's objective liability for legal defects, while allowing its exclusion only where the explicitly prescribed statutory requirements are met. Legal scholarship emphasises that the eviction regime is dispositive in nature; however, contractual modification is not unlimited. In particular, the seller may not exclude or limit liability for defects of which the seller was aware or which the seller concealed in bad faith, as such a contractual provision would run counter to the fundamental principles of the law of obligations (Karanikić Mirić, 2024, p. 396).

The validity of a contractual provision by which the seller is released from liability cannot be assessed in isolation. Rather, it must be evaluated in light of the principle of good faith, the need to protect the economically weaker party, and the requirement to prevent abuse of superior bargaining power. Comparative legal sources confirm a similar approach. The United Nations Convention on Contracts for the International Sale of Goods (CISG), as well as national legal systems such as German and French law, impose restrictions on the permissibility of clauses excluding the seller's liability, particularly in cases involving concealment or non-disclosure of third-party rights affecting the object of sale.

2.1. Legal Criteria for the Permissibility of Derogating the Seller's Liability

The principle of party autonomy allows contractual parties to regulate their mutual relations as they deem appropriate. However, the exclusion or limitation of the seller's liability for legal defects is not unlimited. Freedom of contract in this field is constrained by mandatory rules of the law of obligations and by the principle of good faith. Article 513 of the Law on Obligations (ZOO) provides that the seller's liability may be contractually limited or fully excluded, but not in cases where the seller knew, or could not have been unaware, of the existence of a legal defect. In such circumstances, a contractual provision excluding liability is deemed null and void (Article 513(2) ZOO).

The legal effect of a contractual clause releasing the seller from liability therefore depends on the seller's good faith and full disclosure of all relevant facts concerning the legal status of the object of sale. Any deviation from the statutory regime is subject to strict judicial scrutiny in light of the principle of good faith set out in Article 12 of the ZOO. Where the seller was aware of a third party's right but concealed that circumstance with the intent to mislead the buyer, the exclusion clause becomes void, as it conflicts with the fundamental values of the law of obligations and public policy. This confirms the corrective role of the courts in safeguarding the fair balance between the contractual parties.

Similar solutions may be found in international and comparative law. Under German law, § 435 of the Bürgerliches Gesetzbuch (BGB) provides that an item is free from legal defects where third parties are unable to assert rights in respect of it, except for those expressly assumed by the buyer under the contract. A legal defect exists where a third party may demand the return of the item or impose limitations on its use without the buyer's consent. German doctrine and practice also treat as a legal defect a situation in which a non-existent right is entered in the land register, reflecting a high level of buyer protection and the seller's objective liability (Bürgerliches Gesetzbuch [BGB], § 435, 2025).

In French law, Article 1628 of the Code civil provides that the seller may not be released from liability for legal defects that arise from the seller's own conduct. Even where the contract contains a clause excluding liability, the seller remains liable if the seller knew of the legal defect or caused the disturbance affecting a third party's right (Code civil, art. 1628, Legifrance). Additional protection is afforded to the buyer by Article 1643, which establishes the seller's liability for legal defects that prevent peaceful enjoyment of the thing, unless the buyer expressly agreed to them (Code civil, art. 1643, Legifrance).

In Serbian judicial practice, the validity of the buyer's consent to legal limitations affecting the object of sale is assessed in light of the principle of good faith, the duty of disclosure, and the requirement to preserve contractual equilibrium. The buyer's consent cannot be presumed; it must stem from an explicit declaration of intent based on complete and timely information. The burden of proof lies with the seller to demonstrate that the buyer was informed of the existence of third-party rights or other legal impediments capable of affecting the use of the object of sale. In its decision of the Supreme Court of Cassation of Serbia, Rev. 742/06 of 28 June 2006, the court held that the seller remains liable for legal defects even where the thing has been physically delivered to the buyer, if public-law restrictions exist that affect its use and the buyer was not informed thereof. The court emphasised that a contractual clause excluding liability produces no legal effect where the buyer was not previously informed in good faith of the legal status of the thing.

2.2. Limits of Permissible Contractual Clauses in Light of Public Policy and the Principle of Good Faith

Freedom of contract, although guaranteed by the principle of party autonomy, is in modern contract law subject to limitations arising from public policy, mandatory rules, and the principle of good faith. These limitations become particularly relevant when assessing contractual provisions that derogate from the seller's statutory liability for legal defects, especially where the buyer is in a weaker legal or factual position.

Article 10 of the Law on Obligations (ZOO) provides that a contract contrary to mandatory provisions, public policy, or good morals produces no legal effect. Article 15 of the ZOO establishes contractual relations on the principle of equivalence of performances, while Article 12 obliges the parties

to act in good faith. On the basis of these norms, courts are authorised to declare null and void a contractual provision that leads to a manifest imbalance in the rights and obligations of the parties, or that results from the seller's concealment of decisive circumstances.

Legal scholarship emphasises that the principle of good faith operates as an "imperative standard" permeating the entire system of obligations, functioning as a corrective to contractual autonomy and preventing exploitation of the weaker party by ensuring a fair balance of interests (Pajtić, Radovanović & Dudaš, 2018, pp. 86–88).

Case law largely confirms the primacy of good faith in this context, although examples may be found in which Article 515 is interpreted in a strictly formalistic manner. For instance, the Supreme Court of Montenegro, in decision Rev. 117/98, held that "liability for legal defects complements the effects of the contract of sale and therefore cannot be invoked beyond the short and strict time limits within which the buyer may seek protection against eviction…" (Ćosić, 1988, pp. 216–217). By contrast, formalism has no place in more recent judicial practice. In decision Rev. 742/06, the Supreme Court of Serbia held that the seller cannot be released from liability where the seller concealed the existence of a third party's right limiting the buyer's ability to use the object of sale. The court emphasised that such a clause produces no legal effect, since it is not the result of good faith and full disclosure to the buyer, but rather a consequence of abuse of superior bargaining power and a breach of trust in legal transactions.

A similar approach is evident in international and comparative law. Articles 41 and 42 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) provide for the seller's liability where a third party holds a right in the goods, unless the buyer knew or could not have been unaware of such right (DiMatteo, 2005, p. 109). CISG commentary further underscores that contractual attempts to exclude such liability will be ineffective where they conflict with fundamental principles of good faith and fair dealing (Schwenzer, 2016, p. 656).

In Anglo-American law, the doctrine of *unconscionability* has developed as a mechanism for challenging contractual terms that produce manifest injustice. Courts may intervene where the bargaining process was significantly unequal or where the agreed terms are oppressive in nature (DiMatteo, 2014, p. 212).

German law, in § 307(1) BGB, provides for the invalidity of contractual terms that unfairly place one party at a disadvantage. This rule applies both to standard-form contracts and to individual clauses derogating from statutory obligations where they are contrary to principles of fairness and contractual equality. French law adopts a comparable approach. Article 1170 of the Code civil invalidates any clause that deprives a contractual obligation of its essential content, while Article 1137 provides for nullity where the other party was misled through the concealment of facts of decisive significance (Code civil, arts. 1170 and 1137, Legifrance).

In Swiss law, bad faith is addressed through procedural mechanisms. Under civil procedure rules, a party—here, the buyer—has the right to notify the seller of litigation with a third party concerning legal defects and to invite the seller to intervene in order to protect the buyer's interests. The seller is not obliged to join the proceedings; however, if the court decision is rendered to the detriment of the buyer, its effects may also extend to the seller (Jovičić, 2018, p. 256).

A different approach is adopted in the proposed European codification of private law, namely the *Principles, Definitions and Model Rules of European Private Law* (Draft Common Frame of Reference—

DCFR). In Book IV, Part A (Sales), Article 2:305 (*Third party rights or claims in general*) establishes the general rule that "the goods must be free from any right or reasonably well founded claim of a third party" (von Bar, 2009, p. 282). A separate, autonomous eviction remedy is not provided; instead, a breach of this rule is sanctioned under the general rules governing non-performance of contractual obligations.

In light of the foregoing, it may be concluded that contractual clauses excluding the seller's liability for legal defects lose legal effect where they result from the concealment of decisive circumstances, disturb the contractual balance, or contradict fundamental principles of fairness. Such provisions undermine not only the buyer's individual rights but also overall confidence in legal transactions, and therefore require strict judicial control.

3. Case Law and Comparative Legal Overview

Following the theoretical analysis and examination of domestic legal provisions, it is necessary to consider the practice of foreign courts and international arbitral tribunals, as such practice confirms the universal character of limitations on contractual autonomy and highlights the role of good faith as a corrective mechanism in contractual relations. Comparative analysis demonstrates that, across different legal systems, restrictions on freedom of contract are grounded in similar values—namely, the protection of the weaker party and the preservation of a fair balance of contractual obligations.

In German law, § 435 BGB provides that an item is affected by a legal defect where it is encumbered by a third party's right which the buyer is not obliged to tolerate. In its decision of 10 March 1999 (BGH, VIII ZR 204/98), the Bundesgerichtshof confirmed that the seller bears liability where a legal restriction affects the usability of the item and where the buyer was not adequately informed thereof.

The French Cour de cassation, in its decision of 30 January 2008 (third civil chamber, no. 06-21.145), held that the seller remains liable even where the contract contains an exclusion-of-liability clause, if the seller failed to disclose the existence of an easement that substantially restricts the use of the property. The court emphasised that such a contractual provision produces no legal effect if it is not the result of the buyer's consent formed in good faith and based on prior disclosure.

In the Anglo-American legal tradition, particularly in the English case *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989), the court held that a contractual term imposing a disproportionately high charge for late return of goods does not produce legal effect unless it was clearly and explicitly brought to the other party's attention. The court stressed that terms with unusual or surprising consequences must be specifically highlighted.

Protection of the weaker party has been further developed in United States law through the doctrine of *unconscionability*. In *Williams v Walker-Thomas Furniture Co.* (1965), the United States Court of Appeals for the District of Columbia Circuit declared void a contractual clause under which the buyer, due to delay in instalment payments, would forfeit all previously paid goods. The court held that such a term, reflecting an imbalance of bargaining power, could not have legal effect because it was not the result of good faith and genuinely informed consent (DiMatteo, 2014, p. 212).

Within the framework of the United Nations Convention on Contracts for the International Sale of Goods (CISG), although there is no explicit prohibition of contractual provisions excluding liability, their permissibility is assessed in light of the principles of good faith and fairness reflected in Article 7 of the Convention. In an arbitral award rendered in Vienna (Arbitral Award SCH-4318, 1994), it was found that

an exclusion-of-liability clause was not binding upon the buyer because it had not been clearly disclosed nor properly accepted, thereby violating the standard of good faith contracting. As Schwenzer concludes (2016, p. 656), a contractual derogation of the seller's liability under the CISG cannot produce legal effect where it is contrary to the fundamental principles of good faith and fair dealing.

Based on the analysis of domestic and comparative case law, it may be concluded that the possibility of contractual derogation from the seller's liability for legal defects is not absolute, but rather limited by the principles of good faith and fair dealing, the obligation to fully inform the buyer, and the prohibition of abuse of contractual autonomy.

On the basis of both domestic and foreign case law, it may be concluded that contractual derogation of liability is not absolute. Its permissibility depends on the seller's good faith conduct, the buyer's explicit and prior consent, and the absence of any abuse of contractual position. Otherwise, a clause excluding liability produces no legal effect, regardless of its formal acceptance.

4. Theoretical Challenges and Normative Dilemmas Concerning the Time Limit under Article 515 of the ZOO

The time limit prescribed by Article 515 of the Law on Obligations (ZOO)—according to which the buyer loses eviction-related rights if they are not exercised within one year from the day the buyer became aware of the existence of a third party's right—raises a number of theoretical and practical dilemmas. The key issue concerns its legal nature: whether the time limit constitutes a preclusive period or a limitation period. This distinction has immediate consequences for the buyer's legal protection, particularly with respect to the possibility of suspension and interruption, procedural effects, and the court's duty to take the expiry of the period into account *ex officio*.

In legal doctrine, the prevailing view is that Article 515 establishes a preclusive period (Babić, 2008, p. 40), since the expiry does not merely bar the claim but extinguishes the buyer's substantive right itself. This approach has also been confirmed in judicial practice, where it is emphasised that the expiry of the period under Article 515 of the ZOO results in the definitive termination of the right, regardless of the debtor's will (Veljković, 2018, pp. 129–130). A similar position is reflected in comparative scholarship, which underlines that preclusive periods lead to the extinguishment not only of the possibility to pursue a judicial claim, but of the right itself (Slakoper, 2007, pp. 6–7). This understanding is further supported by more recent domestic scholarship, according to which the buyer's right is extinguished upon the lapse of one year from the moment of learning of the third party's right, confirming the preclusive nature of the period under Article 515 of the ZOO (Karanikić Mirić, 2024, p. 391).

However, the need for a more flexible interpretation has also been emphasised in situations where the seller was aware of the existence of the third party's right and concealed that circumstance. A strictly formalistic application of preclusion in such cases may disturb the balance between the contracting parties and lead to outcomes incompatible with the principle of good faith (Fišer Šobot, 2015, p. 469). Insisting on preclusive effects in these situations creates room for abuse of contractual autonomy, particularly where the seller exploits legal or economic superiority in order to conceal decisive circumstances (Slakoper, 2007, p. 7).

The issue is further complicated by the unclear systematic position of Article 515 in relation to the general rules on limitation and preclusion. Although the legislator uses wording suggestive of preclusion,

it remains ambiguous whether courts must dismiss a claim brought after the expiry of the period on their own motion, even where the opposing party has not raised the objection. This normative ambiguity contributes to inconsistent case law and undermines legal predictability.

Comparative models offer different solutions. German law, in § 438 BGB, provides limitation periods in relation to legal defects, while affording additional protection to the buyer in cases where the seller fraudulently concealed the defect through the application of a longer limitation period under the general rules (§ 438(3) BGB). French law, in Article 1648 of the Code civil, provides that the buyer must initiate proceedings concerning a defect within two years from the moment the defect was discovered, allowing for contractual modification of the time limit, while requiring respect for the principle of good faith and full disclosure. Under the CISG, Article 42 obliges the seller to deliver goods free from any right or claim of a third party. The buyer loses the right to rely on such a defect unless the buyer notifies the seller within a reasonable time, pursuant to Article 43 CISG. Although the Convention does not specify a precise period, practice requires timely notice, with interpretation relying on the principle of good faith in international trade under Article 7(1) CISG (Schwenzer, 2016, p. 656).

In its decision Rev 5683/2020 of 7 April 2022, the Supreme Court of Cassation reaffirmed the importance of the seller's good faith conduct as a criterion when assessing whether the buyer exercised rights in a timely manner. The court took the view that the buyer's procedural position may be preserved where the seller's bad faith is established, thereby justifying deviation from strict time limits. This approach is also indirectly relevant for interpreting eviction, particularly with regard to the consequences of missing the subjective period under Article 515 of the ZOO where the seller was aware of the third party's right and concealed it.

In light of the foregoing, *de lege ferenda* it would be appropriate to consider amending Article 515 of the ZOO in order to clarify the legal nature of the time limit and to introduce exceptions in cases involving the seller's bad faith. A clearer normative solution would strengthen legal certainty, ensure alignment with contemporary European standards and CISG practice, and preserve a fair balance between the contracting parties.

Conclusion

The seller's liability for legal defects is one of the fundamental institutions of the law of obligations, serving to preserve legal certainty and to protect trust in contractual transactions. The analysis demonstrates that the domestic legal framework is based on the seller's objective liability, while also allowing contractual modification, subject to limits established by mandatory rules and the principle of good faith. In this manner, a balance is maintained between freedom of contract and the need to protect the weaker party.

Serbian case law confirms that contractual provisions excluding liability cannot produce legal effect where they result from the seller's bad faith conduct or the concealment of decisive circumstances. Comparable standards exist in German, French, and Anglo-American law, as well as within the framework of the CISG, which points to a broader tendency in modern contract law to limit contractual autonomy in order to preserve a fair balance between the contracting parties.

Particular difficulty arises in relation to the time limit under Article 515 of the ZOO, which is predominantly interpreted in both doctrine and practice as a preclusive period. Such an interpretation

leads to the extinguishment of the buyer's substantive right itself, thereby producing far-reaching consequences for legal protection. A strictly formalistic approach to this rule may, however, undermine fairness, especially in situations where the seller in bad faith concealed the existence of a third party's right.

De lege ferenda, it is necessary to provide a more precise normative regulation of the time limit under Article 515 of the ZOO by clearly determining its legal nature and expressly introducing exceptions in cases involving the seller's bad faith. Such a solution would contribute to strengthening legal certainty, harmonising judicial practice, aligning domestic law with contemporary European and international standards, and preserving a fair balance between contractual parties.

A precise normative regulation of the time limit prescribed in Article 515 of the Law on Obligations, with a clear definition of its legal nature and the introduction of exceptions in cases of the seller's bad faith, would represent an important step toward the modernization of domestic contract law. Such a solution would not only contribute to greater legal certainty and consistency in judicial practice, but would also facilitate the harmonization of Serbian law of obligations with contemporary European standards of protection of contracting parties.

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Pravna priroda roka iz člana 515. ZOO: između savesnosti i formalizma

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Sažetak

Pravna priroda subjektivnog roka iz člana 515. Zakona o obligacionim odnosima, kojim se uređuje ostvarivanje prava kupca u slučaju evikcije, otvara brojna teorijska i praktična pitanja. U domaćoj doktrini i sudskoj praksi taj rok se pretežno smatra prekluzivnim, ali takvo tumačenje postaje sporno kada je prodavac znao za postojanje prava trećeg lica i tu okolnost prećutao. Posebna pažnja posvećuje se granicama ugovorne derogacije odgovornosti prodavca u svetlu načela savesnosti i poštenja. Analizom sudske prakse i uporednih rešenja u nemačkom, francuskom, angloameričkom i međunarodnom trgovačkom pravu (CISG) ukazuje se na potrebu preciznijeg normativnog određenja roka iz člana 515, uz predviđanje izuzetaka u slučajevima nesavesnog postupanja prodavca. Zaključuje se da bi takvo rešenje doprinelo pravnoj sigurnosti, ravnoteži ugovornih strana i usklađivanju sa savremenim evropskim standardima.

Ključne reči: evikcija, pravni nedostatak, ugovorna odgovornost, prekluzija, savesnost i poštenje.

Revenge or Coercive Pornography – A New Criminalization of Gender-Based Violence in Contemporary Criminal Legislation

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Revenge or Coercive Pornography – A New Criminalization of Gender-Based Violence in Contemporary Criminal Legislation

Abstract

Based on international documents, as well as the views of legal theory, criminal liability and punishability for a new incrimination within the framework of gender-based violence against women or girls have been established in European criminal legislation in recent years. This offense is referred to as "revenge or coercive pornography." It is an incrimination directed against an individual's personal freedom (privacy), that is, against his or her sexual freedom. With the increasingly widespread use of modern computer and information technologies, cases of their misuse have emerged in various ways, resulting in violations of sexual dignity, personal freedom, and the privacy of another person or multiple persons. Accordingly, certain criminal legislations in our region already recognize this incrimination, including those of Bosnia and Herzegovina, Montenegro, Croatia, and North Macedonia. In the Republic of Serbia, the introduction of a similar incrimination is expected under the title "Misuse of a recording, photograph, portrait, audio recording, or written material with sexually explicit content." These materials may have been created with the consent of the injured party, but are subsequently made available to other persons without authorization. Based on international standards and comparative legal solutions, this paper analyzes the content, characteristics, constitutive elements, and forms of manifestation of this incrimination, as well as the possibility of its introduction into the legal system of the Republic of Serbia.

Keywords: sexual freedom, sexually explicit content, computer systems, misuse, criminal offense, sanction

Introduction

In contemporary social conditions, in which computer and information technology, as well as systems for the transmission of images or sound, are becoming an inevitable and integral part of people's lives and work, increasingly widespread and diverse forms of their misuse are emerging. In this way, human freedoms and rights are violated or endangered (particularly the right to privacy and human dignity), as well as the sexual integrity of another person or multiple persons, especially women and girls. The use of new forms of technology intensifies the resulting consequences due to the speed of dissemination and the accessibility of harmful content to a large number of people. These consequences are particularly severe in the sphere of violations of an individual's sexual integrity. Therefore, on the basis of relevant international standards, contemporary criminal legislation has established a system of new incriminations that manifest gender-based violence, that is, violence against women and girls (Dragojlović & Đorđević, 2025; Bjelajac, 2022). One of these new incriminations is the offense which, in the law of the Republic of Serbia, according to the Draft Amendments to the Criminal Code of 2025, is titled "Misuse of a recording, photograph, portrait, audio recording, or written material with sexually explicit content" (Article 145a). When the draft legislative text is adopted (which is expected during 2026), this criminal offense will protect the freedom and dignity of the human personality, particularly in the sexual sphere. This offense manifests itself in several specific forms, which are undertaken in relation to: a) a video or other recording, b) a

photograph, c) a portrait, d) an audio recording, or e) another written material with sexually explicit content (which is why this incrimination is referred to in legal theory as “revenge or coercive pornography”). The subject of this paper is the analysis of the new criminal offense “Misuse of a recording, photograph, portrait, audio recording, or written material with sexually explicit content” (Article 145a of the Draft Amendments to the Criminal Code of the Republic of Serbia of 2025) as a form of gender-based violence in the digital environment. The aim of the paper is to determine the criminal law significance and justification for introducing this new incrimination into the legislative system of the Republic of Serbia, as well as to examine its harmonization with the solutions adopted in the countries of the region that prescribe this criminal offense.

International Standards of the New Incrimination

The specific criminal offense that legal theory refers to as “revenge or coercive pornography” does not yet exist in the criminal law system of the Republic of Serbia. The foundation for the criminalization of this form of sexual exploitation of women, or children, within the framework of gender-based violence is provided by Directive (EU) 2024/1385 of the European Parliament and of the Council on combating violence against women and domestic violence from May 2024. Since the Republic of Serbia is in the process of accession to the European Union, it is expected that in the coming period it will fully adopt its international standards in the field of substantive criminal law. According to the text of the European Directive, a criminal offense of sexual exploitation includes an offense titled “Sharing intimate or manipulated material without consent” (Article 5). The content of this incrimination consists of several alternatively prescribed intentional acts, including the following (Milojević, 2025, pp. 391–408):

a) making images, video recordings, or similar materials depicting sexually explicit activities or the intimate parts of another person available to the public through information and communication technologies without that person’s consent, where such conduct is likely to cause serious harm to that person,

b) creating, manipulating, or altering images, video recordings, or similar materials so that it appears that another person is involved in sexually explicit activities, and subsequently making them available to the public through information and communication technologies without that person’s consent, where such conduct is likely to cause serious harm to that person, and

c) threatening (by announcement, oral or written communication, or symbolic indication to another person) to undertake any of the above-mentioned acts in order to compel another person to perform or accept a certain act, or to refrain from it (omit it).

In relation to this incrimination, it should be noted that one of the objectives pursued by the adopted Directive is the harmonization of the definitions of criminal offenses (and the penalties for their perpetrators), particularly with regard to offenses that manifest certain forms of online violence, especially where such violence is inseparably linked to the use of information and communication technologies (through modern computer systems). These are situations in which modern computer and information technologies are used with the aim of causing significantly more severe consequences of the committed criminal offense, thereby substantially altering the characteristics of numerous criminal offenses.

The terms “making available to the public” and “publicly accessible” (as elements of the constituent features of this criminal offense) should be interpreted as referring to potential dissemination to multiple persons, across a wider area, or over a longer period of time. These terms should also be interpreted and applied taking into account the relevant circumstances, including the technology used to make such material available to an individually indeterminate number of people. Furthermore, in order to establish only minimum rules for the most serious forms of online violence, the relevant criminal offenses defined in this Directive are limited to conduct that is likely to cause the victim serious harmful consequences or serious psychological harm, or conduct that is likely to cause the victim serious fear for their own safety or the safety of close (primarily dependent) persons.

In any case, when assessing the likelihood (possibility) that the prescribed conduct of the perpetrator will cause serious consequences, particular objective circumstances of the specific case, as well as the subjective circumstances of the perpetrator, should be taken into account; these issues, as matters of fact, are determined by the competent court. In this decision-making process, particular consideration is given to the possibility of simple, rapid, and widespread distribution of the “material,” as well as the “intimate nature of the act,” such as making images, video recordings, or similar material depicting sexually explicit acts or the intimate parts of another person available to the public through information and communication technologies without their consent, which can be extremely harmful to victims.

The Concept of the “New” Incrimination in the Law of the Republic of Serbia

The Draft Law on Amendments and Supplements to the Criminal Code of the Republic of Serbia from November 2025 (Article 24) provides for the introduction of a new incrimination in Chapter Fourteen titled “Criminal Offenses against the Freedoms and Rights of Man and Citizen,” immediately following the existing criminal offense titled “Unauthorized Publication and Presentation of Another’s Writing, Portrait, or Recording” (Article 145). According to the text of the Draft Law on Amendments and Supplements to the Criminal Code, the new criminal offense would be titled “Misuse of a Recording, Photograph, Portrait, Audio Recording, or Written Material with Sexually Explicit Content” (Article 145a). The protected legal interest is the freedom and dignity of the human personality, particularly in the sexual sphere, while the object of the attack is alternatively defined as: a) a video or other recording, b) a photograph, c) a portrait, d) an audio recording, or e) another written material with sexually explicit content.

There are three forms of manifestation of the basic form of the offense, depending on the type of conduct undertaken (Milojević, 2025, pp. 391–408).

The first form of the basic offense (paragraph 1) is committed by a person who makes available to a third party a video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content, without the consent of the person to whom the material relates, that is, without the consent of the person depicted in the recording, photograph, or portrait, or whose voice is recorded in the audio recording. This offense is characterized by: a) the object of the attack, b) the act of commission – enabling another person to become aware of the content, either by acquiring possession or control of the object of the attack, or by becoming aware of its content, and c) the manner of commission - unlawfully, that is, without consent (explicit or implicit), without the consent of the person to whom the object of the attack relates.

The second form of the basic offense (paragraph 2) is committed by a perpetrator who undertakes a two-act conduct in a specific manner: a) by using a computer system or b) in another way. It is interesting that the law (Article 113), when providing the meaning of certain terms, does not define the term "computer system," although it defines other related terms such as: a) computer data (item 17), b) computer network (item 18), c) computer program (item 19), or d) computer virus (item 20). This offense consists of creating (producing) a new (previously non-existent) or altering (modifying) an existing video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content, and subsequently using or making available to a third party such previously created or falsified recording, photograph, portrait, audio recording, or written material as if it were authentic (Bjelajac & Filipović, 2021, pp. 16–32).

Finally, the third form of the basic offense (paragraph 3) is committed by a person who threatens (announces or indicates) to another person that he or she will make available to a third party their video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content (Kovačević Lepojević & Lepojević, 2019, pp. 89–108).). In the context of the financial dimension of human trafficking, the issue of anonymous money flows and the concealment of the origin of funds takes on particular significance. (Bjelajac & Bajac, 2022).

The perpetrator of the basic offense may be any person. With regard to culpability, intent on the part of the perpetrator is required. For the basic offense, regardless of the form in which it is manifested, a sentence of imprisonment ranging from three months to three years is prescribed. In addition to the penalty, the perpetrator is mandatorily subject to the security measure of confiscation of objects: a) the objects of the offense - video or other recordings, photographs, portraits, audio recordings, and written materials, and b) the means used for committing the offense - special devices by which the criminal offense was carried out. This criminal offense is envisaged to appear in three more serious, qualified forms of manifestation (Janković & Putnik, 2025; Dragojlović, 2025).

The first aggravated form of the offense (paragraph 4) is characterized by the means (or manner) of carrying out the act of commission. This offense exists if the conduct prescribed for the basic form of the offense is carried out through (via or with the assistance of) information and communication technologies, or in another manner, as a result of which a video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content becomes available to a larger number of persons (who are not individually predetermined), indicating the possibility that the consequences of the offense may occur on a larger scale or across a wider area. For this offense, a sentence of imprisonment ranging from six months to five years is prescribed.

The second aggravated form of the offense (paragraph 5) is qualified by the characteristic of the passive subject or victim. The victim is a child - a person under fourteen years of age (Article 113, item 8), and the perpetrator must be aware of the personal characteristic (age) of the victim at the time of undertaking the act of commission. For this offense, a sentence of imprisonment ranging from one to eight years is prescribed.

The third aggravated form of the criminal offense (Article 145a, paragraph 6) is characterized by the personal status of the perpetrator - that is, a person with a special personal capacity (delicta propria). Specifically, this offense is committed by an official person acting in the performance of official duties who undertakes any of the several alternatively prescribed acts, for which different penalties are prescribed: a) for committing the basic offense - imprisonment from six months to five years, b) for committing the

offense through information and communication technologies or in a similar manner - imprisonment from one to eight years, and c) for committing the offense against a child - imprisonment from two to ten years.

The following persons may appear as perpetrators of this offense (Article 113, item 3): 1) a person performing official duties in a state authority, 2) an elected, appointed, or designated person in a state authority or a body of local self-government, or a person who permanently or temporarily performs official duties or functions in such bodies, 3) a public notary, public enforcement officer, or arbitrator, as well as a person in an institution, enterprise, or other entity entrusted with the exercise of public authority who decides on the rights, obligations, or interests of natural or legal persons or on matters of public interest, 4) a person who is de facto entrusted with the performance of certain official duties or tasks, and 5) a military person.

Legislation of the Countries of the Southeast European Region

The new incrimination of "revenge or coercive pornography," under more or less identical titles and with similar legislative systematics, content, constitutive elements, and forms of manifestation, is currently recognized in several legal systems in the region of Southeast Europe that emerged after the dissolution of the SFR Yugoslavia. These include the legislations of: a) Bosnia and Herzegovina, b) Montenegro, c) Croatia, and d) North Macedonia.

Bosnia and Herzegovina

The Criminal Code of the Federation of Bosnia and Herzegovina (CC FBiH), in Chapter Seventeen titled "Criminal Offenses against the Freedom and Rights of Man and Citizen," provides for the criminal offense "Misuse of a Recording with Sexually Explicit Content" (Article 189a). The same criminal offense is also recognized by the Criminal Code of the Brčko District of Bosnia and Herzegovina (CC BD BiH), in Chapter Seventeen titled "Criminal Offenses against the Freedom and Rights of Man and Citizen," under the title "Misuse of a Recording with Sexually Pornographic Content" (Article 186a). Similarly, the Criminal Code of the Republic of Srpska, in Chapter Fourteen titled "Criminal Offenses against Sexual Integrity," prescribes this incrimination under the title "Misuse of a Photograph and Video Recording with Sexually Explicit Content" (Article 170a).

The protected legal interests are: a) privacy (personal intimate secrecy) and b) the (sexual) dignity of another person, while the object of the attack consists of recordings (photographs) with sexually explicit content (or sexually pornographic content) which: a) relate to another person, b) were recorded with the consent of that person, and c) were recorded for the personal use of the recorded person. The basic offense appears in two forms of manifestation. These are (Novaković & Stanković, 2024, pp. 66–69):

1) misuse of a recording with sexually explicit (pornographic) content, which consists of the following elements: a) the consequence - violation (infringement) of the privacy of another person, b) the act of commission - making a recording with sexually explicit (pornographic) content available to a third person, c) the act of commission is undertaken in relation to a recording with sexually explicit (pornographic) content that was made with the consent of the recorded person (the victim) for his or her own personal use, and d) the act of commission is carried out in a specific manner - through the misuse (exploitation) of the relationship of trust between the perpetrator and the recorded person, that is, without the consent of the recorded person; and

2) falsification of a recording with sexually explicit (pornographic) content, which includes: a) the consequence of the offense - violation of the privacy of another (recorded) person, b) the act of commission undertaken in relation to a recording of another person with sexually explicit (pornographic) content, and c) with regard to the prescribed acts within the act of commission, this constitutes a two-act criminal offense consisting of two acts that follow one another, are carried out in continuity, and together form a single act of commission. These acts are: the creation (making or producing a new recording) or alteration of an existing recording with sexually explicit (pornographic) content - carried out in a specific manner by using a computer system (or information and communication technology - Criminal Code of the Brčko District of Bosnia and Herzegovina) or in another way - followed by the subsequent use of such a created recording (photograph) as if it were genuine or authentic.

The consequence of the offense appears as a violation of the protected legal interest - a violation (infringement) of the privacy of another person. The perpetrator of the offense may be any person, while with regard to culpability, intent on the part of the perpetrator is required, encompassing awareness of the nature of the object of the attack and its unauthorized, unlawful misuse (exploitation).

For the basic offense, a sentence of imprisonment of up to three years is prescribed, or up to two years (Criminal Code of the Republic of Srpska). In addition to the penalty, the perpetrator is mandatorily subject to the security measure of confiscation of objects: a) recordings (including photographs) and b) special devices (equipment or means) used for committing the criminal offense.

The aggravated form of the criminal offense (paragraph 3) exists if the act of commission of the basic offense is carried out in a specific manner: a) according to the Criminal Code of the Federation of Bosnia and Herzegovina - through a computer system or network; according to the Criminal Code of the Brčko District of Bosnia and Herzegovina - through information and communication technology; or according to the Criminal Code of the Republic of Srpska – through a computer system or computer network; or b) in another way, as a result of which the recording becomes available to a larger number of persons.

For this offense, different penalties are prescribed depending on the law that regulates it: a) imprisonment from six months to five years (Criminal Code of the Federation of Bosnia and Herzegovina), b) imprisonment of up to three years (Criminal Code of the Brčko District of Bosnia and Herzegovina), or c) imprisonment from one to three years (Criminal Code of the Republic of Srpska).

Montenegro

The Criminal Code of Montenegro, in Chapter Fifteen titled “Criminal Offenses against the Freedoms and Rights of Man and Citizen,” provides for the criminal offense titled “Misuse of Another Person’s Recording, Photograph, Portrait, Audio Recording, or Written Material with Sexually Explicit Content” (Article 175a). This offense has two objects. These are: a) the protected legal interest - the freedom and dignity of the human personality, and b) the object of the attack - video or other recordings, photographs, portraits, audio recordings, and other written materials with sexually explicit content.

Depending on the type, nature, significance, or character of the conduct undertaken within the act of commission, the law distinguishes three forms of manifestation of the basic offense (Vukićević, 2024, pp. 109–127).

The first form of the basic offense (paragraph 1) consists of making available to a third person a video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content. For the existence of the offense, it is necessary that this act of enabling a third person or multiple persons to become aware of such materials is undertaken in a specific unlawful manner - without the (explicit or implicit) consent of the person to whom the written material relates, or without the consent of the person depicted in the recording, photograph, or portrait, or whose voice is recorded in the audio recording.

The second form of the basic offense (paragraph 2) consists of undertaking several alternatively prescribed acts in relation to the object of the attack - a video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content - such as: 1) falsification: a) in a specific manner - by using a computer system. A computer system (Article 142, item 19) is considered to be any device or group of interconnected or related devices, one or more of which, depending on the program, performs automatic data processing, or in another way; and b) through specific acts consisting of: creating (producing or making) a new (previously non-existent) or altering (modifying or adapting) an existing video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content; 2) the use of such newly created or altered recording, photograph, portrait, audio recording, or written material; or 3) making such a recording, photograph, portrait, audio recording, or written material available to a third person as if it were authentic (genuine).

The third form of the basic offense (paragraph 3) consists of threatening (announcing or indicating) to another person that his or her video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content will be made available to some (any) third person, regardless of whether such a threat is actually carried out in the specific case or not.

The perpetrator of the offense may be any person. The subjective element of the offense consists of intent as the form of culpability of the perpetrator. It must include the perpetrator's awareness and knowledge of the nature of the object of the attack. For this offense, a sentence of imprisonment of up to two years is prescribed. In addition to the penalty, the perpetrator is mandatorily subject to the security measure of confiscation of objects (paragraph 7): a) the objects of the offense - video or other recordings, photographs, portraits, audio recordings, and written materials, and b) the means used for committing the offense - special devices by which the criminal offense was carried out.

The criminal offense "Misuse of Another Person's Recording, Photograph, Portrait, Audio Recording, or Written Material with Sexually Explicit Content" (Article 175a) also appears in three aggravated, qualified forms of manifestation.

The first aggravated form of the offense (paragraph 4) represents an offense qualified by the manner or means of commission. This offense, for which a sentence of imprisonment of up to three years is prescribed, exists if the act of commission of the basic offense is carried out: a) through information and communication technologies, or b) in another manner as a result of which the video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content becomes available to a larger number of persons.

The second aggravated form of the offense (paragraph 5) is qualified by the characteristic of the injured party. This offense exists if the act of commission is committed against a child.

Finally, the third aggravated form of the offense (paragraph 6) exists if any of the previously described forms of manifestation is committed by an official person in the performance of official duties.

For this offense, different penalties are prescribed depending on which criminal offense was committed by the official person in the performance of official duties: a) for the basic offense - imprisonment from three months to four years, b) for the first aggravated form of the offense - imprisonment from three months to five years, and c) for the second aggravated form of the offense – imprisonment from two to ten years.

For criminal policy reasons, the Criminal Code provides the possibility of non-punishment for the criminal offense "Misuse of Another Person's Recording, Photograph, Portrait, Audio Recording, or Written Material with Sexually Explicit Content" (Article 175a). According to the statutory provision (Article 176a) titled "Exclusion of the Existence of Criminal Offenses from Articles 172 to 176 of this Code," it is explicitly prescribed that the perpetrator of the criminal offenses referred to in Articles 172 to 176 of this Code shall not be punished if, after undertaking the act of commission, he or she prevents or discloses a criminal offense for which a sentence of imprisonment of five years or a more severe penalty may be imposed by law. The statutory provision (Article 142, item 33) explains that the expression "shall not be punished" means that in such a case no criminal offense exists. In other words, it may be concluded that in the case of so-called "active repentance," there exists a special ground for the exclusion of a criminal offense (an objective ground excluding the unlawfulness of the act). Namely, when the perpetrator, by undertaking the conduct prescribed by law as the act of commission, fulfills one of the exhaustively listed criminal offenses against the freedoms and rights of man and citizen (the so-called "catalogue" of criminal offenses), the criminal offense does not exist if the following cumulative conditions are met: 1) if the offense in question is a criminal offense for which a sentence of imprisonment of at least five years or a more severe penalty is prescribed, and 2) if the perpetrator subsequently, through further conduct (an active, positive act), either: a) prevents the criminal offense, or b) discloses (reports to the competent state authorities of criminal justice - the police, the public prosecutor's office, or the court) the criminal offense.

Croatia

The Criminal Code of Croatia, in Chapter Fourteen titled "Criminal Offenses against Privacy," provides for the incrimination titled "Misuse of a Recording with Sexually Explicit Content" (Article 144a). The protected legal interest of the offense is the privacy of another person, particularly in the sexual sphere, while the object of the attack is a recording with sexually explicit content of another person that was created with that person's consent for personal use. This criminal offense consists of making available (enabling access) to a third person a recording of another person with sexually explicit content that was recorded with that person's consent for personal use, thereby violating that person's privacy through the misuse of a relationship of trust and without the consent of the recorded person.

In addition to the protected legal interest and the object of the attack, the criminal offense under Article 144a of the Criminal Code of Croatia also consists of the following constitutive elements: a) the act of commission consists of assisting, facilitating, or enabling – in the form of making certain material available to a third person,b) the act of commission is undertaken in relation to a recording of another person with sexually explicit content that was recorded with that person's consent for his or her personal use, c) the act of commission is undertaken without authorization (unlawfully) - without the oral or written, explicit or implicit consent of the recorded person (the injured party), and through the misuse of the relationship of trust between the perpetrator and the injured party, and d) the consequence of the offense manifests as a violation of the privacy of the injured party.

For the basic offense, a sentence of imprisonment of up to one year is prescribed. In addition to the penalty, the perpetrator is mandatorily subject to the security measure of confiscation of objects (paragraph 5) – recordings and special (computer) devices by which this offense was committed.

A special form of the offense (paragraph 2), for which a sentence of imprisonment of up to one year is also prescribed, constitutes a two-act criminal offense characterized by two necessarily connected acts that complement each other and only in their entirety, in continuity, result in this incrimination. These are (Vukićević, 2024, pp. 109–127): 1) the creation (making or producing) of a new recording or the alteration (modification or editing) of an existing recording with sexually explicit content in two ways: a) by using a computer system, or b) in another manner; and 2) the use of a recording with sexually explicit content of another person, either by the person who undertook the previous activity or by a third person (based on prior agreement). A computer system (Article 87, item 18), according to the explicit wording of the law, represents any device or group of interconnected or connected devices, one or more of which automatically processes data on the basis of a program, as well as computer data stored in it, processed, loaded, or transmitted for the purpose of its operation, use, protection, and maintenance. The consequence of the offense is likewise manifested as a violation of the privacy of the person appearing in the recording.

The aggravated form of the criminal offense (paragraph 3) is committed by a person who undertakes one of the above-mentioned acts within the act of commission:a) in a specific manner – through a computer system or network, or b) in another manner as a result of which the recording becomes available to a larger number of persons, thereby multiplying the consequences caused by the offense. For this offense, a sentence of imprisonment of up to three years is prescribed.

Criminal prosecution of the perpetrator of the offense (in either the basic or aggravated form of manifestation) (paragraph 4) is initiated upon the motion of the injured party.

North Macedonia

At the beginning of January 2026 (12 January), the Law on Amendments and Supplements to the Criminal Code was adopted in North Macedonia. By this law (Article 6), in Chapter Fifteen titled “Criminal Offenses against the Freedoms and Rights of Man and Citizen,” a new incrimination titled “Misuse of Another Person’s Video, Photograph, Audio Recording, or File with Sexually Explicit Content” (Article 152a) was introduced after the criminal offense in Article 152 titled “Unauthorized Recording.” The protected legal interest of the offense is the personal freedom and personal dignity of another person, which are of a specific nature in the sphere of sexual life. On the other hand, the object of the attack may be: a) a video or other recording, b) a photograph, c) an audio recording, or d) a file, which relate to another person (and not to the perpetrator himself or herself) and which contain sexually explicit content.

The basic form of the criminal offense (Article 152a, paragraphs 1–3), depending on the type of conduct within the act of commission, appears in several forms of manifestation (Vukićević, 2024, pp. 109–127).

The first form of this offense (paragraph 1) consists of making available to another person (enabling or facilitating their access to) a video or other recording, photograph, audio recording, or file with sexually explicit content, but without the consent of the person to whom such content or file relates, that is, without the consent of the person depicted in the video or photograph or whose voice is recorded in the audio recording. For the existence of this offense, it is important that the act of commission is

undertaken: a) without authorization, unlawfully, without the explicit or implicit, oral or written consent of another person, and b) by assisting or creating the conditions or prerequisites for another person, any person, to become acquainted with the content or to obtain possession of a certain object in the sense of the object of the attack.

The second form of the basic offense (paragraph 2) may be committed by a person who, in a specific manner - through (by using or misusing) a computer system or in another way - undertakes any of several alternatively prescribed acts in relation to a video or other recording, photograph, audio recording, or file of another person with sexually explicit content, such as: 1) falsification of the object of the attack in the form of: a) creating (producing, making, or generating) a new, previously non-existent object, or b) modifying (altering, editing, or adapting) an existing object; 2) the use of the object of the attack - its use in any manner and for any purpose (motive); and 3) making it available to another unauthorized person to whom the specific object of the attack does not relate. This may be done through any act of enabling or facilitating another person, any person, to obtain possession of such an object or to become acquainted with its content without actually possessing it.

A computer system (Article 122, item 26) refers to any device or set of interconnected devices, one or more of which performs automatic data processing according to specific programs.

Finally, the third form of the basic offense (paragraph 3) consists of threatening another person that his or her video or other recording, photograph, audio recording, or file (document) with sexually explicit content will be made available to a third person. The act of commission of this offense consists of a threat. This is the announcement of a certain action that represents a “harm” to another person. It consists of indicating (or communicating orally, symbolically, or in writing), either directly or indirectly, to another person that an “unpleasant” fact concerning them will be revealed or published in the form of certain sexually explicit content. For such a threat to be legally relevant in the context of this incrimination, it must meet certain conditions. Specifically, the threat must be: a) serious, b) real, c) possible, and d) unavoidable.

The perpetrator of the offense may be any person, while the subjective element of the offense consists of the perpetrator’s intent, which includes awareness of the nature of the object of the attack. For this offense, regardless of the form of manifestation, a sentence of imprisonment ranging from one to five years is prescribed. In addition to the penalty, the perpetrator is mandatorily subject to the security measure of confiscation of objects (paragraph 7): a) video recordings or other recordings, photographs, audio recordings, and written materials with sexually explicit content (the objects of the offense), and b) special devices by which the criminal offense was committed (the means of committing the offense).

This criminal offense has three aggravated, qualified forms of manifestation. The first aggravated form of the offense (paragraph 4) is qualified by the means (manner) of carrying out the act of commission of the basic offense – in a way that makes a video or other recording, photograph, audio recording, or document with sexually explicit content available so that a larger number of persons can become acquainted with its content. For this offense, a sentence of imprisonment ranging from one to eight years is prescribed.

The second aggravated form of the offense (paragraph 5), for which a sentence of imprisonment ranging from three to ten years is prescribed, exists in the case of committing the offense in the presence

of a child. In this way, the child becomes aware of material with explicit sexual content, which may negatively affect the child's psychological development.

The third aggravated form of the offense (paragraph 6) is characterized by the personal status of the perpetrator. Namely, this offense may be committed only by a specific person - an official acting in the performance of official duties who undertakes any of the above-mentioned acts within the act of commission. Depending on the type, nature, or character of the conduct undertaken by the official, different penalties are prescribed: a) imprisonment from one to ten years - for the basic offense, b) imprisonment from three to ten years - for the first aggravated form of the offense, and c) imprisonment of at least four years - for committing the offense in the presence of a child.

Conclusion

Based on the international standards of the European Union, primarily Directive (EU) 2024/1385 of the European Parliament and of the Council on combating violence against women and domestic violence (2024), a new incrimination has recently been introduced in a number of contemporary criminal legislations, which in legal theory is referred to as "revenge or coercive pornography." This represents a specific form of manifestation of gender-based violence against women, or girls. This incrimination is currently recognized in a limited number of legislations, including those of Bosnia and Herzegovina, Montenegro, Croatia, and North Macedonia. At present, this incrimination is not recognized in the legislation of Serbia, but it can be expected that it will be introduced in a future legislative reform with a dual object: a) the protected legal interest - privacy, freedom, and the dignity of the human personality in the sexual sphere, and b) the object of the attack - video or other recordings, photographs, portraits, audio recordings, and other written materials with sexually explicit content (which is why this incrimination is referred to in legal theory as "revenge or coercive pornography").

This new criminal offense is recognized in the regional legislations under different titles, systematized within different groups of criminal offenses, but with the same or similar content: 1) misuse of a recording with sexually explicit content (Bosnia and Herzegovina) as an offense against the freedom and rights of man and citizen (or misuse of a photograph and video recording with sexually explicit content in the Republic of Srpska as an offense against sexual integrity), 2) misuse of another person's recording, photograph, portrait, audio recording, or written material with sexually explicit content (Montenegro) as an offense against the freedoms and rights of man and citizen, 3) misuse of a recording with sexually explicit content (Croatia) as an offense against privacy, and 4) misuse of another person's video, photograph, audio recording, or file with sexually explicit content (North Macedonia) as an offense against the freedoms and rights of man and citizen.

In a similar manner, the content of this new incrimination in the law of the Republic of Serbia is envisaged by the Draft Amendments to the Criminal Code from the end of 2025 under the title "Misuse of a Recording, Photograph, Portrait, Audio Recording, or Written Material with Sexually Explicit Content" (Article 145a). According to the proposed legislative solution, this offense, depending on the type of conduct undertaken, may appear as: a) unauthorized making available to a third person a video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content, without the consent of the person to whom the material relates, that is, without the consent of the person depicted in the recording, photograph, or portrait or whose voice is recorded in the audio recording, b) the creation of a

new or the alteration of an existing video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content in a specific manner - by using a computer system or in another way - so that it may subsequently be used or made available to a third person as authentic, or c) a threat that another person's video or other recording, photograph, portrait, audio recording, or written material with sexually explicit content will be made available to others.

In this way, through a system of criminal sanctions, the criminal law protection of sexual freedom and sexual integrity of women, including minors, from all forms of misuse of modern computer and information technologies or systems would be raised to a significantly higher level in the Republic of Serbia as well.

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Osvetnička ili ucenjivačka pornografija – nova inkriminacija rodno zasnovanog nasilja u savremenom krivičnom zakonodavstvu

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Sažetak

Na temelju međunarodnih dokumenata, kao i shvatanja pravne teorije u evropskom krivičnom zakonodavstvu je poslednjih godina uspostavljena krivična odgovornost i kažnjivost za novu inkriminaciju u okviru rodno zasnovanog nasilja nad ženama ili devojčicama. Ono se naziva "osvetnička ili ucenjivačka pornografija". Radi se o inkriminaciji koja je usmerena protiv lične slobode (privatnosti) čoveka, odnosno protiv njegove polne slobode. Sa sve širom upotrebom savremene računarske, kompjuterske, informatičke tehnologije, javljaju se slučajevi njihove zloupotrebe na različite načine usled čega se vređa polno dostojanstvo, lična sloboda, odnosno privatnost drugog ili drugih lica. Tako ovu inkriminaciju danas poznaju određena krivična zakonodavstva iz našeg regiona: Bosne i Hercegovine, Crne Gore, Hrvatske i Severne Makedonije. U Republici Srbiji se očekuje na sličan način uvođenje ove inkriminacije pod nazivom: "Zloupotreba snimka, fotografije, portreta, audio zapisa ili spisa sa seksualno eksplicitnim sadržajem", koji su istina sačinjeni uz pristanak oštećenog lica, ali se potom neovlašćeno čine dostupnim drugim licima. U radu se na temelju međunarodnih standarda, odnosno uporednopravnih rešenja analiziraju sadržina, karakteristike, elementi bića, te oblici ispoljavanja ove inkriminacije sa mogućnošću njenog uvođenja u pravni sistem Republike Srbije.

***Ključne reči*:** polna sloboda, seksualno eksplicitni sadržaj, računarski sistemi, zloupotreba, krivično delo, sankcija

The Right of Retention as a Means of Securing Claims: Structure, Legal Nature and Comparative Legal Analysis with Special Reference to the Theory and Practice of the Republic of Serbia

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The right of retention as a means of securing claims: structure, legal nature and comparative legal analysis with special reference to the theory and practice of the Republic of Serbia

Abstract

The right of retention is a complex civil law institute that combines elements of real and obligation law, functioning at the same time as a real means of securing claims and a form of legally permissible self-protection of the creditor. Although it is often applied in everyday legal transactions, this institute in domestic legal doctrine is still assessed as insufficiently normatively rounded, primarily due to fragmentary legislation and limited judicial practice. Such a situation opens up numerous controversial issues regarding its legal nature, scope and limits of application, as well as its relationship to related institutes. The aim of the paper is to systematically examine the concept of the right of retention, the conditions for its establishment, the way of exercising the right of retention, legal effects and the limits of the creditor's responsibility for damage caused to the retained thing, by applying a critical legal and normative analysis. In addition to the analysis of the domestic legal framework and court practice, the work also includes a comparative legal approach, through consideration of solutions developed in certain continental European legal systems, as well as in international and model sources of contract law. In this way, common tendencies are pointed out, but also differences in the normative design and functional understanding of the right of retention. The goal of the work is to offer theoretically grounded and practically applicable interpretations that can contribute to a clearer understanding of this institute and to the improvement of legal certainty in its application, while relying on the experiences of comparative law as a corrective and inspiration for possible normative additions to domestic legislation.

Keywords: right of retention, right of retention, means of securing claims, self-protection of rights, comparative legal analysis.

Introduction

The right of retention (ius retentionis) in modern legal theory is defined as the authority of the creditor to retain the property of the debtor that is legally located in his country, in order to ensure the fulfillment of the due claim, whereby the return of the property can be withheld until the obligation is fulfilled. In this sense, retention is not exhausted in the factual retention of things, but represents a legally recognized means of creditor protection that simultaneously has the function of real security and permitted self-protection of rights (Pavićević, 2024 and Wiese, 2021). The historical development of the right of retention indicates its complex and gradual genesis. In Roman law, a person who held someone else's thing and invested costs for its maintenance was obliged, when the owner of the thing raised a rei vindicatio, to return the thing to the plaintiff, and initially he did not have any rights that could demand compensation for the value of the costs invested (impensae) (Stanković & Orlić, 2001, pp. 261). The right that the defendant received to retain the plaintiff's case until the expenses incurred were not reimbursed was not a separate institution, but was exercised within the framework of the complaint of fraud (exceptio

doli) (Stanković & Orlić, 2001, pp. 261). Exceptio doli is an objection to an action based on fraud or malicious conduct on the part of the plaintiff. Therefore, as the right of retention is somewhat more recent, its development was slower than other civil law institutes. In modern civil law, the right of retention is still not regulated in a unique and systematic way, but normative fragmentation is expressed. Nevertheless, despite the incomplete legal arrangement, the right of retention is often applied, especially in the case of catering storage contracts. Article 728 of the ZOO (Narodna skupština Republike Srbije, 2020, Art. 728) prescribes that a caterer who receives guests for the night has the right to keep the things that the guests brought until full payment of claims for accommodation and other services), as well as in the case of work contracts, storage contracts, transport contracts and other contractual relationships.

In practice, disputed issues related to the conditions for the creation of the right of retention, its duration and termination, the creditor's responsibility for damage caused to the retained item, as well as the scope of claims that can be secured by this institute, are particularly distinguished. A particularly important question is the dilemma of whether the right of retention can be exercised exclusively for the purpose of collecting a claim arising from a specific retained item or whether it can include earlier, due claims against the same debtor. The absence of clear normative solutions in this regard further contributes to legal uncertainty and opens up space for different, often conflicting interpretations.

Starting from the mentioned problems, the paper aims to, by applying normative, dogmatic and critical legal analysis, provide a systematic presentation of the right of retention as a specific civil law institute that unites elements of real and obligation law, functioning simultaneously as a real means of securing claims and a form of legally permissible self-protection of the creditor. The paper discusses the concept of the right of retention, the conditions for its establishment, the way of exercising the right of retention, its legal effects and limits, as well as the question of the creditor's responsibility for damage caused to the retained item. Special emphasis is placed on the analysis of judicial practice, with the aim of seeing how the courts interpret and apply this institute in specific disputes. Through this methodological approach, the work aims to offer theoretically grounded and practically applicable interpretations that can contribute to a more consistent application of the right of retention and the improvement of legal security in legal transactions.

The concept and legal nature of the right of retention

The right of retention (ius retentionis) in modern legal theory is not seen as a mere factual retention of someone else's property, but as a legally recognized authority of the creditor to refuse the return of the property that is legally located in his country, in order to ensure the fulfillment of the claim. Its essence is not exhausted in the possession of things, but in the normatively legitimized right of retention that produces certain legal effects towards the debtor, and in certain situations also towards third parties. Pavićević points out that the right of retention has the structure of a real means of security, since it is directly related to the thing and the state over it, but at the same time it differs from classic real rights in that it does not require a formal constitution, entry in public registers or the consent of the debtor. Precisely because of this, retention is described in modern doctrine as a sui generis institute, whose legal nature is determined functionally, not exclusively formally. A similar conclusion is drawn by Wiese, who disputes the traditional dichotomy according to which certain forms of retention are qualified as real and others as obligational rights. According to this understanding, retention can rather be understood as a legally recognized right

of retention, that is, as a special type of legal "retention capacity" (retention capacity), which functions primarily as a defense against the owner's demand for the return of things. In this sense, retention does not necessarily have to be a subjective right in the classic meaning of that term, but a legal tool that allows the creditor to suspend the effect of the debtor's property rights until the obligation is fulfilled (Wiese, 2021).

This understanding of the right of retention has significant consequences for its legal nature. Retention is not based on the purpose of obtaining benefit from the thing, nor for its permanent retention, but exclusively as an instrument of security and pressure on the debtor. Its function is primarily defensive: the creditor uses the right of retention in order to protect himself from the risk of non-fulfilment, and not for the immediate disposal of the thing. Precisely because of this, in theory, retention is often associated with the permitted self-protection of rights, since it allows the creditor to react immediately without prior court intervention (Pavićević, 2024).

The problem of the legal nature of retention comes to the fore especially in situations of competition between several rights of retention. Silink points out that in the absence of clear normative rules on priority, judicial practice often resorts to ad hoc solutions, which can lead to legal uncertainty. This phenomenon additionally confirms that retention cannot be viewed as a static right, but as a dynamic institute whose legal nature depends on the relationship in which it is applied and on the interests it should protect (Silink, 2024).

A special form of retention, which further sheds light on its legal nature, is the attorney's lien in common law systems. As Okosa points out, the attorney's lien allows the legal representative to retain the client's documents or funds in order to collect due professional fees, and this right is based directly on the law and professional rules, and not on a special security agreement. This example clearly shows that retention functions as an institutionalized form of creditor protection, which balances between the need for efficient collection and the limitation of the debtor's absolute right to property (Okosa, 2020).

Based on the above, it can be concluded that the right of retention represents a hybrid institution of civil law, the legal nature of which cannot be unambiguously determined by applying classical categories. Its essence lies in the function it performs: the securing of claims through the retention of things and the temporary limitation of the debtor's property rights, while at the same time respecting the principles of conscientiousness, proportionality and the prohibition of abuse of rights. It is precisely this functional and flexible nature that makes the right of retention one of the most complex, but also the most important institutes of modern obligation law.

The right of retention in comparative law

In the continental European legal tradition, the development of the right of retention is closely related to the evolution of the understanding of mutual obligations in contractual relations. Although in Roman law the mutual obligations from the contract were initially viewed as mutually independent, already in the classical period the understanding prevailed that it is contrary to the principle of conscientiousness to demand the fulfillment of an obligation without simultaneously fulfilling one's own. On that basis, the objection of an unfulfilled contract (exceptio non adimpleti contractus) was developed, which in medieval and early modern law served as a foundation for the later development of the right of retention in modern legal systems (Van den Daele, 1968; Ernst, 2000).

In German law, this development culminates in the clear demarcation of the right of retention as an independent institute of obligation law. The right of retention is understood as a procedural and substantive legal defense that allows the debtor to withhold his own action until he receives a counteraction, whereby the court does not reject the claim, but orders the simultaneous performance of obligations *(Zug um Zug).* This approach has been elaborated in detail in systematic commentaries on German civil law, especially in relation to the general right of retention and reciprocal contracts (Gröschler, 2007; Pennitz, 2007). The German model is particularly significant because it normatively includes situations in which the debtor must fulfill the obligation before the creditor, but is still granted the right to withhold fulfillment if it subsequently becomes apparent that the countermeasure is threatened, which connects the right of retention with the so-called by the defense of uncertainty.

A similar, but narrower approach is present in Austrian law, where the right of retention is traditionally linked to the retention of things for the purpose of compensation for costs or damages, with an emphasis on the protection of the conscientious holder. The Austrian model confirms the continental tendency to limit the right of retention by the requirement of a connection between the claim and the thing, but at the same time recognizes the possibility of its application in situations where the balance of contractual obligations is subsequently disturbed due to the deterioration of the property position of the other party, which corresponds to general theoretical statements about the function of retention in reciprocal obligation relations.

Contrary to the systematic German and relatively restrictive Austrian approach, French law maintains a fragmentary model. The right of retention does not develop as a general institute, but is recognized in precisely defined situations and always under the condition of the existence of a direct connection between the claim and the thing. However, in French law there is also the idea that it is against the principle of conscientiousness to demand fulfillment without simultaneously fulfilling one's own obligation, which confirms the common Roman-doctrinal origin of this institute and its functional connection with the complaint of unfulfilled contract (Ernst, 2000).

A special and doctrinally extremely significant example within continental Europe is represented by Portuguese law, which develops the right of retention (direito de retenção) as a strong real means of security, even in relation to a mortgage. Portuguese jurisprudence, consolidated through the decision of the Supreme Court, confirmed that the right of retention on real estate can have priority over a previously registered mortgage, but only with the cumulative fulfillment of strictly defined conditions. As Shearman de Macedo and Rogado point out, this solution is based on normative changes to the Portuguese Civil Code, which extended the right of retention to protect the buyer-consumer from the pre-contract for the sale of real estate, especially when it comes to residential buildings (Shearman de Macedo & Rogado, 2014). The Portuguese model thus introduces a pronounced social protection component into the retention institute, starting from the idea that professional mortgage creditors, like banks, have significantly greater capacities for risk assessment and management compared to consumers.

These tendencies are not limited exclusively to national legal systems, but are also reflected in international uniform law. The United Nations Convention on the International Sale of Goods (CISG) does not recognize a general right of retention, but recognizes the right to suspend performance in situations where countermeasures are threatened, as well as special retention rights related to the costs of storing goods. This approach is analyzed in detail in the doctrine that considers the possibility of the existence of

unwritten retention rights and their connection with the general principles of the CISG (Kern, 2000; Witz, 2003; Hartmann, 2006; Mohs, 2010; Fountoulakis, 2010).

A similar functional approach is taken by the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Trade Agreements, as well as the Draft Common Framework of Reference (DCFR). These sources start from the idea of simultaneous performance of mutual obligations and recognize the right of retention as a corrective in case of non-fulfilment or serious threat of non-fulfilment, emphasizing the criteria of reasonableness regarding the scope and duration of that right (Cauffman, 2008).

All of the above shows that in modern European and international law, the right of retention does not develop as a strictly formalized institution, but as a flexible mechanism for protecting the contractual balance. Although the normative solutions differ, the common denominator is the effort to prevent dishonest behavior and ensure the simultaneity of actions, which confirms the right of retention as one of the key instruments of fairness in contractual relationships.

The right of retention in theory and practice of the Republic of Serbia

The right of retention, that is, the right of retention, is conceptually defined in Article 286, paragraph 1 of the Law on Obligations from 1978. The law stipulates that the creditor of a due claim in whose hands some of the debtor's property is located has the right to keep it until the claim is paid. If the debtor becomes unable to pay, the creditor can exercise the right of retention even though his claim is not yet due (Narodna skupština, 1978, Art. 286). The application of the right of retention is possible both in civil and economic relations (Bukljaš, 1968, pp. 119). One of the key conditions for the emergence of the right of retention is that the creditor's claim is due. When the debtor settles his due obligation, the creditor is obliged to return the withheld thing to him. The maturity of the claim is considered to be the moment when the debtor needs to fulfill his obligation, that is, the moment when the creditor acquires the right to demand the fulfillment of the obligation. Only from that moment does the creditor have the right to retain the debtor's property, which is the first and basic condition for the emergence of the right of retention. However, as with most legal institutes, there is an exception to this rule. Article 286, paragraph 2 of the ZOO stipulates that, if the debtor becomes unable to pay, the creditor can exercise the right of retention even if his claim is not yet due. This legal solution is logical and justified, because otherwise the creditor would be put in a disadvantageous position: he would be obliged to return the thing to the debtor, although it is clear that due to the debtor's insolvency there is a real danger that he will never be able to collect his claim. Therefore, the legislator justifiably prioritizes creditor protection in situations of increased risk.

The right of retention arises primarily on the basis of the law, and much less often on the basis of a contract. According to the ZOO, the right of retention includes two basic powers: the right to retain the debtor's property and the right to charge the creditor, under certain conditions, from the value of the retained property (Stanković & Orlić, 2001, pp. 261). Thus, retention acquires a double function — preventive and ensuring. The specificity of the right of retention is also reflected in its accessory nature, which means that the retention is always related to a specific, individually determined and due claim. It does not exist independently, but follows the main obligation. The right of retention is the right to keep, not the right to dispose of things. It is indivisible. Therefore, the creditor cannot alienate the retained thing, nor use it beyond the framework necessary for its preservation. Retention is primarily a means of

pressuring the debtor to fulfill his obligation. It is also a real means of security, because it is related to the state's property and not to the person of the creditor, which distinguishes it from personal means of security such as surety (Babić, 2008, pp. 221). The subject of retention can be all movable things that can be traded, money, and even certain categories of real estate. However, with real estate there is a significant specificity: the creditor cannot be settled from the value of the retained real estate, but has the exclusive authority to retain it until the claim is paid (Radulović, 2020, pp. 176). Furthermore, the creditor cannot keep the debtor's power of attorney, documents, identification or other things that by their nature cannot be put up for sale (Stanković & Orlić 1982, pp. 392). Also, the right of retention cannot be acquired even though the debtor's thing is in the hands of the creditor in the following cases: if the thing left the debtor's state against his will, if the thing was handed over to the creditor exclusively for safekeeping, as well as when the thing was handed over to a servant (Stanković & Orlić, 2001, pp. 264).

Precisely because of the wide use of retention in everyday obligation relationships and fragmentary normative regulation, numerous disputed issues arise in practice. Although the right of retention is established in the law, its application requires clear judicial interpretations and continuous theoretical processing in order to ensure consistency, legal certainty and protection of both sides of the obligation relationship.

In relation to other means of security, the advantages of the right of retention are primarily reflected in its simplicity regarding the constitution of the right of retention. No special form or registration in the public register is required for the creation of the right of retention, which significantly distinguishes it from a pledge on movable property or a mortgage on immovable property. The right of retention arises as soon as a certain thing of the debtor is in the hands of the creditor. It is this immediacy and "informality" that make retention a very effective, fast and available means of security in everyday legal relations. The right of retention is a security instrument that is based without registration costs, without hiring a public notary and without the need for a special contract. Therefore, it is particularly suitable for craftsmen, hoteliers, transporters, storekeepers and other persons who come into contact with other people's belongings in their regular activities.

Understanding the shortcomings of the institute of the right of retention is of key importance for its further improvement. The main disadvantage of retention lies in the limited scope of the creditor's authority. Although he has the right to retain the thing, he does not have the right to automatically collect from it without court proceedings or the consent of the debtor. Thus, part of the efficiency of the institute is lost, especially in comparison with lien law, where the possibility of out-of-court sales is much wider. We believe that introducing the possibility of out-of-court sale of retention items, under controlled conditions, should be considered, in order to achieve a balance between the protection of the debtor and the effectiveness of security. The out-of-court sale of retention items could be realized through an auction sale or sale by direct negotiation. Such a way of settlement could be conditioned by a mandatory prior address to the debtor, with the aim of enabling him to participate in the sale procedure, since it is also in his interest to sell the subject of retention, if the sale takes place, at the highest possible price. In this way, greater transparency of the procedure and protection of the interests of both parties would be ensured, because the remaining amount realized by the sale, after the settlement of the creditor's claim, undisputedly belongs to the debtor. Another disadvantage is related to the duration of retention. It exists only while the thing is in the creditor's state. Every person who exercises factual authority over a thing has a state. If the

thing, voluntarily or forcibly, is returned to the debtor, the right of retention ceases. This limits the duration of retention and in some cases reduces its practical value.

That the state of the thing is a key condition for the emergence of the right of retention is evidenced by the (Decision, PARS, Pž 2822/2021) which says: "Retention enjoys state protection, which further means that the person who pleads for the title of retainer is obliged to prove that he has acquired that title, and in order to acquire that title it is necessary that he used the right of retention on things that were in his country." Property ownership is a condition without which retention cannot be based." From the explanation of the decision in question:..,, The second-instance court does not accept the expressed legal opinion of the first-instance court. By provision of Art. 450th century 1 of the Law on Civil Procedure, it is prescribed that the discussion of the claim for interference with the state is limited only to discussing and proving the fact of the last state of the state and the resulting interference, and that the discussion of the right to the state, the legal basis, the conscientiousness of the state or requests for compensation is excluded. According to the provisions of Art. 70 of the Law on the Basics of Property Relations, any person who directly exercises de facto authority over things (immediate ownership) has ownership of property, while according to the provisions of para. 2. State property is also owned by a person who exercises de facto authority over the property through another person to whom, on the basis of a usufruct, agreement on the use of an apartment, lease, custody, service or other legal business, the property was transferred to the immediate state (intermediate state).

Therefore, the retention enjoys the state protection, which further means that the person who pleads for the title of retainer must prove that he has acquired that title, and in order to acquire that title, it is necessary that he used the right of retention on things that were in his country. Possession of property is a condition without which retention cannot be based. In the specific case, the first-instance court itself determines that the direct and indirect holder was the defendant, not the plaintiff, and then erroneously finds that by expressing the intention to retain the thing, without it having previously left the defendant's state, he acquired the status of retainer and, in connection with that, the right to state protection. In this sense, the statements from the explanation of the challenged decision that the defendant did not demand that the matter be returned to him are without effect. This is because, according to the factual determination, he did not lose the property, nor did he lose the authority to access the property, he had the keys, which indicates that he did not lose the property, nor did the plaintiff acquire it."

Decision No. Už-4793/2016 of the Constitutional Court dated February 8, 2018 is also impressive it says that there is no right of retention due to the negligence of the holder of the thing. "When the holder did not check the land registry status before concluding the purchase contract and when he started adaptation works on the real estate after learning that the owner disputed the registration of the property rights of his seller, which is why he filed a criminal complaint against several persons for fraud, his state is negligent, because he had reason to doubt the validity of the legal transaction on the basis of which he entered the state. With the right of retention, the conscientiousness of the owner who requests the return of the thing from the holder does not affect the exercise of this right."

Namely, bearing in mind that the creditor does not have the right to keep things of special properties, as well as things that have been handed over to him exclusively for safekeeping or service, in order not to fraudulently acquire grounds for collection from those things, it is clear that this rule has a preventive and protective function. It prevents abuses of the retention institute and preserves trust in bond

relationships, because the opposite solution would allow the creditor, using a specific legal position, to unjustifiably ensure the collection of claims to the detriment of the debtor. However, despite these limitations, a relevant and disputed question is justified in theory and practice: can the creditor retain the debtor's property solely for the purpose of collecting a more recently due debt, i.e. a claim that is directly related to that property, or can the right of retention include older, previously due claims that did not arise due to the retained property? This question is of particular importance, because it concerns the scope of the right of retention and its function as a means of security, but also the balance of interests between the creditor and the debtor. The answer to this question depends on whether the retention will be interpreted restrictively, as strictly related to the specific claim arising in connection with the retained item, or more broadly, as an instrument that allows the creditor to ensure the payment of all due claims against the debtor, provided that the legal conditions for exercising the right of retention are met.

We are of the opinion that the creditor has the right to collect earlier claims, as long as they are due, as long as there is a basic condition of retention — the state of things and that the state was not established against the will of the debtor in the sense that it was acquired fraudulently. The conditions must be met cumulatively. In case the state was acquired fraudulently, then it would not have the right to keep the thing and collect the earlier due claims. The law does not limit retention only to claims arising from a specific matter, so such a limitation would be artificial and against the logic of the institute. As the requirement for retention is that the claim is due, it is clear that earlier claims meet that criterion.

Another significant disadvantage of the retention institute is reflected in the unequal position of debtors. The debtor is actually in a weaker negotiating position, because the creditor can easily use the holding of things as a means of conditioning. In practice, the creditor sometimes unjustifiably increases the amount of the claim, refuses to return the item, or prevents the debtor from using an item that is necessary for the activity (eg a vehicle needed for transporting goods). Such a situation creates additional costs and disturbs the balance of the obligation relationship.

On the basis of Article 76 of the Law on the Fundamentals of Property Relations, the holder has the right to self-help against the person who disturbs him in the state without authorization or whose state has been taken away from him, provided that the danger is immediate, that self-help is necessary and that the method of its execution corresponds to the circumstances in which the danger arose. Permitted self-help, in the sense of Article 162 of the ZOO, includes the right of every person to remove a violation of rights when there is an immediate threat of danger and when such protection is necessary, whereby the method of removing the violation must be appropriate to the circumstances in which the danger arises. Therefore, self-defense is allowed only exceptionally and in situations where the violation of rights must be prevented without delay. Moreover, today's modern legal order excludes self-help and requires individuals to realize their rights through the courts (Stojanović & Petrović, 1990, pp. 347).

The institute of the right of retention is specific precisely because it connects the elements of real and obligational law, creating a protection mechanism that is on the border between permitted self-protection and self-government, as evidenced by the Judgment of the Supreme Court of Cassation, Rev 6417/2021 of May 25, 2022, from the explanation: ,,...Starting from the established factual situation, the lower courts, by applying Article 286, paragraph 1 and 154, paragraph 1 of the Law on Obligations and the burden of proving a causal connection between the action of the defendant and the resulting material damage, rejected the claim because the plaintiff did not prove that he suffered the damage through the

fault of the defendant. Namely, they concluded that the defendant's act of changing the lock on the leased business premises is a manifestation (conclusive action) of his unilateral cancellation of the lease agreement provided for in the provision thereof in this case of non-payment of rent based on Articles 582 and 584 of the ZOO, using his right as a lessor. Since that action is not illegal, and on that day there was his due claim of 14,400 euros based on unpaid rents from the plaintiff, they assessed that in this particular case the conditions of the right of retention - retention from Article 286, paragraph 1 of the ZOO, which provision stipulates the right of a creditor of a due claim in whose hands some of the debtor's property is to retain it until the claim is paid, were met. At the same time, the second-instance court found that, regardless of the date of finality of the aforementioned judgment, the defendant's claims were then 15.07.2011. was due due to non-payment of rent for the time period starting from 01.04.2010. year. When determining that the plaintiff did not overhaul the machines in question in the twelfth year, which represents 80% of their working life, the lower courts judged that the mere fact that they lost value due to standing does not lead to the conclusion that due to the retention of the machines by the defendant, there was damage to the plaintiff's property. They also concluded by applying the rule on the burden of proof from Article 231, paragraph 2 of the Civil Code that the plaintiff did not prove the damage suffered in the name of lost profit, especially when it is taken into account that he was operating with losses from 2009 onwards. Retention is a means of legal self-protection of rights and permitted self-help based on Articles 286, paragraph 1 and 162 of the ZOO. The provision of Article 287 of the same law, which the auditor unfoundedly refers to, excludes the right of retention if the debtor demands the return of a thing that left his country against his will or when he handed it over to the creditor for safekeeping or service. However, in this particular case, for all the reasons already mentioned, the conditions for the application of this exception, which would deny the defendant the right of retention, were not met. The auditor unfoundedly attacks the contested decision and for damages in the form of lost profits because it was properly adopted by applying the rules on the burden of proof from Article 231, paragraph 2 of the Civil Code. With the remaining audit allegations, in which he disputes the established working life of the disputed machines and points out that the defendant transferred these machines unprofessionally and stored them in an inadequate hall, which led to the occurrence of damage, the plaintiff actually disputes the established factual situation as incomplete and incorrectly determined, but this cannot be a reason for declaring an audit based on Article 407, paragraph 2 of the ZPP."

When someone acts in the case of permitted self-help and thereby causes damage to the person who caused the need for self-help, he is not obliged to compensate it because retention is a means of legal self-protection of the right and permitted self-help (Judgment, VSRS, Prev. 406/2005).

The right of retention is also a means of defense of the creditor in a dispute in which the debtor demands the return of the item (Stanković & Orlić, 2001, pp. 261). It is about the so-called objection of retention, which the creditor can point out when the debtor demands the return of things, but has not settled the due obligation. As the duration of the retention is not time-limited, it means that the creditor can keep the thing until the debtor fulfills his obligation. Namely, the creditor's authority to settle from the value of the retained item is one of his key rights and is to a significant extent similar to the position of the lien creditor. A creditor holding a thing by retention has the right to collect from its value in the manner prescribed for lien creditors, but is obliged to inform the debtor of his intention in a timely manner before undertaking settlement measures (Narodna skupština, 2020, Art. 286). The reason for this is based on

the fact that the creditor's claim is already due, so the notice is seen as the last warning to the debtor before the start of forced collection (Stanković & Orlić, 2001, pp. 267).

In the context of settlement methods, the procedure for civil and economic relations differs in terms of efficiency. In civil disputes, the creditor must request a court decision allowing the sale of the item, either through a public sale or at the current market price. On the contrary, in economic relations, the creditor can start a public sale already after eight days from the day of sending the warning to the debtor, i.e. sell the thing at the market or stock exchange price, with the obligation to notify the debtor in advance. This solution is much more effective and achieves the basic purpose of the retention institute as a means of self-protection.

Bearing in mind that in practice creditors are often settled out of court, it is justified to ask whether the more favorable and faster regime, characteristic of commercial law, should be extended to civil relations as well. In situations where there is a lack of a fast judicial mechanism or a precise normative arrangement, the right of retention loses its purpose and can easily turn into impermissible self-government. That is why it is necessary to improve the normative framework of retention, especially in the part related to the method of settling the debtor and the protection of the rights of all participants. Furthermore, as a very important and theoretically complex topic, the relationship between the right of retention and compensation for damages is imposed. Retention as an institution of self-protection can simultaneously represent the potential liability of the creditor for the resulting damage.

A party in an obligation relationship is obliged to act with the care that is required in legal transactions in the appropriate type of obligation relationship (the care of a good businessman, i.e. the care of a good household member (Narodna skupšina, 2020, Art. 18). Violation of this obligation leads to the liability of the creditor. or dangerous conditions, in case of insufficient control and supervision over the thing, as well as in the case of acting contrary to the debtor's explicit instructions, etc. Liability may also arise when the creditor exceeds the limits of the necessary actions for the preservation of the thing, or when he fails to take the elementary protection measures that can be expected.

In this sense, in the case where the creditor of a due claim, in whose hands some of the debtor's property is located, keeps the thing until the claim is paid, there is no place for establishing the creditor's liability towards the debtor as in the sense of ordinary damages, nor due to the lost profit that the debtor would have made by using the retained items (Judgment, ASNS, Gž 1620/2021). Also, compensation for lost profit due to retention in case of non-payment of rent (Narodna skupština, 2020, Art. 154, 155, 189, 286 and 584) in a situation where the lessor retained the tenant's belongings due to non-payment of rent by the tenant, i.e. exercised the right of retention, the tenant cannot claim lost profit, when it was determined that the tenant, according to the final accounts, operated at a loss in the years preceding the closing of the business premises in question, according to which he could not even suffer damage in the form of lost profit (Judgment, ASNS, Gž 1620/2021).

Therefore, the creditor will be liable for real damage, lost profit, and even for non-material damage in case of unjustified retention of things, that is, when he uses retention beyond the limits of his authority. Such situations arise e.g. when the creditor keeps the thing even though the claim is not due, when he refuses to return the thing even though the debt has been fully settled, when he abuses the position of the debtor in order to obtain additional benefit, when he increases the amount of the claim or makes the exercise of the right conditional on unfounded demands, as well as when he uses the thing without the

debtor's approval or contrary to its nature and purpose. In all these cases, as well as in other similar ones mentioned, the creditor exceeds the limits of self-protection permitted by law, and his actions pass into self-government, which necessarily activates the rules of responsibility for damage. Therefore, the debtor can demand compensation for actual damages, lost profits, and even compensation for non-material damages in exceptional situations. Therefore, the retention of things must be aligned with the principles of conscientiousness and honesty.

Conclusion

The right of retention, although at first glance it seems like a simple civil law institution, in essence it is not. It is a very complex institute that requires special, comprehensive and precise legal regulation. Its application in legal traffic is frequent and almost everyday, especially with storage contracts, hotel management contracts, storage contracts, labor contracts, transport contracts and similar contractual relationships. Precisely because of its frequent application, the need for its more detailed and systematic normative regulation becomes even more pronounced.

What is necessary, first of all, is to clearly and unambiguously regulate the issue of collection, that is, settlement of the creditor from the retained debtor's property. In this regard, legal theory and practice should consider the solutions that exist in commercial law relations and prescribe a similar, perhaps more efficient model of settlement of claims from retained debtor's property for civil law relations as well. Long-term settlement of the creditor exclusively through the courts often leads to the loss of the purpose of the retention institute itself, whose basic function is quick and effective pressure on the debtor to fulfill the obligation. This is particularly evident considering that the right of retention does not require a special form, nor registration in public or central registers, but arises directly on the basis of the law or contract.

The right of retention is at the same time an institute of real law and obligation law, a real means of securing claims, but also a form of legal self-protection of rights, i.e. the creditor's allowed self-help. Its specificity is reflected precisely in the fact that this institute, figuratively speaking, "floats" between the aforementioned legal categories. It has points of contact with numerous related institutes, such as the pledge, but it is clearly different from them in its origin, effect and legal nature.

Comparative legal analysis shows that the right of retention in modern legal systems does not develop as a strictly unique and formally codified institute, but as a functional mechanism for preserving contractual balance and protecting creditors in situations of mutual obligation disruption. Although the normative solutions differ - from the systematically regulated German model, through the more restrictive and fragmentary approach present in French law, to specific solutions in Portuguese law that emphasize consumer protection - the common denominator is the effort to prevent unfair behavior and ensure the simultaneity of actions. International and model sources of contract law further confirm this tendency, favoring flexible rules on retention and suspension of performance depending on the specific circumstances of the case. Such a comparative legal context indicates that the right of retention should be viewed not only as a technical means of security, but as an instrument of fairness and correction of contractual relations, which can serve as an important guideline for its future normative improvement in domestic law. Fragmentary and insufficiently precise legal regulations of this institute can lead to inconsistency of court decisions and uneven application of the right of retention in practice. Such a situation

creates legal uncertainty, both for creditors and debtors, but also complicates the work of the courts. In order to facilitate its application and ensure greater legal certainty in legal traffic, both for the parties and for court practice, we believe that it would be expedient to pass a special law that would detail and systematically regulate the right of retention and all disputed issues that arise in practice.

Such a normative solution should, first of all, precisely regulate the rights and obligations of the creditor and the debtor, the question of maturity of claims, the range of claims from which the creditor can be satisfied (including a clear determination of whether and to what extent the retention includes older claims), the rules on retention of things, the time frame of retention for the protection of the debtor, the conditions and method of returning things, as well as the conditions for responsibility for damage and other relevant issues.

With a clear and unambiguous normative regulation of this matter, the legal system would become fairer, more functional and more predictable, and at the same time, the confidence of participants in legal transactions would be strengthened and the rights of persons whose rights are threatened or violated would be more effectively protected.

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Pravo retencije kao sredstvo obezbeđenja potraživanja: struktura, pravna priroda i uporednopravna analiza sa posebnim osvrtom na teoriju i praksu R. Srbije

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Sažetak

Pravo retencije predstavlja složen građanskopravni institut koji objedinjuje elemente stvarnog i obligacionog prava, funkcionišući istovremeno kao realno sredstvo obezbeđenja potraživanja i oblik zakonski dopuštene samozaštite poverioca. Iako se često primenjuje u svakodnevnom pravnom prometu, ovaj institut u domaćoj pravnoj doktrini i dalje se ocenjuje kao nedovoljno normativno zaokružen, pre svega zbog fragmentarne zakonske regulative i ograničeno razvijene sudske prakse. Takvo stanje otvara brojna sporna pitanja u pogledu njegove pravne prirode, obima i granica primene, kao i odnosa prema srodnim institutima. Rad ima za cilj da, primenom kritičkopravne i normativne analize, sistematično ispita pojam prava retencije, uslove za njegovo zasnivanje, način vršenja prava zadržavanja, pravna dejstva i granice odgovornosti poverioca za štetu nastalu na zadržanoj stvari. Pored analize domaćeg pravnog okvira i sudske prakse, rad obuhvata i uporednopravni pristup, kroz razmatranje rešenja razvijenih u pojedinim kontinentalnoevropskim pravnim sistemima, kao i u međunarodnim i modelnim izvorima ugovornog prava. Na taj način se ukazuje na zajedničke tendencije, ali i na razlike u normativnom oblikovanju i funkcionalnom razumevanju prava retencije. Cilj rada je da ponudi teorijski utemeljena i praktično primenljiva tumačenja koja mogu doprineti jasnijem razumevanju ovog instituta i unapređenju pravne sigurnosti u njegovoj primeni, uz oslanjanje na iskustva uporednog prava kao korektiv i inspiraciju za moguće normativne dopune domaćeg zakonodavstva.

Ključne reči: pravo retencije, pravo zadržavanja, sredstvo obezbeđenja potraživanja, samozaštita prava, uporednopravna analiza.

Safety of Cosmetic Products: Regulatory Foundations and Practical Challenges

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Safety of Cosmetic Products: Regulatory Foundations and Practical Challenges

Abstract

This study analyzes the regulatory aspects of cosmetic product safety, focusing on the international, European and national legal frameworks, the practical implementation of regulations and current industry trends. Cosmetic products, including formulations for skin, hair and nail care, as well as fragrances, must be safe due to their direct impact on consumer health. The study examines the definition and classification of cosmetics in relation to medicinal and biocidal products, as well as innovations such as natural formulations, nanomaterials, and personalized cosmetics, which further complicate the regulatory framework. Regulatory systems encompass international guidelines, the European Regulation (EC) 1223/2009 and Serbian national legislation. Particular emphasis is placed on product safety assessment, preparation of the Product Information File (PIF), implementation of Good Manufacturing Practice (GMP), ingredient and nanomaterial control, labeling and advertising, as well as cosmetovigilance and post-market surveillance to ensure timely responses to adverse effects. In practice, challenges include improper labeling, the presence of unregistered products on the market, complex cross-border supply chains, online sales, the use of nanomaterials and an underdeveloped cosmetovigilance system. Recommendations include enhancing cosmetovigilance, educating manufacturers, importers and consumers, strengthening online market oversight, adapting regulations to technological innovations and promoting international cooperation. Effective consumer protection requires the integration of strict regulation, responsible conduct by all stakeholders, continuous market surveillance and the use of digital tools for standardized monitoring of adverse effects, thereby improving product safety, transparency and consumer confidence in the cosmetics market.

Keywords: cosmetic products, safety, cosmetovigilance, regulatory framework, practical challenges

Introduction

The cosmetic industry represents one of the most dynamic segments of the global market, driven by increased consumption and the development of innovative formulations, active ingredients and advanced technologies. The modern cosmetic industry includes dermocosmetics, natural and nanotechnology-based products and personalized care, increasing the complexity of safety requirements due to direct skin, hair, and mucous membrane contact (Ferreira et al., 2022; Ribet et al., 2021; Sharma et al., 2024) Cosmetovigilance plays a central role in this system, acting as an early-warning mechanism that supports proactive safety management by enabling the identification, collection and evaluation of adverse reactions, along with timely intervention by competent authorities. Given that consumers apply multiple cosmetic products daily, systematic safety assessment remains essential. Regulation (EC) 1223/2009 is a key instrument for harmonizing safety standards and requires evidence of product safety before market entry. Safety assessment involves analyzing the toxicological profile of each ingredient and evaluating the final product to minimize risks such as irritation, allergy or phototoxicity. The rise in imported products and unverified online items further complicates surveillance and necessitates stronger regulatory

vigilance. Rapid technological development, globalization and expanding e-commerce additionally challenge regulatory enforcement, highlighting the need for continuous regulatory improvement (Đukić-Ćosić & Antonijević, 2018; Regulation (EC) 1223/2009; Savić & Paunović, 2018; Toklu et al., 2019; Vieira et al., 2024).

This study analyzes the regulatory aspects of cosmetic product safety, focusing on the obligations of manufacturers, responsible persons and distributors, mechanisms for monitoring safety, and alignment with EU and national regulations. It evaluates system weaknesses, especially in adverse effect reporting, and proposes improvements to enhance consumer protection and ensure product quality and safety. By addressing these challenges, the study underscores the importance of consistently strengthening safety culture within the cosmetic industry.

Cosmetic Products – Definition and Classification

> Article 2 of Regulation (EC) 1223/2009 states:
> "cosmetic product means any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours" (Regulation (EC) 1223/2009).

The regulatory framework clearly distinguishes cosmetic products from medicinal products, which have therapeutic or diagnostic functions, and from biocidal products intended to act against harmful organisms. The cosmetic industry includes a wide range of products such as skincare and haircare preparations, hygiene products, decorative cosmetics, perfumes and sun care products. These categories undergo distinct regulatory scrutiny, particularly regarding ingredient restrictions, claim substantiation and microbiological quality. Each category requires specific standards for formulation, labeling and safety assessment, necessitating rigorous control procedures to ensure consumer safety (Ferreira et al., 2022; SCCS, 2021).

Natural and organic cosmetics are gaining importance due to increasing consumer awareness regarding ingredients, sustainability and environmental aspects, yet they remain insufficiently standardized in terms of labeling (Fonseca-Santos et al., 2015; Hirata et al., 2022; Vasiljević & Bojović 2018). A lack of unified certification systems across markets often leads to consumer confusion, emphasizing the need for clearer regulatory definitions. The use of nanomaterials enhances the penetration of active substances and texture of formulations but requires stricter oversight due to potential health and environmental risks. Personalized cosmetics, tailored to individual user needs, introduce new challenges in production, labeling and ensuring product safety (Ferreira et al., 2023).

A clear understanding of cosmetic product definitions, classification and systematic monitoring of contemporary trends is crucial for implementing an effective regulatory framework, essential for consumer protection and ensuring high product safety standards. With the ongoing emergence of new product categories, regulatory adaptation has become a key component of market oversight.

Cosmetovigilance

Cosmetovigilance is the systematic monitoring of cosmetic product safety based on user reports and ingredient analysis, aimed at identifying and preventing adverse effects (Dhiman & Kumar, 2023; Praveen & Swaminathan, 2023; Savić & Paunović, 2018). This creates a system in which real-world evidence is of central importance, allowing regulatory bodies to detect patterns that may not be visible during pre-market assessment.

Under EU regulations, manufacturers and responsible persons must report adverse effects to support risk assessment and corrective actions, including updating safety evaluations or withdrawing products. The system covers risk management, labeling, toxicological assessment, and testing of ingredients and finished products (Altiokka & Üner, 2022; Yadav et al., 2025). Timely and accurate reporting is essential for identifying emerging safety concerns, particularly in the context of complex global supply chains.

International cooperation, supported by organizations such as the International Cooperation on Cosmetics Regulation (ICCR), contributes to harmonization of standards and more effective implementation of cosmetovigilance. Its success depends on the coordination between consumers, manufacturers and regulatory authorities, as well as on the use of modern monitoring systems. Cosmetovigilance thus represents a key mechanism for continuous improvement of cosmetic product quality and safety (Ribet et al., 2021; Yadav et al., 2025). As the market continues to expand, the development of digital reporting tools and AI-supported surveillance systems is expected to further enhance its effectiveness.

Adverse Effects of Cosmetic Products – Identification, Monitoring and Reporting Mechanisms

Adverse effects of cosmetic products include skin allergies, irritations, contact dermatitis, phototoxicity, and photosensitivity, while systemic reactions are less common. These effects may result from inadequate testing, incorrect formulation, contamination or improper use. In some cases, reactions may arise from interactions between multiple concurrently applied products, complicating causality assessment. Monitoring such effects is a core aspect of cosmetovigilance, relying on manufacturer responsibility, regulatory oversight and active consumer participation (Khan et al., 2024; Lucca et al., 2020).

Manufacturers must document reported reactions and implement corrective actions, such as formulation adjustments, label updates or product recalls, in accordance with Regulation (EC) 1223/2009. Post-market surveillance supports timely identification of emerging risks and updating of safety assessments. Monitoring systems, including EU's centralized notification databases, facilitate structured reporting and improve data comparability across markets. These regulatory databases provide standardized data collection and trend analysis. Consumers play a crucial role, as direct reporting helps identify higher-risk products. Educating users on proper product use and reporting procedures further reduces the likelihood of adverse effects (Lucca et al., 2020; Nayak et al., 2023; Vieira et al., 2024).

The combination of regulatory control, manufacturer responsibility and informed consumer participation enables rapid responses to serious adverse effects, enhances product safety and strengthens consumer confidence. The growing use of digital tools, such as mobile reporting applications and

automated signal detection systems offers additional opportunities to improve surveillance efficiency. Standardized reporting, advanced monitoring methods and international harmonization remain essential for the continued development of effective cosmetovigilance (Mancuso & Martini, 2021; Nayak et al., 2023).

Regulatory Frameworks for Cosmetic Product Safety

International Framework

The international framework for cosmetic product safety is guided by global organizations influencing national regulations. The International Organization for Standardization (ISO) sets standards including ISO 22716 for Good Manufacturing Practice (GMP). The World Health Organization (WHO) provides guidance on chemical safety and adverse effect identification, while the Organisation for Economic Co-operation and Development (OECD) standardizes chemical and toxicological testing. The International Cooperation on Cosmetics Regulation (ICCR) facilitates information exchange and coordinated risk management, supporting consistent regulations and industry transparency (Ferreira et al., 2022; Swathi & Nagasamy Venkatesh, 2023; Yadav et al., 2025).

European Union Framework

In the European Union, Regulation (EC) 1223/2009 serves as the principal legal framework for cosmetic products, covering all stages from production and distribution to marketing and sales. This directly applicable regulation establishes uniform rules for market placement, quality control, safety and supervision, aiming to protect consumer health, increase transparency and support free trade within the single market. It also provides a foundation for consistent enforcement across Member States, reducing discrepancies in national approaches. Key provisions introduced by the regulation include (Liu et al., 2020; Lukić, 2018; Regulation (EC) 1223/2009; Ribet et al., 2021; Savić & Paunović 2018; SCCS, 2021; Vasiljević & Bojović 2018):

- Strengthened safety requirements: Manufacturers must conduct a comprehensive safety assessment and prepare safety report before market placement.
- Introduction of the “responsible person”: Legally accountable entity responsible for ensuring compliance with legislation and monitoring adverse effects.
- Centralized notification via CPNP portal (Cosmetic Products Notification Portal), allowing unified product registration across the EU.
- Reporting of serious undesirable effects: Responsible person informs competent authorities, which exchange information with other Member States.
- Nanomaterials regulation: All nanomaterials (colorants, preservatives and UV filters) must be explicitly approved and labeled, with term “nano” indicated in brackets. Safety assessments of these ingredients with potential health risks are conducted by the Scientific Committee on Consumer Safety (SCCS) in accordance with guidelines.
- Enhanced market surveillance obligations: Authorities must conduct coordinated inspections and participate in EU-level alert and monitoring systems.

National Framework in the Republic of Serbia

The national legislation of the Republic of Serbia is largely harmonized with Regulation (EC) 1223/2009, including definitions, safety criteria, obligations of the responsible person, substance restrictions and the regulation of nanomaterials, while retaining certain specificities in certification and oversight procedures. Despite significant progress, challenges remain in market surveillance, information exchange regarding adverse effects and consistent implementation of GMP standards, particularly among smaller manufacturers (Regulation (EC) 1223/2009; Savić & Paunović, 2018). Additional challenges include the need for more frequent coordinated inspections and improved data transparency in post-market monitoring.

The regulatory framework is based on Law on Products for General Use and Rulebook on Cosmetic Products, which govern market placement, obligations of manufacturers, importers, and distributors, as well as mechanisms for control and supervision. Regulations cover safety, composition, labeling, GMP and adverse effect monitoring, aiming to strengthen consumer protection and ensure alignment with EU standards. Subordinate legislation further defines technical requirements, including mandatory product notification in national electronic database prior to market entry, INCI-based labeling and specific warnings. These measures promote consistency in documentation and facilitate traceability throughout the supply chain. Manufacturers and distributors must maintain comprehensive safety files, including safety assessments, ingredient data, test results, and GMP evidence. Alongside sector-specific rules, horizontal legislation on consumer protection, advertising, privacy and general product safety also applies, reinforcing the overall quality and safety of cosmetic products market (Regulation (EC) 1223/2009; Republic of Serbia, Ministry of Health, 2019; Savić & Paunović, 2018).

Key Safety Requirements for Cosmetic products

Cosmetic products safety constitutes a fundamental element of EU and national regulatory frameworks, including Serbian legislation, defining the obligations of manufacturers, importers and responsible persons to protect consumer health and ensure product quality. Ensuring safety requires a comprehensive approach encompassing all stages of the product life cycle, from formulation to post-market monitoring. The main requirements include (Alves et al., 2022; Mancuso & Martini, 2021; Praveen & Swaminathan, 2023; Savić & Paunović, 2018; Swathi & Nagasamy Venkatesh, 2023; Vieira et al., 2024):

- Product Safety Assessment – Before market placement, safety report must be prepared, including toxicological profile of ingredients, identification of potential risks and results of laboratory testing.
- Product Information File (PIF) – Comprehensive document demonstrating regulatory compliance, product description, safety assessment, raw material data, stability and microbiological test results and evidence supporting declared claims.
- Good Manufacturing Practice (GMP – ISO 22716) – Guidelines covering production processes, quality control, hygiene, storage and documentation to minimize contamination risks. GMP implementation should be regularly audited to maintain compliance and ensure consistent product quality.

- Ingredient Control – Compliance with lists of prohibited and restricted substances, regulated preservatives, colorants and UV filters; nanomaterials require additional safety assessment and specific labeling.
- Microbiological Safety and Stability – Products must remain safe throughout their shelf life, with special criteria for sensitive user groups.
- Post-Market Surveillance and Cosmetovigilance – Monitoring and reporting adverse effects to identify emerging risks and implement corrective measures, supported by detailed incident records and trend analysis.
- Labeling and Advertising – Labeling informs consumers and ensures safe use, requiring the product name, function, INCI ingredients, net quantity, expiry/PAO, warnings and responsible person details. Advertising must be accurate, scientifically justified and non-misleading. These measures support fair marketing, consumer protection, manufacturer accountability and market transparency.

Practical Challenges in the Regulation and Safety of Cosmetic Products

Although the regulatory framework for cosmetic products is well-established, practical experience reveals several challenges in consistent enforcement and market supervision:

- Implementation of Safety Standards: Difficulties in quality control and document verification, discrepancies between labeling and actual composition, use of unauthorized or restricted substances and inaccurate declarations of active-ingredient concentrations. These discrepancies can compromise consumer safety and reduce confidence in the regulatory system.
- Product Classification: Borderline products between cosmetics, medicinal products and biocides can lead to divergent regulatory interpretations.
- Challenges for Small Manufacturers: Limited resources for implementing GMP standards, preparing documentation, monitoring adverse effects and conducting post-market surveillance. Support and guidance from regulatory authorities could mitigate these barriers.
- Globalization and Online Sales: Increased entry of non-notified products, difficulties in supervising online trade, and non-transparent marketing claims.
- Monitoring Adverse Effects: Underreporting by consumers, healthcare professionals and distributors restricts detection of high-risk products and delays corrective measures.

These challenges highlight the need to enhance regulatory oversight, strengthen cosmetovigilance and provide targeted education for all stakeholders across the production and distribution chain (Altıokka & Üner, 2022; Ferreira et al., 2022; Omondi & Mwangi, 2023; Swathi & Nagasamy Venkatesh, 2023; Vieira et al., 2024). Improved digital reporting systems and stakeholder training are essential strategies to address these gaps effectively.

Recommendations for Improving the Regulation and Cosmetic Product Safety

Based on the identified challenges, following recommendations can enhance legislative implementation, cosmetic product safety, consumer trust and the quality of cosmetic industry:

1. Enhancement of Cosmetovigilance – Develop efficient systems for reporting and analyzing adverse effects, including digital platforms for direct consumer and professional input, enabling timely identification and withdrawal of high-risk products.
2. Education of Manufacturers and Distributors – Provide continuous training, especially for small-scale producers, on GMP, safety assessment, labeling and marketing claims, incorporating case studies and practical examples to facilitate implementation.
3. Implementation of Digital Technologies – Implement applications and databases for real-time monitoring of adverse effects, automated signal detection and data visualization to standardize data collection, identify trends and accelerate responses to hazardous products.
4. Strengthening Oversight of Online Sales – Monitor unregistered and imported products sold online and develop guidelines for tracking cross-border sales, with collaboration with e-commerce platforms to prevent distribution of unsafe products.
5. Regulatory Alignment with Technological Innovations – Establish specific guidelines for nanomaterials, personalized cosmetics and natural products, standardizing testing and labeling methods and defining risk assessment criteria for emerging ingredients and novel formulations.
6. International Cooperation and Harmonization of Standards – Intensify information exchange and coordinated responses with international regulatory bodies; harmonized reporting and shared databases can improve global safety monitoring.
7. Raising Consumer Awareness – Conduct campaigns and provide educational materials on consumer rights and responsibilities, emphasizing safe use, adverse-effect reporting and recognition of misleading marketing claims.

Conclusion

The cosmetic products safety constitutes a fundamental aspect of consumer health protection and market stability. Analysis of international, European and national regulatory frameworks demonstrates clearly defined standards and responsibilities for manufacturers, distributors and responsible persons, encompassing product safety assessment, adherence to good manufacturing practices, mandatory product notification and proper labeling and ingredient disclosure. While the legal framework provides a solid basis for consumer protection, its implementation faces challenges such as inaccurate labeling, unregistered or unsafe products, complex supply chains, online sales, misleading claims, nanomaterials and underdeveloped cosmetovigilance. Contemporary trends, such as personalized cosmetics, natural formulations and technological innovations, further complicate regulatory requirements and require continuous adaptation of legislation. Effective consumer protection therefore depends on integration of strict regulations, responsible conduct of all stakeholders across the production and distribution chain, continuous market surveillance and systematic monitoring of adverse effects, alongside regulatory adaptation to innovation and market globalization. Legislation in this field must remain flexible enough to accommodate technological and market changes while maintaining clarity to ensure consistent enforcement and a high level of cosmetic product safety, thereby safeguarding consumers and fostering market trust.

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Bezbednost kozmetičkih proizvoda: regulatorni temelji i praktični izazovi

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Sažetak

Ovaj rad analizira regulatorne aspekte bezbednosti kozmetičkih proizvoda, sa fokusom na međunarodne, evropske i nacionalne pravne okvire, praktičnu primenu regulativa i aktuelne trendove u industriji. Kozmetički proizvodi, uključujući preparate za negu kože, kose i noktiju, kao i mirise, moraju biti bezbedni zbog direktnog uticaja na zdravlje potrošača. Rad ispituje definiciju i klasifikaciju kozmetike u odnosu na lekove i biocidne proizvode, kao i inovacije poput prirodnih formulacija, nanomaterijala i personalizovanih kozmetičkih proizvoda, koje dodatno komplikuju regulatorni okvir. Regulatorni sistemi obuhvataju međunarodne smernice, Evropsku regulativu (EC) 1223/2009 i nacionalno zakonodavstvo Srbije. Poseban značaj daje se proceni bezbednosti proizvoda, pripremi dosijea sa informacijama o proizvodu (Product Information File – PIF), primeni Dobre proizvođačke prakse (DPP), kontroli sastojaka i nanomaterijala, označavanju i oglašavanju, kao i kozmetovigilanci i nadzoru na tržištu radi pravovremenog reagovanja na neželjene efekte. U praksi, izazovi uključuju neadekvatno označavanje, prisustvo neregistrovanih proizvoda na tržištu, složene prekogranične lance snabdevanja, prodaju putem interneta, upotrebu nanomaterijala i nedovoljno razvijen sistem kozmetovigilance. Preporuke uključuju jačanje kozmetovigilance, edukaciju proizvođača, uvoznika i potrošača, pojačanu kontrolu onlajn tržišta, prilagođavanje regulative tehnološkim inovacijama i unapređenje međunarodne saradnje. Efikasna zaštita potrošača zahteva integraciju stroge regulative, odgovorno postupanje svih aktera, kontinuirani nadzor tržišta i korišćenje digitalnih alata za standardizovano praćenje neželjenih efekata, čime se poboljšava bezbednost proizvoda, transparentnost i poverenje potrošača na tržištu kozmetičkih proizvoda.

Ključne reči: kozmetički proizvodi, bezbednost, kozmetovigilanca, regulatorni okvir, praktični izazovi

Legal Framework Governing the Types and Handling of Medicinal Products with an Overview of Principles of Good Pharmacy Practice in the Provision of Pharmaceutical Services in Serbia

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Legal Framework Governing the Types and Handling of Medicinal Products with an Overview of Principles of Good Pharmacy Practice in the Provision of Pharmaceutical Services in Serbia

Abstract

The healthcare system represents one of the most complex systems in any state. Article 65 of the Law on Health Care stipulates that pharmaceutical healthcare is included among the activities constituting healthcare provision at the primary level. At the national level, each country establishes a positive legal framework governing the field related to the types and handling of medicinal products, as well as other key issues, primarily through the adoption of relevant laws and bylaws. It is generally considered that any pharmacotherapy necessarily implies a coherent approach among all participants in the process — patients, physicians, pharmacists, and other professionals whose medical services may be required. Following a brief overview of the concept and significance of pharmaceutical activity, medicinal products, and medical devices, this paper analyzes the legal framework regulating the types and handling of medicinal products. In addition to examining the applicable laws, relevant bylaws are also presented. Finally, the paper provides an overview of the principles of Good Pharmacy Practice in the provision of pharmaceutical services in Serbia.

Keywords: medicinal product, medical device, pharmaceutical activity, Good Pharmacy Practice, healthcare

Introduction

The current Law on Health Care entered into force in 2019. Article 65 of this law stipulates that pharmaceutical healthcare is included among the activities constituting healthcare provision at the primary level of healthcare. Furthermore, Article 79, paragraph 1 of the Law on Health Care (National Assembly, 2019) prescribes that pharmacy activity is performed by a pharmacy institution at the primary level of healthcare. The right to healthcare is a universal human right and is considered a hallmark of modern society. Article 68 of the Constitution of the Republic of Serbia (National Assembly, 2006) contains provisions that generally regulate healthcare in the Republic of Serbia. According to these provisions, “everyone has the right to the protection of their physical and mental health. Children, pregnant women, mothers during maternity leave, single parents with children up to seven years of age, and the elderly are entitled to healthcare funded from public revenues if they do not obtain it in another manner, in accordance with the law. Health insurance, healthcare, and the establishment of health funds shall be regulated by law. The Republic of Serbia shall support the development of healthcare and physical culture.”

At the outset, it should be noted that the healthcare system represents one of the most complex systems in any state. A system implies “a set of interrelated elements that collectively lead to the realization of goals within the environment in which the system exists. A system encompasses the totality or complexity of elements or individual components” (Cucić et al., 2000, p. 20). Healthcare systems are “strongly influenced by the prevailing norms and values within a society; they often reflect the social and cultural expectations of citizens and are shaped by a country’s unique national history, traditions, and

political system" (Jovanović et al., 2015, p. 76). The social security system in Serbia consists of "the system of social insurance, the system of social care for children and families, the system of social protection for veterans, military disabled persons and civilian war invalids, and the system of social welfare" (Kosanović & Anđelski, 2015, p. 49), while the system of social insurance includes "pension and disability insurance, health insurance, and unemployment insurance" (Kosanović, 2011, p. 26). In addition to the importance of health and healthcare itself, particular emphasis is placed on "health insurance as one of the most significant social, economic, and consequently political issues" (Janković, 2011, p. 70). According to Article 4 of the Law on Health Insurance (National Assembly, 2019), "compulsory health insurance includes insurance in the case of illness and injury outside work, as well as insurance in the case of occupational injury and occupational disease." Furthermore, pursuant to Article 5 of the same law, "compulsory health insurance is organized on the principles of obligatoriness, solidarity and mutuality, transparency, protection of the rights of insured persons and protection of the public interest, continuous improvement of the quality of compulsory health insurance, as well as economy and efficiency of compulsory health insurance." However, "in conditions of increased demand for healthcare services, insufficient accumulation of contribution funds within the compulsory health insurance system, organizational challenges within the system, and similar circumstances, the need arises for a stronger presence of voluntary forms of health insurance" (Kočović, Rakonjac Antić & Rajić, 2013, p. 541).

The *World Health Report 2000* defined "three intrinsic goals of health systems: improving health, enhancing responsiveness to the legitimate expectations of the population, and ensuring that financial contributions to healthcare are distributed fairly" (Evans et al., 2001, p. 307). In general terms, "there is no single best or universally recommended way of organizing healthcare and health services. For this reason, significant differences exist among countries with regard to the objectives, structure, organization, financing, and other characteristics of healthcare systems. These differences result from historical, economic, geopolitical, sociocultural, and other factors" (Mitrović & Galović, 2013, p. 145). As has already been emphasized, the primary objective of a healthcare system is "the promotion and preservation of people's health. In addition to this primary objective, the healthcare system has two further goals: responsiveness, in terms of meeting the expectations placed upon it, and fairness, in terms of ensuring equal treatment of all individuals within a country" (Radivojević & Vesić, 2020, p. 154). For a healthcare system to function successfully, it must be "adequately organized, properly guided, sufficiently financed, and well structured" (Jovanović et al., 2015, p. 76).

Until the beginning of the twentieth century, as many as 80% of medicines were prepared in pharmacies (Remington, 2012). The rapid development of the pharmaceutical industry in the mid-twentieth century "enabled the large-scale production of high-quality and safe medicinal products, in accordance with the needs of the growing market and the stringent requirements of regulatory authorities" (Đekić, Čalija & Vuleta, 2013, p. 444). Contemporary approaches to therapy increasingly emphasize individualization, that is, a patient-oriented approach in which the patient is viewed as an individual with specific needs (Allen et al., 2011, p. 710).

Following a brief overview of the concept and significance of pharmaceutical activity, medicinal products, and medical devices, this paper analyzes the legal framework governing the types and handling of medicinal products. In addition to examining the applicable laws, relevant bylaws are also presented, bearing in mind that bylaws "define specific areas of pharmaceutical healthcare more precisely and in

greater detail" (Jović & Tasić, 2009, p. 2). Subsequently, the paper provides an overview of the principles of Good Pharmacy Practice in the provision of pharmaceutical services in Serbia, taking into account the growing tendency that "within pharmaceutical management, in both business and healthcare environments, the philosophy of Good Practice is strongly present" (Tasić & Hadži-Arsić Novaković, 2005, p. 225).

Concept and Significance of Pharmaceutical Activity, Medicinal Products and Medical Devices

The beginnings of legal regulation of pharmaceutical activity in Serbia "are linked to the early nineteenth century, specifically the period following the attainment of independence. The first pharmacy in Serbia was opened in 1830 in Belgrade. Six years later, the Court and Military Pharmacy was established in Kragujevac, which subsequently stimulated the opening of other pharmacies throughout Serbia. During this period, pharmacies in Serbia based their operations on the Austrian pharmacy system" (Jovanović, 2016, p. 122). Healthcare systems have undergone numerous processes of change over time, involving varying degrees of reform. The main drivers of these reforms have included "economic changes – acceleration of the global economy, globalization, and the global economic crisis; political changes – transformation of socio-economic systems in former socialist countries and liberalization; demographic changes – shifts in population size, age structure, educational structure, etc.; epidemiological changes – decreases in mortality and morbidity; sociocultural changes – changes in lifestyles, traditional family structures, values, and general expectations" (Simić, 2012). Developments in pharmaceutical activity within healthcare systems abroad have also been shaped by reforms and developmental initiatives. For example, in Sweden, "several initiatives have been implemented to improve pharmaceutical activity. On the one hand, annual thematic campaigns targeting specific patient groups have been introduced, while on the other hand, in recent years, greater emphasis has been placed on the prevention of drug dependence" (Westerlund & Bjork, 2006). After the introduction of pharmacist-led medication counseling, "which has been legally mandated in Finland since 2000, improvements in medication counseling rates have been observed" (Bell et al., 2007). Pharmaceutical practice – including patient care and research – "is well developed in Denmark. In addition to medication counseling and services such as cholesterol, blood glucose, and blood pressure measurements, models of best practice in pharmaceutical care have been established" (Herborg, Sorensen & Frokjaer, 2007). However, "despite positive developments in pharmaceutical activity, top-down approaches to implementing such initiatives have been criticized" (Rossing et al., 2005). In 2005, the National Health Service in England "introduced pharmacy contracts aimed at ensuring that all pharmacies provide seven essential services related to pharmaceutical activity and meet quality standards. Services offered in pharmacies include supervised methadone administration and smoking cessation programs" (Noyce, 2007). In Saudi Arabia, "community pharmacy practice typically focuses on traditional roles, including dispensing prescription and over-the-counter medications and providing brief standard counseling with limited patient care services" (Alrasheedy, 2024; Alanazi, Alfadl & Hussain, 2016; Mohammed et al., 2021).

Pharmaceutical activity is defined as "a healthcare activity that ensures the pharmaceutical healthcare of the population, carried out within the healthcare system at the primary, secondary, and tertiary levels, as well as in private practice, and encompassing: the supply of medicinal products and medical devices to the public, healthcare institutions, private practices, and other legal entities; implementation of preventive measures to maintain, protect, and promote public health, including health

promotion, disease prevention, and health education; dispensing of medicines and medical devices, together with guidance on storage, shelf life, proper use, adverse reactions and interactions, correct administration, and disposal; optimization of pharmacotherapeutic interventions and procedures for the rational use of medicinal products and medical devices, and provision of information to the general public and healthcare professionals in accordance with the law; participation in the development and implementation of pharmacotherapeutic protocols; reporting of adverse events, adverse reactions to medicines and medical devices, or falsified medicinal products; monitoring therapeutic outcomes to optimize treatment and improve patient outcomes by tracking specific parameters; identification of potential drug interactions with other medicines, food, etc., and prevention of unnecessary therapeutic duplication; preparation and dispensing of magistral or galenic medicines; withdrawal or recall of medicines and medical devices from retail; management of pharmaceutical waste; collaboration with other healthcare professionals regarding the use of medicines and medical devices; and other pharmaceutical services and pharmacy activities in accordance with the law" (Guide to Good Pharmacy Practice, 2021, p. 3). According to Article 2, item 1 of the Law on Medical Devices (National Assembly, 2017), a medical device (general) is "any instrument, apparatus, appliance, software, implant, reagent, material, or other product intended to be used alone or in combination, including software intended by the manufacturer for diagnostic or therapeutic purposes and necessary for its proper application in humans, which is intended by the manufacturer for: diagnosis, prevention, monitoring, prediction, prognosis, treatment, or alleviation of disease; diagnosis, monitoring, treatment, alleviation, or compensation for injury or disability; examination, replacement, or modification of anatomical, physiological, or pathological functions or states; provision of information via in vitro examination of human samples, including donated organs, blood, and tissues; control or support of conception; cleaning, disinfection, or sterilization of medical devices." In addition to the general definition of a medical device, the same legal text recognizes the following categories of medical devices: in vitro diagnostic medical device, active medical device, implantable medical device, active implantable medical device, custom-made medical device for a specific patient, medical device intended for clinical investigation, and single-use medical device.

According to the provisions of Article 14 of the Law on Medicines and Medical Devices (National Assembly, 2010), "a medicinal product is any product placed on the market in a specific strength, pharmaceutical form, and packaging that contains a substance or combination of substances that has been shown to have properties to treat or prevent disease in humans or animals, or a substance or combination of substances that may be used or administered to humans or animals with the intention of restoring, correcting, or modifying physiological functions through pharmacological, immunological, or metabolic action, or for establishing a medical diagnosis. A substance may be of any origin and can include: human origin (blood and blood products); animal origin (microorganisms, whole animals, organ parts, animal secretions, toxins, extracts, blood products); plant origin (microorganisms, whole plants, plant parts, plant secretions, extracts); chemical origin (chemical elements, naturally occurring chemical substances, and chemically synthesized products)." The provisions of Article 4 of the Rulebook on the Manner of Advertising Medicines and Medical Devices (Ministry of Health, 2010) regulate that advertising of medicinal products or medical devices includes: promotion through mass media, including the Internet; advertising in public spaces; and other forms of promotion such as mailings or in-person visits; promotion directed at healthcare and veterinary professionals authorized to prescribe medicines or medical devices,

including direct communication at professional meetings, in professional journals, and through other forms of professional promotion; provision of free samples to the professional community; and sponsorship of scientific and promotional events involving professional participants. The Rulebook on the List of Medicines Prescribed and Dispensed at the Expense of Compulsory Health Insurance (Republic Fund for Health Insurance, 2025) establishes the list of medicines that are prescribed and dispensed at the expense of compulsory health insurance. According to Article 3 of the Rulebook on the Method of Quality Control of Medicines and Medical Devices (Ministry of Health, 2011), "quality control of a medicinal product, regardless of the type of marketing authorization, is performed in accordance with its registration by: laboratory quality control and documentation quality control." Article 2, item 1 of the same Rulebook stipulates that "pharmaceutical testing of a medicinal product or medical device is a physico-chemical, biological, or microbiological examination aimed at determining the quality of the product." Medicinal products may also undergo clinical testing in accordance with the standards of Good Clinical Practice, as established by the Guidelines for Good Clinical Practice (Ministry of Health, 2025). Pursuant to Article 2 of the Rulebook on Clinical Trials of Medicinal Products in Human Medicine (Ministry of Health, 2022), "a clinical trial of a medicinal product is an investigation conducted in humans to determine or confirm the clinical, pharmacological, and pharmacodynamic effects of the medicinal product, to identify any adverse reactions to the investigational product, to examine its absorption, distribution, metabolism, and excretion, and to establish its safety and efficacy." Pharmacovigilance, defined as "a set of activities relating to the collection, detection, assessment, understanding, and prevention of adverse reactions to medicines, as well as other drug-related problems," is regulated by the Rulebook on the Method of Reporting, Collecting, and Monitoring Adverse Reactions to Medicines (Ministry of Health, 2011).

Legal Framework Governing the Types and Handling of Medicinal Products in Serbia

The legal framework regulating the types and handling of medicinal products represents a critical component in safeguarding patients' rights and, more broadly, the protection of human rights in relation to health. The medico-legal perspective "does not yet provide answers to all open questions regarding the use of medicines. It concerns an approach from the perspective of patient rights, which requires consideration of medicinal products as a source of health, and, to a lesser extent, as pharmaceutical goods on the market. Patient treatment and the professional aspects of medical and pharmaceutical practice are understood in a therapeutic sense and are appropriately balanced in the interest of each patient" (Mujović Zornić, 2008, p. 12).

Article 2 of the Law on Medicines and Medical Devices (National Assembly, 2010) recognizes specific categories of medicinal products. A reference medicinal product is "a medicine for which a marketing authorization has been issued in the Republic of Serbia or in the European Union based on complete documentation demonstrating quality, safety, and efficacy in accordance with applicable requirements." A well-established use (WEU) medicinal product is defined as a medicine "whose active substance is well-known, whose efficacy is established, and whose safety is at an acceptable level, which has been in use for at least ten years as a medicine in the European Union, and for which the marketing authorization is based on bibliographic data." A fixed-combination medicinal product is a medicine "whose fixed combination of active substances has not been used as a medicinal product for therapeutic purposes prior to marketing authorization, while each individual active substance is part of a medicine authorized

in Serbia or in the European Union." A consent-based medicinal product is a medicine "with the same qualitative and quantitative composition in terms of active substances and of the same pharmaceutical form, for which, in the marketing authorization procedure, documentation on the quality, safety, and efficacy of a medicine already authorized in the Republic of Serbia is used, provided that written consent is obtained from the marketing authorization holder." A generic medicinal product is defined as a medicine "containing the same qualitative and quantitative composition of active substances and the same pharmaceutical form as the reference medicinal product, with demonstrated bioequivalence through appropriate bioavailability studies. Different salts, esters, ethers, isomers, mixtures of isomers, complexes, or derivatives of the active substances of a generic medicine are considered the same active substance unless there are significant differences in safety or efficacy. Different oral forms with immediate release are considered the same pharmaceutical form." A generic medicinal product with mixed safety and efficacy data is a medicine "that does not fully meet the definition of a generic medicinal product, i.e., for which bioequivalence cannot be fully demonstrated through bioavailability studies, or in cases where one or more active substances, therapeutic indications, strength, pharmaceutical form, or route of administration differ from the reference product." A similar biologic medicinal product is "a biologic medicine similar to a reference biologic product that does not meet the criteria for a generic product due to differences in raw materials and manufacturing processes between the similar biologic product and the reference biologic product." A hybrid generic medicinal product is "a medicine that does not fully meet the definition of a generic medicinal product, i.e., for which bioequivalence cannot be fully demonstrated through bioavailability studies, or in cases of changes in one or more active substances, therapeutic indications, strength, pharmaceutical form, or route of administration compared to the reference product. A hybrid generic product is similar to the reference medicinal product because it contains the same active substance, but certain differences exist, such as strength, indication, or pharmaceutical form. The requirements for obtaining marketing authorization for a hybrid medicinal product are partially based on studies conducted with the reference product and partially on new data" (Vrcelj Jovanović, Vukajlović & Stajković, 2022, p. 15).

The Law on Medicines and Medical Devices (National Assembly, 2010), in Article 2, further recognizes the term "pharmaceutical equivalents," which refers to medicines "containing the same quantity of the same active substance(s) in the same pharmaceutical form, administered in the same way, and meeting the requirements of the same or comparable standards." A pharmaceutical form is defined as "the form in which a medicinal product is suitable for administration (e.g., tablet, capsule, ointment, injection solution, premix, etc.)." The same law, in paragraph 36, addresses the category of falsified medicinal products. A falsified medicinal product or medical device is defined as a medicine or device "that is manufactured, prepared, marketed, or distributed with the intention to deceive those who use or handle it, containing false information regarding identification (manufacturer, place of production, marketing authorization holder, registration holder as maintained by the Agency, analysis certificate, and other product-related documentation), or that may contain correct or incorrect ingredients relative to the declared composition, may lack active substances, may contain insufficient quantities of active substances, may have false packaging, or any other medicinal product or medical device considered falsified according to European Union or World Health Organization standards."

Interchangeability of medicines is defined by the Rulebook on the Form and Content of Medical Prescriptions, Method of Dispensing and Prescribing Medicines (Ministry of Health, 2018). According to Article 2, item 8 of this Rulebook, "interchangeable medicines are those containing the same active substance (identical INN), the same quantitative composition of the active substance, and the same pharmaceutical form, differing only in excipients and brand name, which, based on product documentation, demonstrate a degree of similarity such that their effects in terms of efficacy and safety are essentially equivalent." In certain circumstances, medicines "may not be considered interchangeable even if they meet the above criteria. For example, this applies when there are clinically significant differences between products, or if substitution cannot be safely performed (e.g., specific pharmaceutical forms, medicines administered via a medical device, or medicines with a narrow therapeutic index). In such cases, interchangeability is determined on a case-by-case basis. The concept of interchangeability does not apply to biological or similar biologic medicines" (Vrcelj Jovanović, Vukajlović & Stajković, 2022, p. 15).

The following table presents the types of medicinal products and their key characteristics as stipulated by the Law on Medicines and Medical Devices (National Assembly, 2010).

Table 1. Types of medicinal products and their characteristics as defined by law

	Type of medicinal product	**Key characteristics**
1	Biological medicinal product	A biological medicinal product is a medicine whose active substance is a biological substance, meaning a substance derived or extracted from a biological source, for which physicochemical and biological testing, as well as a description and control of the manufacturing process, are required for classification and quality assurance.
2	Immunological medicinal product	In human medicine, an immunological medicinal product is any medicine consisting of vaccines, toxins, sera, or allergens. In veterinary medicine, an immunological medicinal product is administered to animals to induce active or passive immunity, or to diagnose their immune status.
3	Advanced therapy medicinal products	Advanced therapy medicinal products include: gene therapy medicinal products; somatic-cell therapy medicinal products; and tissue-engineered products.
4	Medicinal products derived from blood and plasma	Medicinal products obtained from human or animal blood or plasma.
5	Radiopharmaceuticals	Radiopharmaceuticals include radiopharmaceutical medicinal products, radionuclide generators, radiopharmaceutical kits, and radionuclide precursors. A radiopharmaceutical medicinal product contains one or more radionuclides for medical purposes (radioactive isotopes) when prepared for use. A radionuclide generator is any system containing a parent radionuclide from which a derived radionuclide is produced, typically by elution, for use in a radiopharmaceutical product. A radiopharmaceutical kit is a preparation intended to be combined with or dissolved in radionuclides immediately prior to use. A radionuclide precursor is any other radionuclide produced for the purpose of labeling another substance prior to its application.

	Type of medicinal product	Key characteristics
6	Herbal medicinal product	A herbal medicinal product is any medicine whose active ingredients consist exclusively of one or more substances of plant origin, one or more herbal preparations, or a combination of one or more substances of plant origin with one or more herbal preparations.
7	Traditional and traditional herbal medicinal product	A traditional medicinal product is based on scientific principles and the results of tradition or other conventional therapeutic approaches. Marketing authorization is granted for traditional medicines in accordance with the Law.
8	Homeopathic medicinal product	A homeopathic medicinal product is a medicine prepared from substances, products, or compounds constituting homeopathic substances according to the homeopathic manufacturing process, following the methods of the European Pharmacopoeia or pharmacopoeias valid in an EU member state.
9	Veterinary medicinal product	A premix is a pharmaceutical form of a veterinary medicinal product intended for mixing with animal feed. A medicated feed premix is a special pharmaceutical form of a veterinary medicinal product produced exclusively for the preparation of medicated feed.
10	Magistral and galenic medicinal product	A magistral medicinal product is prepared in a pharmacy according to a prescription (formula) for a specific patient or user. A galenic medicinal product is prepared based on valid pharmacopoeias or magistral formulas in a galenic laboratory and is intended for patients of a pharmacy, other healthcare institutions, or other forms of health services when no authorized medicinal product is available under the conditions prescribed by law and subordinate regulations.

Principles of Good Pharmacy Practice in the Provision of Pharmaceutical Services in Serbia

Good Pharmacy Practice is defined as “a system of standards and guidelines that enables the provision of pharmaceutical services of appropriate quality to every patient, with the aim of delivering optimal, evidence-based pharmaceutical healthcare” (Guide to Good Pharmacy Practice, 2021, p. 2). Good Pharmacy Practice (GPP) in Serbia is based on four core principles: patient well-being, optimal use of medicines, promotion of rational and cost-effective prescribing and dispensing, effective communication and multidisciplinary collaboration in the provision of pharmaceutical services.

The role of pharmacy practice is “to supply citizens with medicines, medical devices, and other health-relevant products; to provide services and offer advice and guidance on the correct use of medicines and other products, adverse effects, and potential drug interactions. In recent years, the term ‘pharmaceutical healthcare’ has been adopted as the essence of pharmacy practice, with patients and society as the primary beneficiaries of pharmacists’ activities” (Jović & Tasić, 2009, p. 2). The healthcare system as a whole “is reflected in the delivery of services. Pharmaceutical services provided in pharmacies directly impact people’s health and quality of life. Pharmacists are obliged to ensure that the service provided to each patient meets appropriate quality standards, achieved through compliance with the requirements of GPP” (Jović & Tasić, 2009, p. 3).

To fulfill these principles, the following conditions are necessary: "the pharmacist must conduct pharmacy practice in accordance with the GPP Guide and the established quality system for pharmacy services; assessment and development of competencies should follow the National Framework for the Assessment of Pharmacist Competencies to ensure high-quality pharmaceutical healthcare; educational programs for the pharmacy profession should be competency-based and aligned with current needs and developments in pharmacy practice; the pharmacist must have access to up-to-date, evidence-based, independent, comprehensive, and objective information regarding therapy, medicines, and other health-promoting products; continuous collaboration with other healthcare professionals, particularly physicians, should be established as a partnership related to patient therapy, based on mutual trust regarding all pharmacotherapy matters; the pharmacist must have access to information about the patient's health status and ongoing therapy, which is necessary to provide quality pharmaceutical services; the pharmacist should actively participate in the pharmacovigilance system, including reporting suspected quality defects of medicines and medical devices, as well as suspected falsified medicines, in accordance with relevant laws regulating medicinal products and medical devices, which enables the pharmacist to report and collect feedback on adverse reactions to medicines and medical devices; the pharmacist must identify, document, and report problems related to medicines; the pharmacist must comply with regulations for the management of pharmaceutical waste" (Guide to Good Pharmacy Practice, 2021, p. 11).

Conclusion

The expansive production and use of medicines at the global level has been driven partly by the rapid development of the pharmaceutical industry and partly by the needs of modern medicine, which has evolved toward increasingly combined applications of medicines and medical treatments as an almost universal practice. Modern types of medicines have become not only significantly more effective compared to earlier formulations and effects, but also more specific in their modes of action. It is considered that any drug therapy necessarily implies coherence in the approach of all participants, including the patient, the physician, the pharmacist, and other professionals involved in providing the necessary medical services.

As stated at the outset, the healthcare system represents one of the most complex systems in any country.

At the national level, each state has established a legal framework governing the types and handling of medicines, as well as other key aspects, based on the adoption of relevant laws and subordinate regulations. Rights and obligations are defined, particularly regarding the quality, efficacy, and safety of medicines. It should be noted that the development of legal regulation in this field in most countries has been primarily driven and stimulated by numerous harmful consequences resulting from the consumption of medicines that were not adequately regulated. New laws have been enacted to ensure greater safety of medicines for both humans and animals.

Of particular importance is the upward trend in the adoption of national standards in pharmacy related to healthcare principles, which are included and implemented through the established concept of good pharmacy practice in the majority of countries worldwide.

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Pravna regulativa o vrstama i tretmanu lekova uz osvrt na principe Dobre apotekarske prakse u pružanju farmaceutske usluge u Srbiji

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Sažetak

Zdravstveni sistem predstavlja jedan od najsloženijih sistema u bilo kojoj državi. Članom 65. Zakona o zdravstvenoj zaštiti uređeno je da se u zdravstvenu delatnost na primarnom nivou zdravstvene zaštite ubraja, između ostalog i farmaceutska zdravstvena zaštita. Na nacionalnom nivou svaka država ima uspostavljen pozitivnopravni sistem uređenja oblasti koja se odnosi na vrste i tretman lekova, kao i svih drugih ključnih pitanja, a koji je zasnovan na donošenju odgovarajućih zakona i podzakonskih akata. Smatra se da svaka terapija lekom obavezno imlicira koherentnost u pristupu svih učesnika - i pacijenta, i lekara, i farmaceuta, kao i drugih učesnika u ovom procesu čije su medicinske usluge potrebne. U radu je nakon kraćeg osvrta na pojam i značaj farmaceutske delatnosti, lekova i medicinskih sredstava, analizirana pravna regulativa koja uređuje vrste i tretman lekova, pri čemu su pored analize važećih zakona predstavljeni i relevantni podzakonski akti. Na kraju, učininjen je osvrt na principe Dobre apotekarske prakse u pružanju farmaceutske usluge u Srbiji.

Ključne reči: lek, medicinsko sredstvo, farmaceutska delatnost, Dobra apotekarska praksa, zdravstvena zaštita

Between Cooperation and Rivalry: Attempts of Yugoslav and Italian Communists to Define Common Attitudes Towards Movements of the Early New Left in 1968

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Between Cooperation and Rivalry: Attempts of Yugoslav and Italian Communists to Define Common Attitudes Towards Movements of the Early New Left in 1968

Abstract

Deep structural changes of the Western European societies in the years after the Second World War and the creation of welfare state policies influenced leftist political thought in the countries of the Western Block to take many different paths of ideological evolution. Two of the most important currents that emerged on the European left in the aftermath of the political turmoil which marked the year 1968 were Eurocommunism and ideologies of the New Left. Meanwhile, the League of Communists of Yugoslavia developed close cooperation with the Italian Communist Party, which would soon become the first Eurocommunist party in Europe, and participated in creation of the Reformist Block, an informal group of European Marxist parties that would start numerous political initiatives in order to weaken the Soviet influence in the international socialist institutions. This paper will try to summarize the results of historical research conducted in three archives in modern-day Serbia on the subject of Yugoslav participation in the formation of the collective attitudes and policies of communist parties from the Reformist Bloc towards political organizations associated with ideologies of the New Left. Also, the aim of this paper is to contribute in the long research process that could eventually provide an answer to the question – was cooperation between Eurocommunists and the New Left ever possible, and to what extent did their rivalry influence the events on the European left?

Key words: *Eurocommunism*, *New Left*, *democratic socialism*, *League of Communists of Yugoslavia*, *Communist Party of Italy*.

Structural Origins of Eurocommunism and of the New Left Ideologies: The Italian Case as a Model for Understanding the Turmoil on the European Left

For the last six decades, numerous researchers from the fields of social science and humanities have invested significant effort in trying to define, distinguish, and estimate the different forms of influence that new social policies introduced after the Second World War (so-called ``welfare state`` policies) had on different societies in the countries of the Western Bloc (Weller & Sant'Ana, 2019, pp. 2–30). Though the costs and contributions of ``welfare state`` policies to this day remain a subject of debate among the parties from both the right and left wings of the political spectrum, many experts agree that deep structural changes that influenced societies of Western Europe and the United States had at least a noteworthy influence in creating the same ideological, cultural, and political developments that allowed for the previously mentioned debates to take their current forms (Obinger & Schmitt, 2011, pp. 246–270). One significant aspect of the aforementioned evolution in the sphere of ideas that is to a certain extent disregarded in historiography today was the change that occurred within those perceptions and beliefs, which shaped the policies of leading Marxist parties and unions in the countries of Western Europe (Petersen & Mioni, 2022, pp. 43–59). This process was exceptionally intense and fast in Italy, where swift social and political changes in the aftermath of the Second World War created an opening for leftist

movements to rapidly increase their political power and social influence, which in turn increased the ferocity of competition on the Italian left (Drake, 2004, pp. 47–63).

Analyzed sources are suggesting that Italian communists have developed new and rediscovered old ideas after witnessing the changes that Italian society was going through in the late 1950s and early 1960s, which they, as contemporaries, already perceived to be consequences of industrialization, technological modernization, urbanization, development of consumer culture, new artistic waves and other aspects of the long term historical and social process that was later named *Italian economic miracle* (Archives of Yugoslavia (AY), League of Communists of Yugoslavia (LCY), 507-IX, 48/I-490-525, Recorded conversations with Italian communists about the social and political situation in Italy). At the same time, the Italian working class became unprecedentedly unionized, while growingly influential unions were able to pressure the government into further expanding the same policies that led to the rise of the financial and political power of the unions, thus constantly renewing the phenomenon that would later be defined as the ``welfare state circle`` (Pons, 2001, pp. 3–27; Macdonald, 1996, pp. 152–188). However, this process had quite an unexpected effect on the popularity of far-left parties in Italy, and a certain number of Italian communists already in the early 1960s wrote about how the working class has lost interest in the concept of a ``global revolution``, as well as patience for complex Marxist theory, and is becoming increasingly more concerned with the local problems of their own social habitat, which they could now address through their communal representatives and unions (Brogi, 2018, pp. 134–157; Sassoon, 1992, 139–169). With the social and cultural changes, it was becoming ever more apparent that the age of right-wing dictatorships on the Mediterranean was over in Italy, and thus the fear of a new fascist takeover was no longer powerful enough to fuel the ideological radicalization of the Italian workers in their transition towards the consumer class (a phenomenon which at the same time became a primary subject of later famous debates in British sociology, see more in: Goldthorpe, 1967, pp. 11–37; Crewe, 1986, 620–638).

The effort of different leftist organizations to explain all new cultural phenomena and adopt political practices to the new social reality led towards the formation of two main directions of thought, the New Left and Eurocommunism. The case of the Italian left represents one of the best possible examples of the great changes on the European left in the late 1950s and early 1960s since in Italy, the ideas that would later define both paths of ideological evolution started forming during the immediate aftermath of the sudden economic changes. Yet, while the forces of the New Left were left largely outside the perspective of major political parties in Italy and Europe until the rebellions of 1968, Eurocommunist reforms attracted attention from many ``traditional`` parties of far-left in both Eastern and Western Europe (Kriegel, 1967, pp. 253–268; Raymond, 2005, pp. 40–63). Even during the times of the PCI`s *(Partito Comunista Italiano*) Bolshevization there were some Italian Marxists who openly expressed doubts in the idea that Bolshevik socialist model is universally applicable to all countries, geographic regions, and societies in all historical periods. In the years that followed the split between the Yugoslav and Soviet parties in 1948, many members of analytical offices within the Yugoslav party enthusiastically reported about those Italian Marxists and some communist party members who returned to exploring the works of Antonio Gramsci, especially those in which he further elaborated on his famous words from his letters to the communists of Turin, where he stated that ``*there is no magical formula for creating socialism*`` (AY, LCY, 507-IX, 48/I-392-426, Reports about the attitudes of PCI leadership).

Following Antonio Gramsci`s ideas of adjusting the political practice and eventually the socialist model itself to the imperatives of local political and economic circumstances of numerous Italian provinces with different histories and cultures, Italian communists to a certain extent unknowingly started to create a new party ideology already in the early 1960s (AY, LCY, Ideological Commission, II/2-b-244-252, Documents for preparation for the sessions of the Ideological Commission). Although the new ideology of Italian party, which would later become known as *Eurocommunism*, was defined only after the split with Soviet party in 1968, and formally adopted during the famous ``historical congress`` (XII Congress of PCI) in 1969, prominent Italian communists have already started, as early as mid-60s, to elaborately inform their Yugoslav counterparts of their intentions to change the party ideology, as relations between the two parties slowly grew ever closer. However, Italian communists have been aware that the road of changing the party policies and eventually, the party ideology itself would certainly lead them to the point where it would be no longer possible to maintain good relations with the Soviets and communist parties of the Eastern Bloc. Subsequently, they were already searching for new friends and allies within growingly vast and diverse spheres of of international socialist movements, which they have found within the ranks of the increasingly influential League of Communists of Yugoslavia (AY, Cabinet of the President of the Republic (CPR), I-3-a/44-59-62, Information about the visits of general secretaries of PCI Lugi Longo and Enrico Berlinguer).

Yugoslav Role in the Creation of the Reformist Bloc on the European Far-Left

Reconciliation of the Yugoslav and Soviet parties in mid to late 1950s was quickly followed by the development of close cooperation between the LCY and PCI, which was an exception in comparison to the usual development of relations between Yugoslav communists and Marxist parties of both Eastern and Western Europe, since the majority of these parties still held reservations towards evolving the cooperation with the LCY beyond what French communists defined as ``*coldly warm formalities*`` (AY, Socialist Alliance of the Working People of Yugoslavia (SAWPY), A-074-078, International Cooperation, Reports on cooperation with PCI and PCF). Besides the already existing determination of some structures within PCI to break away from the overwhelming influence of the Soviet party, another factor that contributed to the fast development of cordial relations between Yugoslav and Italian communist parties could have been the constant increase in the process of exchange between Yugoslavia and Italy. Almost immediately after the formal renewal of the relations between the League of Communists of Yugoslavia and communist parties of Western Europe in 1956 and 1957, delegations of the PCI Central Committee started to visit Yugoslavia almost regularly every year, while it was not uncommon for the individual members of the Italian Communist Party leadership to make more than a few visits to their Yugoslav comrades during the course of the same year (AY, CPR, I-3-a/44-59-62). At the same time, Italian Marxist papers started to gradually increase the number of articles dedicated to the questions related to the problems and successes of Yugoslav economy, foreign policy, and most frequently, about the evolution of the Yugoslav party ideology and the development of the Yugoslav socialist model (AY, LCY, 507-IX, 48/I-374-665, Reports about the articles concerning Yugoslavia published in PCI party press). Already in the late fifties and early sixties it became common for Palmiro Togliatti and Luigi Longo, as well as for other members of the PCI leadership, to openly criticize the policies of the Soviet party in their increasingly frequent conversations with Josip Broz Tito, Aleksandar Ranković, or Edvard Kardelj, and to propose such

changes to PCI policies that would be similar to the principles of Yugoslav conceptions of self-governance, internal democratization and decentralization of the party (AY, LCY, 507-IX, 48/I-392-426, Reports about cooperation and communication with the Italian Communist Party).

The Yugoslav party defined its first policies of financial support towards Italian communists even before the reforms of PCI political practices managed to attract the attention of other European Marxist parties. During the years that followed the informal beginnings of changes in PCI ideology and political practice, the League of Communists of Yugoslavia continued to develop cooperation with the Communist Party of Italy, while the increasingly closely connected Yugoslav and Italian communists worked together on organizing new collective political initiatives of European Marxist parties and lobbying in the international communist institutions in an endeavor to secure wider support of the numerous far-left parties for the new Eurocommunist ideology (AY, SAWPY, A-074-078). For example, analyzed sources show that in this period Italian and Yugoslav communists often engaged in long disputes with the communist parties of the Eastern Bloc and clashed with the leaderships of Soviet and Chinese parties over many different questions, from the debates about the influence of the Soviet party on the European far-left to the joint efforts of Italian and Yugoslav communists to support King Sihanouk against the Khmer Rouge in Cambodia (AY, CPR, I-3-a/44-66-69). Notes taken during the conversations between delegations of Italian and Yugoslav communists in the early seventies show that Enrico Berlinguer and others members of the Italian party leadership openly promised to follow the path of Yugoslav party in the affairs of international communist institutions, while Josip Broz Tito and members of LCY Central Committee promised that Yugoslavia will continue to provide financial aid to all the plans of Italian communists in regard of expanding their new ideology through Europe and the world, expand the policies of financing activities of Italian communists in Yugoslavia, while providing various forms of protection for the Italian communists against possible retribution of the Soviet party leadership (AY, LCY, 507-IX, 48/I-392-426).

However, by far the most discussed sphere of constantly expanding cooperation between Yugoslav and Italian communists, both in the reports of analytical offices of the LCY and during the conversations between the two party leaderships, was the creation of the ``Reformist Bloc`` of the European Marxist parties. State institutions of Yugoslavia and party commissions of the LCY invested a considerable amount of effort and resources in building and maintaining close relations with the reformist fractions of French, Greek, and Spanish communist parties, as well as in helping the Italian communists in their endeavors to integrate these fractions in the early international initiatives of the future Eurocommunist parties. Since LCY leadership opposed the usage of the term ``Eurocommunism``, a compromise was made between Josip Broz Tito and Enrico Berlinguer that the new bloc of the European Marxist parties will refer to themselves as democratic socialists, thus using the ``old`` term, which implied a connection with the earlier ideology of German communists under the leadership of Rosa Luxembourg, whith whome Lenin and Trotsky had famous desputes about the necessity of creating one party dictatorship in order to inshure transition from capitalist reality to Marxist utopia. Aiming to deny even the Marxist character of new ideologies that were forming on the European far-left, members of the Soviet and other Eastern Bloc parties started using the term ``Reformist Bloc`` to define the new informal political alliance between Yugoslav and Italian communists and other Mediterranean democratic socialists. In doing so, the Soviets and their allies were referring to old debates between Lenin and the social democrats of the late XIX and early XX century, majority of whom were back then still devoted Marxists, and symbolically

marking supporters of new leftist ideologies from the ever growing spectrum of democratic socialism as ``outcasts`` and ``traitors`` from the perspective of those who believed in the universal and timeless character of those principles that defined the Bolshevik socialist model (AY, LCY, 507-IX, 122/1-52-81; AY, LCY, 507-IX, 48/I-392-426; AY, LCY, 507-IX, 33/I-210-255; AY, LCY, 507-IX, 33/I-712-779; Analytical reports on the development of cooperation between LCY and PCI, PCF, PCE and KKE).

On the other side, Eurocommunist parties and LCY adopted the term ``Reformist Bloc`` when addressing their own group formed in opposition to the Soviet influence in the international communist organizations. Yugoslav and Italian communists concluded that Soviets ``*have provided LCY and PCI with a favor*`` by granting them a term that is short and convenient to, and, at the same time, allows them to express the crucial point of their cooperation against the Soviet withougt getting into debates about how Yugoslav party wants its socialist model to continuously be seen as a unique alternative to the Soviet model, while avoiding to make the same model seem indistinguishable from the new Eurocommunist ideologies whose development LCY supported (AY, SAWPY, A-074-078, International Cooperation, Reports on cooperation with PCI). Recorded conversations between the members of Yugoslav and Italian party leaderships show that leaders of the two parties sometimes even went as far as to mock the Soviets and joke about the fact that Soviet party leadership is still expecting ordinary working, and consumer middle-class voters, as well as university students in Western Europe during the late 1960s to find and comprehend some contemporary relevance in old debates between Lenin and social democrats. Yet, with the great student rebellions of 1968 and the appearance of the New Left movements in the United States and Western Europe, Italian and Yugoslav communists would soon come to the rather disappointing realization that their understanding of new leftist competition and the social causes of its emergence is surprisingly similar to the Soviet understanding of numerous phenomena in regard to the evolution of Eurocommunist ideologies or rediscovery of democratic socialism in Western Europe (AY, LCY, 507-IX, 48/I-490-525, Recorded conversations with Italian communists about the social and political situation in Italy).

Year of Shock: The Efforts of European Communists to Understand and to Define the New Movements and Rebellions of 1968

When great student rebellions of 1968 broke out in the countries of Western Europe and in the United States, communist parties of both the Eastern and Western blocs found themselves in a situation that members of French Communist Party`s (PCF) leadership described as ``*a state of shock and disbelief*`` (AY, LCY, 507-IX, 33/I-210-255, Reports on cooperation with the Communist Party of France). Analyzed sources indicate that communist parties of the Mediterranean showed considerably more concern with the rising of the new movements and with them, new leftist ideologies, than was the case with communist parties of the Eastern Bloc, which didn't have to fear the possible appearance of new political competition. According to later testimonies of leading Eurocommunists, up until the spring and summer of 1968, members of Italian and French communist parties shared a belief that they were the only force on the Western European left, beside the socialist parties of both countries, that enjoyed enough popularity, had the required resources, and possessed the necessary social influence to organize and lead demonstrations that would look similar to those that occurred during the ``Red Spring`` of Europe (1946-1949) and later during the 1950s, which had numbered more than a million participants. During

one of the increasingly frequent meetings with the LCY leadership, a member of the PCI Central Committee stated: ``*It is not the ideology of the new movements that French communists find to be so shocking…It is the fact that bourgeoisie scribes from Sorbonne have rallied a hundred thousand workers to participate in their rebellion, even some from unions under PCF control, thus the party itself may be forced to join them…*`` (AY, LCY, 507-IX, 48/I-431, Reports about visits of Carlo Galluci and Giancarlo Pajetta).

In this regard, two examples of the most common reactions in relation to new university movements can be recognized in the comparison of how French and Italian party leadership reacted to student rebellions. More conservative French party leadership quickly came into conflict with the university professors and students who led the rebellion at Sorbonne University, while the youth of the French party often clashed with the members of the new movements on the streets of Paris. Diplomatic representatives of Yugoslavia in France reported that physical conflicts between young French communists from the provinces and some student groups didn't stop even after the French party joined most of the communist unions in support of the general strike and demonstrations that followed the uprising at Sorbonne (Diplomatic Archives of Serbia (DAS), Federal Secretariat for Foreign Affairs (FSFA), F-41, France, year 1968, Information about the attitudes and activities of the French communists). On the other hand, Italian communists wrote to their Yugoslav counterparts about their fears that they weren't fast enough in implementing changes to their political practice and have thus missed out on the opportunity to integrate new movements into the PCI sphere of influence on the Italian far left. Some authors of articles in Italian Marxist papers even went as far as to openly suggest that the Italian party must accelerate the process of changing its party ideology even at the cost of permanently damaging relations with the Soviet party, arguing that a split with the Soviets will eventually come, if not in the near future, then ten years from that point, but should Italian party continue to prolong implementing reforms, the PCI itself may not be a politically relevant force in a decade (AY, LCY, 507-IX, 48/I-392-426, Information about the writing of the Italian press and recorded conversations with PCI members).

However, both Italian and French communists displayed a considerable amount of concern about the agenda of new movements on the European left, and especially about the perceived ``*lack of class consciousness*`` and traditional Marxist principles in the political agenda of those movements that later became known as the first organization of the New Left in Europe (DAS, FSFA, F-41, France, year 1968, Reports on the writings of PCF party`s press). Beside the differences in defining priorities of their social and political engagement, Italian and French communists alike emphasized that the perceived anti-authoritarian character of the new movements went too far from the perspective of the traditional Marxist parties, leaving the materialistic aspect and attaching itself to more abstract, cultural questions the new movements have oppened. For example, while students at Sorbonne declared PCF party bureaucracy to be ``*as authoritarian in both spirit and action as De Gaulle and his administration*``, prominent Italian Marxists and members of the PCI Central Committee wrote numerous essays in which they explained how many student movements view authoritarian elements in government and within state institutions as a problem that arrived from the reproduction of dominant conservative culture, rather than as just a small part in the larger mechanism in which the class-baised system conducts its generational reproduction and oppression. Another aspect in which ideologies of the new movements and old communist parties differed was the relationship between the ``individual`` and the ``collective`` in the context of organized political action. While many of the early university movements declared that the goal of collective struggle was to

free the individual, leadership of French and Italian communist parties claimed that everything except the individual contribution in collective struggle leads to leftist parties falling a step away from the idea that nothing from the spectrum of individual hardships exists outside the influences of social reality and a step closer to those liberal parties that explain social problems through individual responsibility and/or lack of meritocratic principles (AY, LCY, 507-IX, 33/I-210-255; AY, LCY, 507-IX, 48/I-392-426, Reports about the important attitudes of PCI and PCF).

It is interesting to note that both PCI and PCF leadership expressed great admiration for the way in which the Yugoslav party was able to politically crush the opposition in 1968 and then to integrate a significant number of students and professors who participated in the rebellion into the party structures of the LCY (AY, LCY, 507-IX, 33/I-210-255, AY, LCY, 507-IX, 48/I-392-426). After the famous speech delivered by Josip Broz Tito on 9th of June 1968, in which the Yugoslav president publicly offered to resolve the problems of Yugoslav society that the student movement pointed out within the sphere of LCY party ideology and subtly offered amnesty in exchange for abandoning the demonstrations, the student movement in Yugoslavia became deeply devided, with the majoirty of students and professors accepting the compromise with the party and the state. Analyzed sources show that almost immediately after the end of student demonstrations in Yugoslavia, representative organizations of the students who were close to LCY rapidly expanded their membership and afterwards engaged in numerous political, and sometimes even physical confrontations with those students who remained determined to insist on fullfilment of their movement's initial demands (State Archives of Serbia (SAS), Fond of the Security and Intelligence Agency (BIA), XIII-3-8, Reports about occurrencess on the Faculty of Philosophy, University of Belgrade, after the speech of Josip Broz Tito). Even before that point, Yugoslav students failed to incite wider rebellions (notable attempts being the examples of students entering factories and military facilities and finding nothing but dismissal of their agenda and even anger towards the idea of participation in actions against the party) and to gather larger support from the general public, as was the case in Italy and especially in France, where many unions declared support for the rebellion at Sorbonne and subsequently went on strike (AY, LCY, 507-IX, 30/I-331, Information about the internal changes in French party and changes of PCF attitudes).

Italian and French communists estimated that main reasons for the LCY's success was the fact that university movement in Yugoslavia was all along much closer to traditional Marxist ideologies than to those new ideologies in Western Europe and US they already started defining as New Left. One of the letters sent to the Yugoslav party headquarters from the party office for international relations of PCI reads: ``*If there is any movements in Yugoslavia simmilar to the New Left in Italy and France, those should be searched for only among those students that refused the compromise offered by Josip Broz Tito in his speach on the 9$^{th}$ of jun...*`` (AY, LCY, 507-IX, 48/I-427-456, Correspondence between PCI and LCY departments for international relations). Even the minority comprised of Yugoslav professors and students who refused to accept compromise offered by LCY were, according to PCI and PCF members who communicated with LCY institutions, much closer to their own Eurocommunist ideology or some other form of democratic socialism, then they were to the ideologies of New Left (AY, LCY, 507-IX, 33/I-210-255; AY, LCY, 507-IX, 48/I-392-426, Reports about the important attitudes of PCI and PCF). However, it is also important to note that documents from Yugoslav secret service and party ideological commissions show a considerable amount of concern within the Yugoslav regime about the possible cooperation of

Yugoslav students with their counterparts in Italy, France and even Czechoslovakia (Yugoslav party was the first Marxist party of Europe to support rebellion in Czechoslovakia and new reformist policies of Dubček, and yet Yugoslav secret service followed those students who had family members at the University of Prague), and almost obsessive effort to prove that university movements in Yugoslavia were under various potential ``Western`` influences, including the supposed ideological connection between Yugoslav student movement and organizations of New Left in Western Europe (SAS, Fond BIA, XIII-4, Analysis of student movement and their activities).

While it is important to concider to whant extent were Italian and French communists aware of social reality and political situation is Yugoslavia, reports of the LCY party institutions testify that authors of the articles in PCI and PCF party newspapers claimed that it was precicely the supposed ``class based aproachment`` in defining the agenda of the university based movement and concern about the rise of social inequalities that differentiated the student rebellion in Yugoslavia from the student rebelions in major financial centres of Western Europe (AY, LCY, 507-IX, 33/I-255-310; AY, LCY, 507-IX, 48/I-427-456; Information about the writings of Italian and French press about the social and political situation in Yugoslavia). Apart from that aspect, Italian and French communists on multiple occasions confessed to their Yugoslav counterparts that they don't see how it can be possible for a student movement that accuses a communist party of betraying its own revolutionary idealism to be even remotely similar to those movements in Western Europe, which refused even to consider cooperating with the ``old`` communist parties of Italy and France. Granted, the Italian communists did recognize the concern of their Yugoslav counterparts that the perceived anti-authoritarian agenda and supposed attraction to cultural issues of the Yugoslav student movement were somewhat similar to what they had whitnessed in Rome or Paris, but they had a strong counterargument, which stated that those aspects had been present in such a small portion of the Yugoslav student movement that they may as well be interpreted as nothing more than an expected consequence of cultural Westernization in rich and urban parts of Yugoslavia. Besides, Italian communists argued, the majority of those who activly participated in the Yugoslav student movement were never as distant from their traditional culture and local community as was the case with members of university movements in Western Europe, which, according to leading Italian experts in Marxist theory, made Yugoslav rebels of 1986 unable to even understand some of the global occurrances, let alone articulate their own attitudes towards them. Authors of some articles in the French party press, who were not concerned with keeping good relations with LCY like analysts who came from the ranks of PCI membership, soon added in their own version of this commentary – ``A*nd more importantly, Yugoslav students are more concerned with the problems of their own society* (Than their French counterparts)`` (DAS, FSFA, F-41, France, year 1968, Information about the attitudes and activities of the French communists). Thus, although dissidents from the Yugoslav theater of the global ``year of the rebellions`` were largely politically ineffective and irrelevant from the perspective of the socialist regime and of the larger Yugoslav society, narratives created by the French and Italian communists alike portrayed the same dissidents as much less elitist, and much more compassionate and empathetic than their Western counterparts. Consequently, neither Yugoslav communists nor their French and Italian counterparts expected either a radical, violent organization of the New Left to be formed in Yugoslavia or a more liberal, academically oriented one. (AY, LCY, 507-IX, 48/I-431-336, Conversations with Luigi Longo, Enrico Berlinguer, Giancarlo Pajetta and Carlo Galluci).

Adopting Policies of Tolerance and Restraint in Cooperation with the New Left

Although the Yugoslav party and secret service privately tried to find both communicational and ideological connections between not just the student movement but wider opposition in Yugoslavia with the new global movements and ideologies that only appeared in the perceptions of a large number of Yugoslav and Italian communists after the turmoil of 1968, the official LCY institutions formally denounced even the possibility that such relations may exist (DAS, FSFA, F-41, France, year 1968, Conversations with French communists and socialists). One of the factors that may have influenced the formation of such a narrative could be the fact that it was, to a certain degree at least, expected from the official party and state institutions to follow the pattern in which Josip Broz Tito addressed the students in his famous speech, and he denied the existence of any connection between the then contemporary student rebellions in Poland or France and the student movement in Yugoslavia (Museum of Yugoslav History, television recordings of the speech of Josip Broz Tito from 9tu of June 1968, available on the following link: https://www.youtube.com/watch?v=Nne2feNUEu8). On the other hand, this possition made it very easy for Yugoslav communsits to agree with the previously explained conclusions of their Italian and French counterparts that there wasn't any significant similarities between the Yugoslav students and the participants of university movements in Western Europe and the United States, including those early political parties and other organizations formally founded in the aftermath of the global wave of rebellions which adopted some of those ideologies that were being increasingly refeered by contemporaries as ideologies of the New Left (AY, LCY, 507-IX, 33/I-210-255, AJ, SKJ, 507-IX, 48/I-392-426, Reports on conversations with the members of PCI and PCF).

Despite that, Yugoslav communists still had to participate in the establishment of the common attitudes and policies of the ``Reformist Bloc`` towards the movements of the New Left in Europe. Consequently, actions and ideologies of the New Left organizations became a recurring subject of numerous meetings, seminars, and conferences organized by future Eurocommunists, who at that point still used the term democratic socialists to define themselves, and their Yugoslav allies. It is interesting to note that, despite signifficant efforts of LCY office for international relations to explain in deatail various new ideas presented by those thinkers of the New Left whose works have already been published in countries of Western Europe, many leading Yugoslav communists still found it hard to participate in discussions about the New Left with their Italian counterparts, and on a few occasions Yugoslav representatives openly stated that they don`t have even the slightest understanding of compex ideological distinctions that Italian Marxists have described during the course of the mentioned occasions. This may be considered a potental reason why Yugoslav party representatives were almost always quick to declare support for the perceptions and suggestions explained by Italian communists, and even to go as far as suggesting that French, Spanish and Greek communists should also ``*have faith*`` in the judgment of the Italian party leadership when it comes not just to the issue at hand, but to all matters related with the current development of Marxist theory and other leftist ideologies in Western Europe and in the world (AY, LCY, 507-IX, 48/I-395-439, Recorded conversations with the members of PCI leadership; AY, LCY, 507-IX,30/I-213, Information on the development of cooperation between LCY and PCF).

Other signifficant factor that may have infleunced the Yugoslav attitude in regard of defining collective decissions of communsit parties involved in ``Reformist bloc`` could potentially be deducted

from analyses of LCY party records, in which we can find debates of Yugoslav communists that have been concluded with the assessment that many new movements on the European far-left are deeply entrenched in a state of almost perminant conflict with the domminant parties of the moderate right and centre left, the same parties which participated in Italian and French goverments at the time (AY, LCY, Ideological Commission, II/2-b-(244-252), Documents for preparation for the sessions of the Ideological Commission). Italian democratic Christians and French DeGaullists were strongly opposed not just to all the new movements and student rebellions, but in particular to the rise of New Left ideologies, and Yugoslav communists on more than a few occasions stated that they see the emergence of the ``*common enemy*`` as a potential factor that will contribute towards the development of cooperation between communist parties and the governments of Italy and France. The Yugoslav party has by then already, in a copule of instances, taken the role of a mediator between the Italian communists and democratic Christians, as well as between the French communists and a fraction of the socialist party led by the future president François Mitterrand. To this end, Yugoslav communists have organized seminars, conferences and, most importantly, collective vacations in Yugoslav towns on the Adriatic coast for the members of Italian and French communist and socialist parties, as well as for the leaderships of the unions associated with either communist or socialist parties in Italy or France. On one particular occasion an anonymous author of the report form LCY office for international relations concluded, ``*improvement in relations between communists and socialists in Italy and France, and the relations between PCI and PCF with the governments can be considered a state interest of Socialist Federal Republic of Yugoslavia*`` (AY, SAWPY, A-074-078, International Cooperation, Reports on cooperation with PCI and PCF). Consequently, it is safe to assume that the interest of participating in development of cooperation between communist and socialist parties, as well as between communist parties and the governments of Italy and France, was always a matter which would take precedence over any Yugoslav interest concerning the ``Reformist Bloc``, and especially in comparison to a seemingly trivial matter, as were the relations between communist parties and organizations of New Left perceived in perspective of LCY`s party leadership (for more information about this subject see Filipović, 2023, pp. 505-527).

However, the League of Communists of Yugoslavia was also a firm supporter of those PCI policies which were concerned with improving cooperation between Italian communists and other parties on the Italian left and even insisted upon making the principle of tolerance and communication with political adversaries one of the official policies of all international initiatives started by the parties of the ``Reformist Bloc``. This can be regarded as especially significant in the case of forming Italian party attitudes towards the new movements, since Enrico Berlinguer on numerous occasions stated that Josip Broz Tito`s speech, as well as Yugoslav reaction towards the student demonstrations, inspired certain aspects of PCI policies towards the university movements and some organizations of the New Left in Italy (AY, CPR, I-3-a/44-62-66 Information about conversations between Josip Broz Tito and Enrico Berlinguer). It is also worthy to note that LCY institutions offered to pay for the participation of the new political parties coming from the Italian left in all the conferences, seminars and group gatherings of the European reformists organized in Yugoslavia, provided that PCI leadership assess the ideology of these new movements as ``progressive enough`` for them to be invited to such events. Having this in mind, it is relatively safe to assume that in regard to relations with the New Left, the Yugoslav party would support any course of action the PCI, the other leading party of the ``Reformist Bloc``, decides to implement in Italy and even would go as far as

presenting these stances of Italian communists as the official attitude of the entire reformist group (AY, SAWPY, A-074-078, About the organization of the Mediterranean conference of communist and socialist parties).

In accordance with the previously defined attitudes of leading Italian communists, which have, in light of the latest agreements between Mediteranean communist parties, received support from the League of Communists of Yugoslavia as well as from the Spanish communist party in exile, the XII Congress of PCI defined two different groups of the New Left organizations while using as determining criteria only their political practice, not the ideology of the new movements. The first group was defined as consisting of those New Left organizations which have a pacifist way of conducting their political and social activities and thus exclusively engage in peaceful demonstrations, are not opposed to participation in institutionalized politics, and/or remain open to possible cooperation with other leftist parties and movements. The second group of New Left movements was defined as an ideologically heterogenous group of those parties which have chosen a radical and at times violent approach in their activist practices, which shun the electoral process and mainstream politics, and which refuse the notion of collaborating with the communist, socialist or other ``old`` parties of the European far-left. In the case of the first group, Italian communists decided to engage in cordial communication but restrained cooperation until it could be more clearly assessed to what degree are parties of New Left from this group critical toward the Marxist ideologies. In the case of the second group, Italian communists concluded that if those leftist organizations already refuse to cooperate with PCI, with some of them even having expressed serious animosities towards the traditional Marxist parties and Eurocommunists in general, then at least by accepting to participate in the conflict that they haven`t started, Italian communists would be able to contribute towards further development of their cooperation with socialists and democratic Christians, and other parties in Italian governments who are viewed as primary enemies from the perspective of these new and radical left-wing movements (AY, LCY, 507-IX, 48/I-429, Conclusions of the XII Congress of PCI).

This assessment, which was stated and repeated during the course of discussion, couldn't for obvious reasons become a part of the official PCI declaration about the New Left adopted at the XII Congress, and consequently Italian communists resorted to defining a very long and complex thesis which criticizes political practices and even some ideologies of organizations associated with the second group of the New Left ideologies. In this document, PCI adopted a critique of New Left movements from the previously defined second group which emphasizes the similarities between their radical political practices and those of Marxist parties which insist upon zealously guarding the principles of the Bolshevik socialist model in their most literal form. In severe contrast to them, the declaration of Italian communists then brings up ``bright examples`` of the university movements that have been opposing Bolshevik and anarchist zealotry, but have not transitioned from the ideas of democratic socialism to liberalism either, as some university movements, especially in the US, have already done. In relation to what principles should Italian communists implement when defining their policies towards these examples from the first group of New Left movements, resolutions of the XII Congress advise future Italian party leaders to follow the example of the LCY in regard to the tolerance and understanding shown to the student movements, but also in regard of trying to integrate these smaller organizations into the PCI sphere of influence and to, if possible, ``guide`` their party ideologies towards democratic socialism (meaning the new PCI party ideology). The League of Communists of Yugoslavia and tge Communist Party of Spain inmediatelly after

the XII Congress of the Italian party agreed to make the PCI resolution about the movements and ideologies of the New Left the offical policy of the future European and global political initiatives that would be started by the parties of the ``Reformist Bloc`` (AY, LCY, 507-IX, 48/I-427-428, Reports about the activities of Yugoslav delegation present in Bologna for the XII Congress of PCI).

Years of Lead: Losing the Distinction between Two Groups of the New Left Movements

Even during the political turmoil of 1968, Yugoslav and Italian communists perceived some aspects that would later be associated with the time period both historians and authors of articles in the contemporary press often defined as the ``years of lead`` (*Anni di piombo*) that have lasted from late 1960s to late 1980s. This time period, which was later described as a part of the political crisis that marked the last decade of the welfare state in Europe, was soon to become known for severe political violence, frequent armed clashes of militant groups associated with far-right and far-left ideologies, as well as for assassinations, kidnappings, bombings and other aspects of terrorism (Bull, 2008, pp. 473-488). During this time period, many new radical groups of far-left-inclining youth in Italy, Greece, France, West Germany, Great Britain and later in Spain that were formed during or after the global wave of demonstrations and rebellions in 1968 participated in the acts of terrorism and other violent forms of political activism. Political parties that comprised the governments of the Western European countries have then, with the support of the United States, started attacking ideologies of the New Left in the media, branding them as a cause of the many tragic events that happened during the course of the ``years of lead`` and establishing a political narrative that will soon start to erase the difference between various fractions of new movements (Ronchay, 1979, pp. 921-940). In the early seventies, Italian communists have already assessed that percieved ``moral panic`` raised by popular media and political propaganda of Italian democratic christians and former French DeGaullists will succed in not just turning the public oppinion against the university movements and many notable critics of the Italian and French governments that were associated with them, but in establishing an idea that New Left is not a complex and heterogenous spectrum of ideologies, but instead a unique ideology shared by both rebelious students and far-left terrorists (AY, LCY, 507-IX, 48/I-490-525, Recorded conversations with Italian communists about the social and political situation in Italy).

On the other hand, ideological evolution of both Eurocommunist parties and organizations that followed some of the ideologies of the New Left was starting to gain unprecedented momentum in the early seventies, with the beginning of political crises in leading countries of Western Europe, years of *détente,* the collapse of the last military dictatorships on the Mediterranean and the arrival of many new cultural phenomena that developed in the aftermath of rebellions in 1968. Consequently, some ideological differences that could be considered to be minor at the beginning of this process were starting to appear more significant, while political parties and organizations were constantly searching for more ideological distinctions which would help solidify their social role in the rapidly changing world. Thus, it can be concluded that if there ever was a window of opportunity for cooperation between the communist parties of the ``Reformist Bloc`` and political organizations of the New Left, that opportunity appeared in the inmediate aftermath of the student rebelions, Czechoslovakian crisis, ``great split`` in the International Workers Movement and other significant events which marked the years 1968 and 1969. However, this opportunity failed to materialize while both the Eurocommunists and followers of the New Left ideologies

held significant animosities towards the parties that comprised governments of the Western Bloc and perhaps more importantly, while they shared a status of ``renegades`` from the institutions of ``socialist world`` controlled by the Soviet party and rebels against its power in Moscow (Filipović, 2023, pp. 147–185).

In later years, Eurocommunist parties and their Yugoslav allies became more and more interested in expanding the cooperation with parties of the moderate left and even right centre, while at the same time becoming less tolerant towards liberal parties and university movements of the New Left, whom they had declared to be ``progressive and cooperative`` at first, as well as towards parties from the more radical ``second group``, as defined in the PCI declaration about New Left ideologies, with whom they seemingly never intended to have a relationship past rivalry. From their part, organizations of the New Left defined as participants of ``second groups`` according to their political practices, became even more radical in both their ideologies and their activist roles and thus more distant towards Eurocommunists, who were approaching the age of ``historical compromises`` with their governments. On the other hand, parties from the ``first group`` of New Left ideologies evolved in the same direction former social democrats took at the turn of the century, as they were gradually becoming closer and closer with liberal parties and viewing both Eurocommunists and their own former allies from the ``second group`` of New Left movements as being too radical to cooperate with. In the end, the last permanent barrier for potential cooperation of leading parties of the ``Reformist Bloc`` and both groups of organizations whose party ideology can be considered to be among the ideologies of the New Left was the assassination of Aldo Moro in 1978, ten years after the rebellions of 1968, for which members of the Red Brigades (*Brigate Rosse)* claimed responsibility. Afterwards, PCI offered to cooperate with the government in the struggle not just against the parties originating from the previously defined ``second group`` of New Left movements, but against all possible organizations whose ideology can be defined as belonging to the New Left, which at that point stopped being a complex spectrum of ideologies from the perspective of Italian communists and became solely a synonym for far-left terrorism in Europe.

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Između saradnje i rivalstva: pokušaji jugoslovenskih i italijanskih komunista da definišu zajedničke stavove prema pokretima rane nove levice 1968. godine

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Sažetak

U godinama nakon završetka Drugog svetskog rata, strukturalne promene u društvima Zapadne Evrope i stvaranje politika ”države blagostanja” uticali su da se partije levice u zemljama Zapadnog bloka nađu na različitim i veoma raznovrsim putevima evolucije svojih partijskih ideologija. Evrokomunizam i ideologije Nove levice bile su dve najuticajnije struje koje su se pojavile na krajnjoj evropskoj levici tokom nemira 1968 godine. Za to vreme, Savez komunista Jugoslavije razvio je blisku saradnju sa Komunističkom partijom Italije, koja će uskoro postati prva evrokomunistička partija u Evropi, i učestvovati u stvaranju tzv. Reformističkog bloka, neformalne grupe marksističkih partija Evrope koja će pokrenuti brojne političke inicijative sa ciljem smanjivanja uticaja Sovjetskog Saveza na međunarodne socijalističke institucije. Ovaj rad će pokušati da pruži pregled rezultata istorijskog istraživanja arhivske građe u tri arhiva koja se nalaze u savremenoj Srbiji, sa ciljem rasvetljivanja jugoslovenske uloge u definisanju kolektivnih stavova i politika komunističkih partija Reformističkog bloka prema novim organizacijama koje su osnovali krugovi sledbenika ideologija Nove levice. Takođe, cilj ovog članka je da doprinese dugom procesu arhivskog istraživanja koji bi jednog dana mogao da ponudi odgovor na pitanje – da li je saradnja između evrokomunista i Nove levice uopšte bila moguća, i do koje mere je rivalstvo ovih struja uticalo na događaje na krajnjoj evropskoj levici?

Ključne reči: Evrokomunizam, Nova levica, demokratski socijalizam, Savez komunista Jugoslavije, Komunistička partija Italije.

The Discretionary Powers of Public Enforcement Officers and Their Limits

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The Discretionary Powers of Public Enforcement Officers and Their Limits

Abstract

Discretionary powers of the public enforcement officer represent a limited but significant margin of choice between several legally permitted solutions at the stage of enforcement. They are not systematically and explicitly regulated, but rather arise in a dispersed manner from the provisions of the Law on Enforcement and Security, which leave the enforcement officer with a degree of assessment when selecting the means and objects of enforcement, determining the order and dynamics of enforcement actions, as well as the manner of undertaking auxiliary measures. Due to the intensity of interference with the debtor's property rights, discretionary decision-making is legitimate only if it is strictly confined by the purpose of the proceedings and by the principles of legality, proportionality, and protection of the parties' procedural rights, including the right to a reasoned decision and to a legal remedy. Judicial control ensures verification of whether the decision was made within the limits of the granted powers and supported by reasons that allow the review of legality, thereby preventing arbitrariness. The practical problems observed in the inconsistent application of these powers indicate the need for more precise criteria and a stronger obligation to provide reasoning *de lege ferenda*

Keywords: public enforcement officer, discretionary powers, enforcement proceedings, protection of the parties rights, judicial review.

Introduction

The introduction of the institution of the public enforcement officer into the legal system of the Republic of Serbia represented one of the most significant reform interventions in the field of civil procedural law in the last decade. The primary objective of this reform was to increase the efficiency and effectiveness of enforcement proceedings, relieve the courts of excessive workload, and ensure faster and more reliable realization of recognized and established claims. In this context, the public enforcement officer was conceived as a holder of public powers entrusted with the conduct of enforcement, while enjoying a certain degree of independence in performing these tasks. However, precisely this independence raises important questions regarding the nature and scope of the powers of the public enforcement officer, particularly with respect to the existence and reach of discretionary powers.

In enforcement proceedings, subjective civil rights and obligations are not determined in the same manner as in civil litigation; nevertheless, their realization cannot be conceived without an effective and efficient enforcement procedure (Bodiroga, 2011, p. 194). The right to the enforcement of a court decision must therefore be guaranteed to the same extent as the right to obtain such a decision (Bodiroga, 2012, p. 208).

Unlike traditional judicial decisions, which are more strictly bound by statutory provisions, the actions of the public enforcement officer often involve choosing between several legally permitted options, whether regarding the means and objects of enforcement or the manner in which specific enforcement actions are undertaken. This sphere of decision-making inevitably carries the risk of exceeding the limits of authority and the emergence of arbitrariness if it is not clearly constrained by normative and institutional safeguards.

In domestic legal scholarship, the issue of the discretionary powers of public enforcement officers has not yet been the subject of a separate and systematic analysis. This issue is most often addressed indirectly within broader topics such as the legal status of the public enforcement officer, control over their work, or liability for damages, while discretionary powers themselves remain insufficiently clarified as a distinct legal concept. Consequently, in practice there are uncertainties regarding the distinction between discretionary powers and free evaluation, as well as the limits within which a public enforcement officer may act lawfully and legitimately.

The Concept of Discretionary Powers in Administrative and Procedural Law

Discretionary powers represent a specific form of legal authority in which the legislator leaves a certain margin of decision-making to the competent authority or holder of public powers, allowing them, within the limits set by law, to choose among several legally permitted solutions. Unlike bound powers, where the legal consequence is predetermined and precisely defined by the norm, discretionary powers imply a normatively tolerated flexibility in the application of law.

In contemporary legal theory, discretionary powers are not understood as a space of unlimited freedom of decision-making, but rather as a normative situation in which a public agent, authorized by a competence-conferring norm, chooses between several legally permissible alternatives. The normative framework of discretionary powers is limited and directed, and it must remain subject to the principles of public interest, the rule of law, and other fundamental principles that permeate the legal order (Krešić M., 2025, p. 532).

Starting from the complexity of social relations that legal norms seek to regulate, the legislator deliberately refrains from anticipating every individual situation, instead authorizing the competent authority to assess the concrete circumstances of a case and adopt a decision that most effectively fulfills the purpose of the law. In this sense, discretionary powers serve as an instrument for adapting general legal norms to individual and often unpredictable life situations.

However, discretionary powers do not imply unlimited freedom of action. On the contrary, they are always legally conditioned and restricted by the purpose of the law, the fundamental principles of the legal order, and the obligation to provide reasoning for the decision adopted. These limitations constitute the key distinction between lawful discretionary action and impermissible arbitrariness.

In a state governed by the rule of law, discretionary powers must remain in balance with the fundamental principles of legality, equality before the law, and the protection of the legitimate expectations of the parties. Such powers cannot be used as a means of arbitrary decision-making, but exclusively as a mechanism for achieving the purpose of the law in the most appropriate manner within the legal framework. For this reason, the obligation to provide a reasoned explanation for decisions adopted within the scope of discretionary powers is of essential importance for maintaining trust in the legal order.

These theoretical premises are particularly significant when applied to the public enforcement officer, as the holder of entrusted public powers who directly affects the property rights and legal security of the parties in enforcement proceedings. Precisely because of the intensity of interference with the debtor's rights, the discretionary powers of the public enforcement officer must be clearly grounded in normative provisions and strictly limited, which will be further examined in the following sections of this paper.

Law must constantly evolve and adapt to changes in socio-political reality, new systems of values, and concrete life circumstances, even though in practice it often lags behind social development (Avramović, 2012, p. 323).

Normative Framework of the Discretionary Powers of the Public Enforcement Officer

The Position of the Public Enforcement Officer as a Holder of Public Authority

Entrusted public powers constitute one of the essential features of the position of public enforcement officers within the judicial system (Trešnjev, 2018, p. 302). The law provides that a public enforcement officer exercises the public powers entrusted to them by statute. Unlike notaries public, who are organized as a service of public trust, enforcement officers possess only those public powers explicitly conferred by law, which implies that they undertake certain actions prescribed by law either independently or upon the order of a court (Šarkić, Radulović, Počuča, 2019, p. 58).

Under the Law on Enforcement and Security, the public enforcement officer is authorized to independently carry out enforcement actions within the limits established by law and the enforcement instrument, while being obliged to act conscientiously, impartially, and in accordance with the purpose of enforcement proceedings. It is precisely this independence in action that provides the normative basis for the existence of discretionary powers, while at the same time requiring a clear distinction between permissible discretionary authority and impermissible arbitrariness.

Discretionary Powers in the Conduct of Enforcement Proceedings

The discretionary powers of the public enforcement officer in enforcement proceedings do not stem from a single explicit statutory provision, but are dispersed across a number of norms that leave room for choice among several legally permissible options. Since enforcement proceedings are strictly formal in nature, discretionary powers within this procedure are relatively narrow. These powers most often manifest themselves at the stage of carrying out enforcement, where it is necessary to adapt the general legal norm to the specific circumstances of the case.

One typical example of discretionary authority concerns the selection of the means and objects of enforcement. Although the public enforcement officer is bound by the enforcement instrument and the creditor's motion, they retain a certain degree of assessment regarding the expediency and appropriateness of particular measures, taking into account both the efficiency of the proceedings and the protection of the debtor's rights.

In performing their duties, the public enforcement officer is bound by the principle of formal legality, which implies that the enforcement instrument cannot be reviewed, altered, or adapted within enforcement proceedings. Nevertheless, certain deviations from this principle exist, particularly in situations involving specific or determinable objects (Nikolić, Šarkić, 2022, pp. 1272-1273).

Discretionary powers are also manifested in determining the order and dynamics of enforcement actions, especially in more complex cases involving multiple enforcement measures or interventions affecting different forms of the debtor's property. In such cases, the public enforcement officer determines the priorities of action, assessing which measures will most quickly and effectively lead to the achievement of the purpose of enforcement.

A particular form of discretionary authority is also present when assessing the need to undertake certain auxiliary or preparatory actions, as well as when deciding on the manner of their execution. Although these decisions are formally procedural in nature, they may have a significant impact on the rights and legal interests of the parties, which further emphasizes the need for clear normative frameworks governing their application.

Enforcement proceedings are inherently instrumental, as they serve the compulsory realization of subjective rights that have already been established or recognized. Efficiency and procedural economy represent legitimate objectives of the legislator; however, these objectives cannot be pursued at the expense of violating the fundamental rights of the parties.

By allowing a choice between several lawful solutions, the legislator seeks to ensure the flexibility of the procedure and its adaptability to the specific circumstances of individual cases. Nevertheless, the purpose of enforcement proceedings is not limited to speed and efficiency, but also encompasses the obligation to respect the principles of legality, proportionality, and fairness.

Limits of the Discretionary Powers of the Public Enforcement Officer

The discretionary powers of public enforcement officers in the conduct of enforcement are determined by the fundamental principles of enforcement proceedings. Here, we will address certain principles.

The Principle of Legality as the Fundamental Limit of Discretion

The principle of legality, derived from the principle of constitutionality, requires compliance with all legal norms that form the legal order and lawful conduct by all participants in the proceedings when undertaking procedural actions in enforcement proceedings (Stanković, Trgovčević Prokić, 2020, p. 40). This principle represents the fundamental limitation of any form of discretionary power in a state governed by the rule of law. Although discretionary powers imply a certain degree of freedom in decision-making, they can never exist outside the legal framework nor in contradiction with applicable regulations. A public enforcement officer, as the holder of public powers, is obliged to base every decision adopted within the scope of discretionary authority on the law and the enforcement instrument, respecting their purpose and limits.

Discretionary powers do not imply authority to create new legal norms or to depart from explicit statutory prohibitions. Their function is limited to choosing among several legally permissible solutions already envisaged by the legislator. When a public enforcement officer exceeds these limits, such conduct loses the character of lawful discretionary authority and takes on the features of arbitrariness, thereby constituting a violation of the principle of legality.

In enforcement proceedings, the principle of legality has additional significance due to the intensity of interference with the debtor's property rights. Every decision of a public enforcement officer based on discretionary authority must therefore be clearly reasoned, so that it may be subjected to effective judicial review. The reasoning of the decision represents a key instrument for distinguishing the legitimate exercise of discretionary powers from arbitrary action.

The Principle of Proportionality

In addition to legality, one of the most important limitations of the discretionary powers of the public enforcement officer is the principle of proportionality between the objective to be achieved and the measure used to achieve it. This principle requires that every enforcement action be appropriate, necessary, and reasonable in relation to the purpose of enforcement proceedings. The objective of enforcement proceedings is the lawful and efficient satisfaction of the creditor's claim while simultaneously respecting the rights of the debtor (Bodiroga, 2023, p. 267).

This principle is established in Article 56 of the Law on Enforcement and Security, which provides that, when selecting the means and objects of enforcement for the satisfaction of a monetary claim, the public enforcement officer must take into account the proportionality between the amount of the debtor's obligation and the means and value of the object of enforcement. When choosing between several possible means and objects of enforcement, the public enforcement officer must, ex officio, ensure that enforcement is carried out by the means and against the object that is least burdensome for the debtor. However, the scope of this principle is limited, as it will not apply where the debtor has consented, in the form of a public or legally certified document, that enforcement be conducted by a specific means and against a specific object of enforcement, or where it has been clearly established that there is only one means and one object of enforcement from which the creditor's claim may be satisfied.

When carrying out enforcement, the public enforcement officer, with regard to the choice of the means and objects of enforcement, is guided by the proportionality between the amount of the obligation and the value of the object of enforcement (High Court in Novi Sad, Gži-721/2018, 11 December 2018). In the context of discretionary powers, the principle of proportionality serves to prevent excessive and unnecessary interference with the debtor's rights, particularly in situations where several alternative enforcement measures exist. The public enforcement officer must therefore take into account not only the efficiency of the proceedings but also the degree of burden that a particular measure imposes on the debtor.

Proportionality is of particular importance in enforcement against immovable property, where the consequences of the enforcement officer's actions may have long-term and far-reaching effects on the debtor's life and livelihood. In such cases, discretionary powers must be especially restricted and subjected to stricter criteria of justification. The use of the most severe enforcement measure cannot be justified solely by the interest of the creditor in rapid satisfaction if milder and equally effective measures are available.

The principle of proportionality thus operates as a corrective to discretionary powers, directing the actions of the public enforcement officer toward solutions that maintain a balance between the creditor's interests and the protection of the debtor's fundamental rights.

Protection of the Parties' Rights and the Right to a Legal Remedy

The limits of the discretionary powers of the public enforcement officer are further determined by the obligation to respect the rights of the parties in enforcement proceedings. Although enforcement proceedings have a distinctly coercive character, the parties do not lose their status as holders of

procedural rights, including the right to be informed, the right to a reasoned decision, and the right to a legal remedy.

There are also principles that are not explicitly emphasized but nevertheless permeate enforcement proceedings in their entirety (Keča, 2012, p. 151). One such principle is the protection of the enforcement debtor, according to which the creditor may not obtain less than the amount of the claim, nor may the debtor be deprived of more than what is owed (Jakšić, 2022, p. 882). In enforcement proceedings, the enforcement creditor already enjoys a more favorable legal position, since the existence and validity of the claim have been confirmed by the enforcement instrument (Šarkić, 2018, p. 39). The protection of the enforcement debtor, and of the debtor's property, is ensured through the application of the principle of formal legality as one of the fundamental principles, which means that enforcement cannot be carried out beyond the limits of the enforcement request (Masnikosa, Radovanov, 2018, p. 53).

The right to a legal remedy represents a key mechanism for examining the legality and correctness of the actions of the public enforcement officer, including the verification of whether discretionary powers have been exercised in accordance with the law.

The filing of legal remedies may affect the duration of enforcement proceedings, particularly where such remedies have suspensive effect, as this may slow down the procedure, especially in situations involving the abuse of procedural rights. In order to preserve the principle of efficiency in enforcement, the legislator has opted for the non-suspensive effect of legal remedies, thereby preventing ordinary legal remedies from obstructing the satisfaction of the enforcement creditor's claim. At the same time, the control mechanism within enforcement proceedings should ensure the realization of important legal-policy objectives, such as the right to a fair trial, equal legal protection, and the harmonization of judicial practice in the interest of legal certainty (Stanković, 2016, p. 584).

Accordingly, the current Law on Enforcement and Security provides for appeal and objection as legal remedies (Article 24 LES). Previous legislative solutions had provided only for objection. The reintroduction of the appeal in enforcement proceedings is justified by the need to ensure genuine two-tier decision-making, thereby fulfilling constitutional guarantees of the right to a legal remedy (Bodiroga, 2016, p. 609). In enforcement proceedings, the appeal is defined as a remonstrative, remonstrative-devolutive, preclusive, limited, and bilateral legal remedy which, as a rule, does not have suspensive effect (Stanković, Palačković, Trešnjev, 2022, p. 143). Extraordinary legal remedies (revision and reopening of proceedings) are not permitted in enforcement proceedings (Article 27 LES).

When deciding on a legal remedy, the court does not substitute its own assessment for the discretionary assessment of the public enforcement officer, but examines whether the legal conditions for the exercise of discretion have been met, whether the decision was adopted within the scope of authority, and whether it is reasoned in a manner that allows review of its legality. In this way, an institutional balance is ensured between the independence of the public enforcement officer and the protection of the parties' rights.

In addition to legal remedies, the Law on Enforcement and Security also provides for legal instruments. Thus, according to the provisions of Article 24(1) and Article 148(1) LES, a request for the elimination of irregularities does not constitute a legal remedy but rather a legal instrument available to parties and participants during and in connection with the enforcement procedure, by which they indicate to the court or the enforcement officer that an irregularity may have occurred. In such a case, the

enforcement debtor who has submitted a request for the elimination of irregularities has the right to reimbursement of costs and may submit a claim for costs against the opposing party as enforcement costs, which are compensated in accordance with Article 34 LES depending on the outcome of the procedure for the elimination of irregularities (Answers to questions of commercial courts adopted at the session of the Department for Commercial Disputes of the Commercial Appellate Court held on 6-7 November 2024 and at the session of the Department for Commercial Offences held on 7 November 2024, Paragraf legal database, accessed 6 January 2026). A decision rejecting a request for the elimination of irregularities may be challenged exclusively by objection as a legal remedy (Commercial Appellate Court, Iž-1733/2017, 6 December 2017).

Furthermore, the objection of a third party does not constitute a legal remedy but rather a specific legal instrument in enforcement proceedings by which a third party protects its rights by requesting the exclusion of its property, or the object subject to enforcement, from the specific enforcement procedure (Nikolić, Šarkić, 2024, p. 45).

The legal instrument of restitution in integrum under Article 28 LES is permitted exclusively in cases of failure to meet the deadline for filing an objection or an appeal in proceedings challenging an enforcement decision, while it cannot be used due to failure to undertake specific enforcement actions (Ristić, 2016, p. 60).

The interruption of proceedings (Article 29 LES) provides that if enforcement proceedings are interrupted by operation of law, the public enforcement officer, upon the motion of a party or ex officio, appoints a temporary representative for the party and continues the proceedings even before the reason for the interruption ceases. This does not apply in cases where the interruption results from the legal consequences of bankruptcy proceedings.

Where the interruption of enforcement proceedings occurs by operation of law, the decision on interruption is adopted in the form of a ruling confirming the occurrence of the statutory grounds for interruption. Likewise, the decision on a motion to continue the proceedings is adopted in the form of a ruling against which a legal remedy is permitted (Commercial Appellate Court Decision Iž-271/2021, Paragraf legal database, accessed 6 January 2026).

The discretionary actions of the public enforcement officer have a legitimate place within the enforcement system only if exercised within clearly defined normative and procedural limits that prevent arbitrariness and ensure legal certainty.

Judicial Control of the Actions of Public Enforcement Officers in the Exercise of Discretionary Powers

Judicial control of the actions of public enforcement officers represents a key mechanism for ensuring legality and preventing the misuse of discretionary powers in enforcement proceedings. Although the public enforcement officer is conceived as an independent holder of public powers, their actions are not exempt from institutional oversight but are subject to a multilayered system of legal protection. In addition to judicial control, it should be noted that the profession of public enforcement officers is also subject to supervision by the competent Ministry of Justice and the Chamber of Public Enforcement Officers. Thus, the Supreme Court of Cassation held that a decision imposing the disciplinary measure of permanent prohibition from performing the activity of a public enforcement officer was lawful and well-

founded, even though administrative disputes initiated by the same person concerning previously imposed disciplinary measures had not yet been finally resolved (Supreme Court of Cassation, Uzp-345/2022, 12 April 2023).

Within the framework of regular judicial control, the court has the authority to examine the legality of decisions and actions of the public enforcement officer upon legal remedies submitted by the parties in enforcement proceedings. The limits of judicial review of discretionary powers are reflected in the need to respect the independence of the public enforcement officer within the framework of the law. When discretionary authority has been exercised contrary to the law, without adequate reasoning, or in violation of the fundamental principles of enforcement proceedings, the court is obliged to intervene and ensure the protection of the parties' rights. Serious disciplinary violations, such as changing the means and objects of enforcement and unlawful or improper conduct, constitute grounds for establishing disciplinary liability and imposing the measure of permanent prohibition from performing the activity of a public enforcement officer (Supreme Court of Cassation, Uzp-187/2019, 26 June 2019).

The discretionary powers exercised by the public enforcement officer when adopting conclusions that govern the conduct of the proceedings do not represent a sphere of arbitrariness but are justified only within the limits prescribed by law. Accordingly, there is no legal interest in filing a lawsuit seeking a declaration of nullity of conclusions adopted by a public enforcement officer regarding the sale or delivery of immovable property when such conclusions were issued in the exercise of public powers during the enforcement procedure (Appellate Court in Belgrade, Gž-1641/2019, 11 April 2019).

Critical Review and Practical Problems in the Application of Discretionary Powers

Although the discretionary powers of the public enforcement officer are necessary to ensure the efficiency and flexibility of the proceedings, practice indicates the existence of certain problems arising from their insufficient precision and systematic regulation. These problems do not call into question the justification of discretionary powers themselves, but they point to the need for their clearer legal formulation and more consistent oversight.

One of the main practical issues concerns the insufficiently clear distinction between discretionary authority and bound action. In certain situations, public enforcement officers invoke discretionary powers even where the law prescribes relatively precise conditions for action, which may lead to a misunderstanding of the scope of their authority. For instance, calculating a higher amount as an advance for costs of work or as a success fee for the execution of enforcement has constituted grounds for establishing disciplinary liability and imposing a more severe disciplinary measure on a public enforcement officer (Supreme Court of Cassation, Uzp-381/2018, 13 December 2018). Such practice creates legal uncertainty and makes it more difficult for parties to predict the course and outcome of enforcement proceedings.

An additional problem is the inconsistency in the application of discretionary powers. Since the law does not provide clear guidelines for the use of discretionary powers in certain procedural situations, the practice of public enforcement officers may vary considerably in similar or almost identical cases. Such inconsistency may lead to violations of the principle of equality of the parties before the law and create an impression of arbitrariness in decision-making.

A particularly sensitive issue concerns the application of discretionary powers in situations involving intensive interference with the debtor's property rights, especially in enforcement against immovable property. In such cases, the absence of clear criteria for the selection and sequence of enforcement actions may result in excessive restrictions on the debtor's rights, even when milder and equally effective alternatives exist. This points to the need for the consistent application of the principle of proportionality as an essential corrective to discretionary powers. Submitting a motion for enforcement against the entirety of the debtor's property allows for the issuance of an enforcement decision without specifying the means and object of enforcement in the motion itself (Higher Court, Subotica, GžI.114/2018, 24 September 2018). However, even in such situations, violations of the principle of proportionality may occur. The public enforcement officer is obliged, ex officio, to identify the debtor's property when enforcement has been ordered against the entirety of the debtor's assets (Commercial Appellate Court, Iž.1044/2018, 30 August 2018).

Practical problems in the application of discretionary powers are further intensified by the insufficiently developed practice of judicial review in certain segments of enforcement proceedings. Although judicial protection formally exists, its effectiveness depends on the quality of the reasoning provided in the decisions of public enforcement officers, the number of legal remedies and legal instruments filed, and the willingness of courts to consistently examine the limits of lawful discretionary action. Where decisions are insufficiently reasoned, judicial review loses its essential function.

These problems do not indicate the need to abolish or narrow discretionary powers as such, but rather the need for their clearer normative and institutional guidance. Discretionary powers can fulfill their positive role in enforcement proceedings only if accompanied by precise rules, consistent judicial oversight, and a well-developed sense of professional responsibility on the part of holders of public authority.

Conclusion

The analysis of the discretionary powers of public enforcement officers shows that this institution represents an indispensable (although limited) element of modern enforcement proceedings, conditioned by the need for efficiency, flexibility, and the adaptation of actions to the specific circumstances of individual cases. Discretionary powers, understood as a legally permitted margin of choice between several lawful solutions, enable the public enforcement officer to achieve the purpose of enforcement proceedings in situations that cannot be fully predetermined by normative regulation.

However, precisely because of the scope of authority entrusted to public enforcement officers, particularly in situations involving significant interference with the debtor's property rights, discretionary powers must be clearly limited and subject to effective legal control. Discretionary powers cannot be understood as a space of unlimited freedom, but solely as an instrument for achieving the objectives of the law within the framework of the principles of legality, proportionality, and the protection of the parties' rights.

The current normative framework of enforcement proceedings recognizes the existence of discretionary powers of public enforcement officers, but it does not regulate them systematically or explicitly. The limits of their application are largely derived from the general principles of enforcement proceedings and from the mechanisms of judicial and constitutional review. Such a solution, although

functional, leaves room for inconsistent practice and differing interpretations, which may lead to legal uncertainty and the perception of arbitrariness in decision-making.

Improving the normative framework should not lead to the narrowing of discretionary powers as such, but rather to their more consistent and predictable use. Only discretionary powers that are clearly defined in law and subject to effective institutional oversight can contribute to strengthening trust in enforcement proceedings and confirm the role of the public enforcement officer as a professional and responsible holder of public authority in a state governed by the rule of law.

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Diskreciona ovlašćenja javnog izvršitelja i granice njihove primene

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Sažetak

Diskreciona ovlašćenja javnog izvršitelja predstavljaju ograničen, ali značajan prostor izbora između više zakonom dopuštenih rešenja u fazi sprovođenja izvršenja. Ona nisu sistematski i izričito normirana, već disperzno proizlaze iz odredaba Zakona o izvršenju i obezbeđenju koje izvršitelju ostavljaju procenu pri izboru sredstava i predmeta izvršenja, redosleda i dinamike radnji, kao i načina preduzimanja pomoćnih mera. Zbog intenziteta zadiranja u imovinska prava dužnika, diskreciono postupanje je legitimno samo ako je strogo omeđeno svrhom postupka i načelima zakonitosti, srazmernosti i zaštite procesnih prava stranaka, uključujući pravo na obrazloženu odluku i pravni lek. Sudska kontrola obezbeđuje proveru da li je odluka doneta u granicama ovlašćenja i uz razloge koji omogućavaju nadzor zakonitosti, čime se sprečava arbitrarnost. Uočeni praktični problemi neujednačene primene ukazuju na potrebu preciznijih kriterijuma i jačanja obaveze obrazlaganja de lege ferenda.

Ključne reči: javni izvršitelj, diskreciona ovlašćenja, izvršni postupak, zaštita prava stranaka, sudska kontrola.

Moral and Material Rehabilitation of Persons Groundlessly Deprived of Liberty

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Moral and Material Rehabilitation of Persons Groundlessly Deprived of Liberty

Abstract

The Right to Freedom is one of the basic human rights. This right was proclaimed by the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union, and the right to freedom in domestic law was proclaimed by the Constitution of the Republic of Serbia. Given that the right to freedom is protected by basic international and domestic legal acts, states prescribe sanctions for persons who limit the individual's right to liberty. However, in cases where the state has limited the right to freedom, and especially when it has groundlessly deprived a natural person of liberty, the question arises as to whether it can be held accountable and what its obligations are to the natural person, whom its authorities, courts and police have groundlessly deprived of liberty. This paper will deal with the rights of a natural person who has been groundlessly deprived of liberty, to moral and material rehabilitation. This paper will focus on the determination of the legal nature of the institute of material and moral rehabilitation of persons groundlessly deprived of liberty.

Key words: groundless deprivation of liberty, moral and material rehabilitation, compensation for damage, responsibility of the state

Introduction

Article 1 of the Universal Declaration of Human Rights, 1948. proclaims that all human beings are born free and equal in dignity and rights. Article 2 proclaims that everyone has the right to life, liberty and security of person.

Article 6 of the Charter of Fundamental Rights of the European Union, 2000., proclaims that everyone is entitled to the right to liberty and security.

The Constitution of the Republc of Serbia, in Article 27 stipulates that everyone has the right to personal freedom and security. Depriving of liberty shall be allowed only on the grounds and in a procedure stipulated by the law.

The highest international and national adopted documents guarantee the right to freedom for everyone. Although the right to freedom is a universal, basic human right, it can be limited by the state, and one of the restrictions, the denial of the right to freedom, is the deprivation of freedom by the exponents of state power, the courts and the police.

Allowed restriction of freedom, deprivation of liberty by the state, directed towards persons who are on its territory, and who are suspected of having committed a socially harmful act, can be implemented by ordering custody and sentencing to prison. Both custody and imprisonment are institutes of criminal law, and they are regulated by: custody by criminal law, and imprisonment by criminal substantive law.

In our law, the law of the Republic of Serbia, custody, since it is a measure of securing the presence of the accused in criminal procedure (Code of Criminal Procedure, 2011), is regulated by the provisions of the Code of Criminal Procedure, and imprisonment is a criminal sanction and the conditions for its imposition are prescribed by the Criminal Code (Criminal Code, 2005).

By adopting these laws by the highest authority of the state, prescribing the conditions and procedure in which its authorities can limit the freedom of an individual, the state, as the authority of the government, authorized itself, and in order to protect the public interest, to deny the individual one of the basic human rights, the right to liberty.

The restriction of the basic human right, the right to liberty, by the state authorities is implemented, is performed under the conditions and in the procedure strictly prescribed by positive legislation.

However, despite the fact that during the deprivation of liberty the individual's liberty is limited, i.e. that they are deprived of liberty in accordance with the rules prescribed by positive regulations and in the procedure prescribed by law, and for an action that society through its norms has declared to be socially unacceptable, punishable, a situation may arise where the criminal proceures are not ended by a criminal verdict, i.e. by an extraordinary legal remedy it can be determined that the person did not commit the criminal offence for which they were charged and for which they were sentenced to prison. In such cases, it is indisputable that the person who was deprived of liberty suffered damage, first of all non-material, moral, and eventually material damage. In such cases, it is indisputable that the person who was deprived of liberty suffered damage, first of all non-material, moral, and possibly material damage.

Given that the basic human right, right to leberty, is limited to an individual, the principle of justice requires the state to enable such persons to achieve moral and material rehabilitation (Mrvić Petrović et al., 2003, pp. 303-304).

Civil law entitles the aggrieved individual to demand compensation from the tortfeasor. That is, by causing damage the obligation to compensate for that damage arises for the tortfeasor. Thus, there must be a responsibility for the state to compensate the aggrieved party for groundless use of the most severe criminal-legal repression - deprivation of liberty. That is, due to the fact that the state exponents, the court and the police, limited the liberty and rights of an individual, and later it was established that they did not commit a crime punishable by law, the state responds by materially and morally rehabilitating the individual who was deprived of liberty.

The moral and material rehabilitation of an individual unjustly deprived of liberty is achieved through the compensation of non-material and material damage and through moral satisfaction by publishing in the media a statement about the decision resulting from the groundless deprivation of liberty and unjustified conviction, or by delivering that decision to a legal or natural person ordered by the aggrieved party.

The primary type of compensation for damages to individuals groundlessly deprived of liberty is compensation for material and non-material damage. Damage compensation is a civil legal institution, a non-contractual obligation, which arises from causing damage. However, for the creation of the institution of compensation for damage, in addition to the damage caused, it is necessary to have established the responsibility of the person who is obliged to compensate for the damage which can be subjective or objective.

With the legal institute of compensation for damages due to groundless deprivation of liberty, it is indisputable that an individual grounflessly deprived of liberty suffers, first of all, non-material damage, and can also suffer material damage. However, given that the deprivation of liberty by state exponents was carried out in compliance with positive regulations, it is a disputable second element of the institution of compensation for damages - guilt, responsibility. That is, the question arises whether there can be

responsibility of the state, if its bodies, it's exponents, the courts and the police, acted in compliance with the law. For this reason, and in order to satisfy the principle of fairness, the state has prescribed by law the conditions under which an individual froundlessly deprived of liberty or groundlessly convicted can obtain compensation for non-material and material damage suffered and/or moral satisfaction, and this is prescribed in the law of the Republic of Serbia by the Code of Criminal Procedure (Grubač, 1979).

The subject of this paper is the legal nature of the right to compensation for non-material or non-material damages and the right to moral rehabilitation. In order to understand the legal nature of moral and material rehabilitation due to groundless deprivation of liberty, it is necessary to determine when the damage occurred, that is, when the individual was groundlessly deprived of liberty or groundlessly convicted.

Groundless deprivation of liberty and conditions for exercising the right to compensation for damages

In order for an individual who has been deprived of their liberty to achieve their right to moral and material rehabilitation, it is necessary, first of all, to fulfill the conditions prescribed by law, which determine that deprivation of liberty as groundless.

The Code of Criminal Procedure of the Republic of Serbia defines as groundless deprivation of liberty an individual who: was deprived of liberty, but the proceedings were not initiated, or the proceedings were suspended by a legally binding decision or the accusation was dismissed, or the proceedings were legally terminated by a rejection or acquittal verdict; who has served a prison sentence, and regarding a request for the repetition of criminal proceedings or a request for the protection of legality, they were sentenced to a prison sentence of a shorter duration than the sentence served, or a criminal sanction was imposed that does not consist of deprivation of liberty, or they were found guilty and acquitted; who was deprived of liberty for a longer period of time than the duration of the criminal sanction consisting of the deprivation of liberty imposed on them; who was deprived of liberty due to a mistake or illegal work of the procedural authorities, or the deprivation of liberty lasted longer or was kept longer in an institution for the execution of a criminal sanction consisting of deprivation of liberty.

However, in order for an individual deprived of liberty to have a right to moral and material rehabilitation, it is necessary that that person did not cause the deprivation of liberty by their illegal actions, or that the proceedings were not suspended or the charges were not rejected because the aggrieved party was the prosecutor in the new proceedings, that is, the private prosecutor gave up the prosecution, or because the aggrieved party gave up the proposal, and the withdrawal was based on an agreement with the defendant.

The condition for excluding the state from liability for damages can be determined from the following example of judicial practice:

"The right to compensation for damages is granted to a person groundlessly convicted under certain conditions (Article 556 of the Law on Criminal Procedure (LCP)) and a person who was groundlessly detained (Article 560 of the LCP). It is considered that the person was groundlessly detained, among other things, in the case when no criminal proceedings were initiated or the criminal proceedings were suspended by decision (Article 560 of the LCP). Valuing the contribution of the detained person, the legislator prescribed limitations and an exception when a person who was groundlessly detained cannot

receive compensation for damages. That exception is provided for in Article 560, Paragraph 3 of the LCP, according to which, even if a person was in groundless detention, they are not entitled to compensation if they caused the deprivation of liberty by their illegal actions.

It follows from the established facts that the prosecutor wronged the deprivation of liberty by their illegal actions in the criminal proceedings. The prosecutor received a summons for the hearing and was aware of the fact that criminal proceedings were being conducted against him, they did not respond to the summons nor did they justify their absence, which is why the investigating judge concluded that the prosecutor was hiding and avoiding criminal proceedings, and for those reasons they were ordered to be detained. The aforementioned decision was examined upon the prosecutor's appeal and the extra-procedural council found that the investigating judge acted correctly when they ordered the prosecutor to be detained. Bearing in mind the facts established in this way, the correct conclusion of the lower courts was that the prosecutor wronged the deprivation of liberty by their illegal actions and that therefore the defendant was not liable for damages based on Article 560, paragraph 1, point 1 of the Code of Criminal Procedure. The lower courts therefore properly rejected the plaintiff's request for compensation for non-material and material damages in the name of lost earnings and paid attorney's fees in compliance with the provision of Article 560, Paragraph 1, Item 1 and Paragraph 3 of the Code of Criminal Procedure." (Decision of the Supreme Cort of Cassation, Rev 1435/14 of February 4th, 2016) .

The right to compensation for damages due to groundless deprivation of liberty is a personal right, established in favor of the person who has suffered damage due to deprivation of liberty. The heirs of a person who has been deprived of liberty inherit only the part of the aggrieved party to material damage, and if the aggrieved party has already pointed out the heirs can continue the procedure only within the limits of the already established request for compensation for property damage. The heirs of the aggrieved party may continue the procedure for compensation after their death, i.e. initiate the procedure if the aggrieved party died before the expiration of the statute of limitations and did not waive the claim, in compliance with the rules on compensation of damages prescribed by the Law on Contract and Torts (Code of Criminal Procedure, 2011, art. 588–591) .

The procedure for exercising the right to compensation for damages in the law of the Republic of Serbia is conducted in two stages (Code of Criminal Procedure, 2011, Art. 588 – 591).

The first phase is conducted before the administrative body, the ministry responsible for judicial affairs. This procedure begins by submitting a request for compensation to the competent body - the committee of the mentioned ministry in order to reach an agreement on the existence of damage and the type and amount of compensation.

The competent committee of the ministry has a deadline set by law of three months to decide on the submitted request. The period of three months starts from the date of submission of the request.

If the committee does not make a decision within the given period of three months, the injured party can file a claim for compensation to the competent court.

The aggrieved party has the right to file a lawsuit even in the case when they have reached an agreement with the committee, but only on part of the claim. In that case, they submit the lawsuit afresh on the remaining claim.

The aggrieved party may file a claim for damages within three years from the date of finality of the first-instance rejection or acquittal verdict, i.e. the finality of the first-instance decision suspending the

proceedings or rejecting the charge, and if the appeal was decided by the appellate court - from the date of receipt of the decision of the appellate court, and after that period the statute of limitations for claims for damages begins. While the proceedings before the committee of the ministry responsible for justice affairs are ongoing, the period to be counted for the statute of limitations does not run, that is, the statute of limitations has expired.

The amount of damages awarded to the aggrieved party is measured in compliance with the provisions of the Law on Contract and Torts

The amount of non-material damage, which the court awards to the aggrieved party, is measured by applying the criteria and standards comprised in Article 200 of the Law of Contract and Torts.

An example from court practice: "When deciding on the amount of monetary compensation for non-material damage, the plaintiff's profession and the work they were engaged in at the time they were deprived of liberty, their marital and family status and lack of conviction, the type and severity of the criminal offense that they were charged with in the indictment, the length and conditions of their stay in detention, and based on this, the amount of fair monetary compensation was determined. A higher amount of compensation than the one awarded, both the one demanded by the lawsuit on that basis - in the amount of 7,250,000.00 RSD, and the amount of 100,000.00 RSD awarded by the first-instance verdict, would be contrary to the purpose of the compensation and would favor aspirations that are contrary to its social purpose (Article 200, Paragraph 2 of the Law of Contract and Torts)." (Decision of the Supreme Court of Cassation, Rev 397/17 of March 9th, 2017).

An aggrieved person, a person deprived of liberty has a right to material damage according to the rules of the Law on Contract and Torts, Article 189, and to ordinary damage and loss of profit.

The aggrieved party may submit a request for compensation for damages due to groundless deprivation of liberty within three years from the date of finality of the first-instance rejection or acquittal verdict, i.e. the finality of the first-instance decision by which the proceedings were suspended or the charge was rejected, and if the appeal was decided by the appellate court - from the date of receipt of the decision of the appellate court. After the expiration of the three-year period, they lose the right to claim damages.

The procedure for exercising the right to moral satisfaction is achieved in such a way that the court, at the request of the aggrieved party, delivers a statement of the decision from which the deprivation of liberty is groundless. The announcement is delivered to the media so that they publish it but under the condition that the deprivation of liberty or the conviction of a person is shown through the media.

In the case when the deprivation of liberty was not shown through the mass media, the announcement resulting from the groundless deprivation of liberty will be, at the request of the person groundlessly deprived of liberty, delivered to the state and other authorities, companies and other legal or natural persons, where the person groundlessly deprived of liberty was employed.

After the death of a person groundlessly deprived of liberty, a request for moral satisfaction can be submitted by their spouse, a person with whom they lived in a common law marriage or other permanent union, children, parents, brothers and sisters.

The request for moral satisfaction is not related to the submission of a request for compensation for damages, and it can be submitted if no compensation for damages has been claimed, and it can be

submitted within six months. The request shall be submitted to the court that tried the criminal procedure in the first instance.

The legal nature of the moral and material rehabilitation of a person groundlessly deprived of liberty

From the foregoing, it can be determined that the institution of compensation for damages due to an groundless conviction is a specific legal institution, primarily because it is regulated by the provisions of civil law and the provisions of criminal law, given that only by applying the provisions of both criminal and civil law can the purpose of that institution be realized, the reparation of the aggrieved person, that is, the reparation of the violated personal right - the right to freedom (Mrvić Petrović & Petrović, 2008, pp. 26–30).

Namely, in the event that compensation for damage to a person groundlessly deprived of liberty is considered in compliance with the rules of civil law, then compensation would be possible only in the situation if the guilt of a representative of the state authority, a person who acted on behalf of the state - a judge, a police officer - was proven. The institution of groundless deprivation of liberty most often arises through no one's fault (On the reasons that lead to an unfounded conviction, see: Mc Closkey, 1989, pp. 2-59), and the exclusive application of the rules of civil law would not achieve justice, because in that case the person groundlessly deprived of liberty would not be able to claim compensation for damages. This indicates that the application of only general rules of civil law cannot be the basis of liability for damage caused by groundless deprivation of liberty.

Whereas the compensation for damages to persons groundlessly deprived of liberty cannot be achieved according to the strict rules of civil law, the state's responsibility for compensation for damages due to groundless deprivation of liberty, some theoreticians, find in reasons of justice. Thus, the state's obligation to compensate damages for groundless deprivation of liberty does not arise from its tort liability, but rather from justice, which is supposed to eliminate the damage caused on the basis of an mistake (Marković, 1937, p. 563). Advocates of the theory of justice as the basis of the state's responsibility for compensation for damages due to groundless deprivation of liberty do not deny the legally sanctioned obligation of the state in the event that the body of the criminal procedure caused damage by groundless deprivation of liberty. According to them, the law only sanctioned what follows from the principle of justice (Heninzberg, 1933, p.460, Vujaklija, 1982, pp. 1301–1311).

It is true that justice dictates the right of a person groundlessly deprived of liberty to compensation for damages. However, justice without its support by the law, its inclusion in the legal norm, cannot create an obligation of the state to compensate for damages. For, if only justice were the basis for compensation, it could lead to the fact that the right of a person groundlessly deprived of liberty to compensation depends on the judge's discretionary assessment, which is not in the spirit of the rule of law.

There are further understandings, according to which the responsibility of the state for damage suffered by persons groundlessly deprived of liberty is a subtype of responsibility for damage suffered by persons due to illegal or improper work of state authorities (Radoman, 1977, pp.14).

According to some legal theorists, the responsibility of the state is subjective because the state performs its functions through its bodies and civil servants. So mistakes of state officials are mistakes of

the state, because it made a bad choice of officials, or did not provide funds and so forth (Newsletter of Judical Practice of Supreme Court of Serbia, 2008).

On the other hand, there are understandings that the responsibility of the state is objective, because it exercises power and benefits from the functioning of services and bodies. If it benefits, it bears the risk of causing damage and is responsible for it. For the aggrieved party, it is irrelevant which official is to blame, whether they are overworked, whether the service is poorly organized, or whether it lacks material resources, etc (Newsletter of Judical Practice of Supreme Court of Serbia, 2008).

The stated views on the state's responsibility for the damage suffered by a person groundlessly deprived of liberty indicate the specific legal nature of this institute. The basis of liability for damages, in the law of the Republic of Serbia, is actually found in the regulation of criminal law, the Code of Criminal Procedure, namely in the provisions of Art. 583 - 591.

In order to exercise the right to damages, a person groundlessly deprived of liberty must prove the existence of the circumstances referred to in Article 584, Paragraph 1 of the Code of Criminal Procedure, and it is not necessary to prove omission in work, failure to take the necessary action, which is the case with the state's responsibility for damage from Article 172 of the Law on Obligations.

A person groundlessly deprived of liberty who is seeking compensation for damages does not have to prove omission in work of the enforcement body, or irregular and illegal work - it is only necessary to prove that the criminal proceedings have not ended with a conviction or a sentence imposing a prison sentence. Because of this, there is a similarity with objective responsibility, responsibility without fault. Also, as with objective responsibility, there is an exclusion from responsibility, prescribed by paragraph 2 of Article 583 of the Criminal Procedure Law.

Based on the above, I am of the opinion that the state's responsibility for damage caused by unjustified deprivation of liberty, responsibility without fault, objective responsibility, can be called legal objective responsibility, because it is established by law (Petrović, 2023, pp. 228).

Conclusion

The emergence and development of the right of a person groundlessly deprived of liberty to compensation for damages is directly related to the development of the idea of state responsibility. The idea of state responsibility arose with the disappearance of the absolutist state and the emergence of the idea of the rights of citizens to demand legal and proper work from the state and state bodies.

In such conditions, there was a need to create state responsibility for ggroundless deprivation of liberty, as one of the forms of protection of personal rights, especially the right to freedom and personality rights.

First, aggrieved persons were recognized as having the right to achieve moral rehabilitation, and in the second half of the nineteenth century, the right to compensation for material damage was recognized (Srzentić, 1966, p. 434).

In the nineteenth century, the right to compensation was recognized if the damage was caused by the malicious action of the court, and an example of this is the Code of Criminal Procedure of the Principality of Serbia of 1865.

It was only later , at the beginning of the 20th century that the recognition of the right to compensation for damages due to unjustified deprivation of liberty under the conditions known today was

initiated, i.e. no malicious action of the court was required, and the right to compensation was also recognized for persons groundlessly deprived of their liberty, and not only unjustly convicted. The Law on Court Criminal Procedure of the Kingdom of Yugoslavia of 1929 contained provisions on the right to moral and material rehabilitation of persons groundlessly deprived of liberty and groundlessly convicted.

The right to compensation for moral and material damage of persons unjustifiably deprived of liberty, developed alongside society and society's awareness, expressed through the representatives of the government, of the need to protect basic human rights.

With the exception of the Criminal Procedure Law of 1948, for a period of almost a century, the protection of the right to liberty from state authorities evolved into the right of the aggrieved party to moral and material rehabilitation in the form of compensation for non-material and material damage and moral satisfaction.

In order to exercise the right to moral and material reparation, it is not necessary for the aggrieved party to prove the negligent and malicious behavior of the state authorities (court and police), and it is necessary to attach documents (decisions of the authorities conducting criminal proceedings) on the basis of which the deprivation of liberty has transformed from a grounded and lawful deprivation of liberty to an groundless deprivation of liberty.

In order to exclude the responsibility of the state for damage, the existence of a hidden action of the aggrieved party, by which they avoided the presence of the criminal proceedings, is necessary.

Even the current the Code of Criminal Procedure recognizes the case of state responsibility for damage caused by groundless deprivation of liberty, which can be subsumed under, let's say, general state responsibility for damage caused by its body through improper or illegal work. This is the case from Point 4), Paragraph 1, Article 584 of the Code of Criminal Procedure, when a person is deprived of liberty or the deprivation of liberty lasted longer due to a mistake or illegal work of the procedural authorities. In that case, it is the duty of the aggrieved party to prove the error or illegal work of the procedural body, which is not the case in other cases which the Criminal Procedure Code defines as groundless deprivation of liberty.

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Moralna i materijalna rehabilitacija lica neosnovano lišenih slobode

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Sažetak

Pravo na slobodu predstavlja jedno od osnovnih ljudskih prava. Ovo pravo je proklamovano Univerzalnom deklaracijom o ljudskim pravima, Poveljom o osnovnim pravima Evropske unije, dok je pravo na slobodu u domaćem pravu utvrđeno Ustavom Republike Srbije. Imajući u vidu da je pravo na slobodu zaštićeno osnovnim međunarodnim i domaćim pravnim aktima, države propisuju sankcije za lica koja ograničavaju pravo pojedinca na slobodu. Međutim, u slučajevima kada je država ograničila pravo na slobodu, a naročito kada je fizičko lice neosnovano lišila slobode, postavlja se pitanje da li ona može biti odgovorna i koje su njene obaveze prema fizičkom licu koje su njeni organi, sudovi i policija neosnovano lišili slobode. Ovaj rad će se baviti pravima fizičkog lica koje je neosnovano lišeno slobode na moralnu i materijalnu rehabilitaciju. Poseban fokus biće na utvrđivanju pravne prirode instituta materijalne i moralne rehabilitacije lica neosnovano lišenih slobode.

Ključne reči: neosnovano lišenje slobode, moralna i materijalna rehabilitacija, naknada štete, odgovornost države

Gamification of Restorative Justice Processes: A Conceptual Framework and Practical Application

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Gamification of Restorative Justice Processes: A Conceptual Framework and Practical Application

Abstract

This paper examines the possibilities and limitations of applying gamification within restorative justice processes, based on the assumption that contemporary interactive models can enhance participants' understanding of conflict, the development of empathy, and reflective engagement. Restorative justice is grounded in dialogue between the offender, the victim, and the community, with the aim of fostering accountability, understanding harm, and repairing damaged relationships. However, its practical implementation is often hindered by participants' limited readiness for perspective-taking, emotional barriers, and the lack of adequate methodological tools for preparation and facilitation. In this context, the paper explores the potential of gamification as an approach that employs game mechanics, such as role-playing, interactive narratives, and decision-making simulations, to stimulate experiential learning and engagement. Through theoretical analysis, the paper identifies key phases of the restorative process, understanding harm, perspective-taking, dialogue, reparation, and reflection, and considers how gamified models might support each of them. Particular attention is given to the role of simulations in fostering empathy and preparing participants for restorative encounters, as well as to the potential of reflective mechanisms to deepen the understanding of conflict consequences. At the same time, the paper highlights significant ethical and methodological limitations, including the risk of trivializing conflict, the psychological sensitivity of participants, and institutional constraints on the implementation of such approaches. In conclusion, gamification cannot be regarded as a substitute for restorative dialogue, but rather as a complementary tool that may enhance specific phases of the process. Its value lies in expanding the space for reflection, perspective, taking, and participant preparation, thereby contributing to the development of contemporary methodological approaches in restorative justice.

Key words: restorative justice, gamification, perspective-taking, empathy, interactive simulations, dialogue, reflection

Introduction

The antinomy of good and evil, punishment and forgiveness, is one of the oldest intellectual themes in the history of humanistic thought. Every society continually attempts to impose order on this moral disorder of human behavior by developing institutions that simultaneously condemn evil and open the possibility of its transformation. Since evil is a persistent constant of human conduct (see: Kant, 2018; Arendt, 2000; Niebuhr, 1943; Ricoeur, 1986), justice can never constitute a final solution to this problem, but rather an enduring social effort to limit and render the consequences of evil intelligible. In this sense, every new method, including the gamification of restorative justice, must be evaluated not by whether it eliminates evil, but by whether it helps people recognize it more clearly and respond to it more effectively.

Retributive justice arose from the elementary need of human communities to defend themselves against those who disrupt their order. Even prior to the emergence of the state, communities had to respond to harm through force, to mark it, condemn it, and restrain its perpetrator in order to protect other members

and signal that certain forms of behavior are unacceptable. In this sense, retributive justice is deeply social, even before it became institutionalized as state law. The state later formalized, monopolized, and rationalized this response, but its roots lie in an earlier communal need to preserve itself against forces that undermine trust and security.

Restorative justice, however, proceeds from a different intuition, equally ancient, yet marginalized in modern law, that a community is threatened not only by the offense itself, but also by what remains after punishment. Punishment may interrupt the offender's actions, but it does not necessarily heal the consequences of the harm introduced into the web of human relationships. Indeed, punishment can sometimes generate new risks: even after formally "repaying their debt," the offender may remain socially excluded, morally fixed in the identity of a criminal, and exposed to prolonged stigma that exceeds the sentence itself. In such cases, society not only protects itself from the offender but also produces conditions under which harm is reproduced through stigma, resentment, self-denial, or renewed violence. It is precisely here that restorative justice emerges. Its function is not to weaken punishment or relativize responsibility, but to intervene in the residue that retributive justice leaves behind. It seeks to protect society from the possibility that the punished individual remains permanently bound to their worst act, while also protecting that individual from the excessive and prolonged effects of punishment once it ceases to serve as a measure of justice and becomes a social destiny. In this sense, restorative justice does not stand in opposition to society; rather, it serves its deeper interests by attempting to prevent punishment from generating new, long-term zones of moral and social risk. In other words, while retributive justice arises from the community's need to protect itself from the offender and reaffirm norms, restorative justice arises from the need to protect the community from what persists after punishment: unhealed harm in relationships, enduring stigma, and the risk that the punished individual remains trapped in the identity of their offense.

Restorative justice does not assume that conflict and violence will disappear from society; instead, it is grounded in the idea that the way societies respond to conflict and violence can transform their consequences. In this context, the question of gamification is not one of technological optimism, but of methodological imagination: whether interactive models can help individuals better understand the consequences of their actions and the experiences of those affected by them. Perhaps this is precisely the greatest value of restorative approaches: they do not attempt to negate the reality of evil, but to develop social procedures through which it can be acknowledged, understood, and, where possible, overcome. If gamification can contribute to this process even modestly, its significance lies not in technological innovation, but in expanding the space for human reflection and responsibility. Accordingly, the question of gamifying restorative justice should not be framed in terms of utopian enthusiasm or skeptical dismissal. It is more realistic to view it as another attempt by contemporary societies to continue the long civilizational search for a balance between justice, responsibility, and the possibility of moral transformation through new methodological instruments.

In recent decades, restorative justice has emerged as a significant alternative to traditional, retributive models of criminal justice[1]. Unlike classical punitive approaches that emphasize sanction and

[1] The contemporary concept of restorative justice has developed over recent decades as an alternative to dominant retributive models of criminal law that emphasize punishment and the institutional response of the state. In restorative approaches, the focus shifts toward repairing harm, fostering dialogue between the victim and the offender, and restoring disrupted social relationships. This approach has been systematically developed by authors such as Howard Zehr, who defines restorative

institutional state response, restorative justice focuses on dialogue among the offender, the victim, and the community, with the aim of assuming responsibility, understanding the harm caused, and repairing disrupted social relationships (Zehr, 2002). This approach is grounded in the assumption that crime represents not merely a violation of legal norms, but above all a disruption of interpersonal relationships and trust within the community. Consequently, restorative practices emphasize communication, acknowledgment of responsibility, and the active participation of all actors in the process of resolving conflict.

The development of restorative justice is closely linked to broader shifts in contemporary legal and social theory that seek to overcome the limitations of traditional punitive systems. Numerous studies indicate that restorative approaches can contribute to reducing recidivism, increasing victim satisfaction, and strengthening social cohesion in the communities where they are applied. Particularly significant are victim–offender mediation programs, restorative conferences, and various dialogical models that enable participants to articulate their experiences and identify ways to repair harm. However, despite the theoretical and normative support restorative justice has received, its practical implementation faces numerous challenges. One key issue is the insufficient willingness of participants to consider the perspective of the other party and to engage actively in dialogue. Offenders often struggle to understand the emotional and social consequences of their actions, while victims may encounter difficulties in articulating their experiences and expectations within restorative encounters. An additional problem is the lack of methodological tools that would enable participants to adequately prepare for restorative processes and to reflect on possible outcomes in a safe environment prior to direct interaction. In this context, contemporary research (Deterding et al., 2011; Olivier, 2019; Tong et al., 2020; Facchino et al., 2025) in the fields of gamification, serious games, and interactive simulations points to their potential for fostering empathy, perspective, taking, emotional engagement, and experiential learning, suggesting that they may serve as supportive tools in the preparatory phases of restorative processes. Gamification involves the application of game mechanics, such as role, playing, interactive narratives, decision simulations, and feedback systems, with the aim of encouraging engagement, reflection, and experiential learning. In education, therapy, and social intervention programs, gamification has already demonstrated effectiveness in promoting empathy, behavioral change, and the development of social skills.

Building on these insights, the question arises whether certain elements of restorative justice can be structured through gamification mechanics. In other words, can principles characteristic of games be used to improve participant preparation, facilitate perspective-taking, and encourage reflection on the consequences of conflict? The aim of this paper is to examine the possibilities of gamifying certain phases of the restorative process by identifying key elements of restorative justice that may be suitable for such an approach. Through an analysis of theoretical insights from restorative justice and game studies, the paper seeks to propose a conceptual framework that may serve as a basis for further research and experimental models of applying gamification in restorative practices.

In this paper, gamification is not considered a substitute for restorative processes, nor a method capable of independently resolving conflicts between victims and offenders. Restorative justice remains fundamentally a social and communicative process grounded in direct dialogue, acknowledgment of

justice as a process oriented toward understanding harm and taking responsibility for its repair, as well as John Braithwaite, who has highlighted the importance of reintegrative approaches in modern justice systems (see: Zehr, 2002; Braithwaite, 2002; Sherman & Strang, 2007).

responsibility, and the possibility of reparation. Gamification is understood here exclusively as a potential auxiliary methodological tool, particularly in the phases of participant preparation, perspective-taking, and reflection on the consequences of conflict. Such an approach aligns with broader trends in contemporary research on interactive media, where digital simulations and narrative scenarios are used as instruments of experiential learning and social reflection, rather than replacements for real-world social processes.

Research Methodology

This paper is based on a qualitative, theoretical, conceptual methodology and belongs to the category of interdisciplinary exploratory research. Its focus is not the empirical testing of an existing standardized model, but the conceptual examination of the possibilities of gamifying certain elements of restorative justice. Given that this topic lies at the intersection of multiple disciplines and remains insufficiently explored in contemporary literature, the methodological approach had to be adapted to this early stage of research development. For this reason, the paper does not proceed from a narrowly defined hypothesis suitable for direct empirical verification, but from a problem, oriented question: whether and to what extent certain phases of restorative justice can be conceptualized and modeled through gamification mechanics without compromising the ethical, legal, and social seriousness of the restorative process.

The methodological foundation of the paper rests primarily on the analysis of relevant scholarly and professional literature from several interconnected fields. The first group of sources includes literature on restorative justice, criminology, and the philosophy of punishment, examining key concepts, objectives, and stages of the restorative process, as well as differences between retributive and restorative responses to crime and social conflict. The second group consists of works in legal philosophy, moral philosophy, and social philosophy, providing deeper insight into issues of guilt, responsibility, evil, punishment, stigma, and the possibility of moral transformation after wrongdoing. The third group comprises contemporary research on gamification, game studies, serious games, and interactive media, particularly studies addressing procedural rhetoric, experiential learning, empathy development, perspective, taking, and the simulation of social processes. The fourth group includes research from the psychology of trauma, empathy, and social cognition, necessary for understanding the psychological foundations of restorative dialogue and assessing the potential role of gamified tools in participant preparation and reflection.

Methodologically, the paper first employs an analytical, reconstructive approach. Core concepts used across different disciplines are reconstructed within their original theoretical contexts and then brought into relation with one another. Particular attention is given to concepts such as restorative justice, gamification, perspective, taking, responsibility, harm, reparation, and reflection. This approach is necessary because identical terms often carry different meanings across disciplines. For example, the concept of “guilt” differs in criminal law, existential philosophy, and restorative practice; similarly, “gamification” cannot be mechanically transferred from digital design literature into legal or therapeutic contexts without prior conceptual clarification. Establishing terminological and theoretical precision is therefore a primary task of the paper.

Subsequently, an interpretative and comparative method is applied. In this phase, key elements of the restorative process are compared with mechanics characteristic of gamified systems. This comparison is not intended to equate the two domains, but to identify points of potential intersection. The goal is not to claim that restorative justice is a form of game or that gamification can replace judicial or

dialogical processes, but to examine whether certain gamification mechanics, such as role, playing, interactive narratives, decision simulations, branching scenarios, and reflective feedback, can function as auxiliary methodological tools in specific phases of restorative justice. In this sense, the comparative approach serves as a tool for conceptual mapping rather than proof of equivalence.

An important component of the methodology is the heuristic approach. Since no fully developed and standardized model of gamified restorative justice currently exists, it was necessary to employ theoretical imagination grounded in disciplined analogy. Experiences from serious games, interactive simulations, moral narratives, and educational digital tools are used as heuristic resources for considering potential applications in the restorative context. This approach requires caution: analogy is not evidence, and examples from education, psychological training, or social simulation cannot be uncritically transferred into judicial processes. Nevertheless, in the study of emerging and underdeveloped topics, heuristic methods represent a legitimate means of opening conceptual inquiry and identifying future research directions.

The paper also adopts a normative, critical approach. It does not limit itself to the question of whether gamification is technically feasible, but also considers whether it is ethically, legally, and socially justified. Particular attention is given to risks such as the trivialization of conflict, secondary victimization, digital inequality, manipulative design, and the reduction of serious restorative processes to simplified interaction models. This normative dimension is essential to avoid technological reductionism and to demonstrate that any potential gamification of restorative justice must be considered within clearly defined ethical boundaries. In other words, the methodology is not neutral toward its subject; it is consciously critical, asking not only what can be done, but also what should be done and under what conditions.

A further significant methodological element is the interdisciplinary synthesis of theory. The topic of gamifying restorative justice cannot be adequately addressed from the perspective of a single discipline, as it simultaneously involves questions of legal responsibility, social responses to harm, the psychology of victims and offenders, and the nature of interactive media. Accordingly, interdisciplinarity is not treated as a mere aggregation of references, but as an effort to construct a coherent conceptual framework from multiple theoretical sources. Within this framework, law provides criteria of responsibility and institutional legitimacy, sociology illuminates the function of punishment and social trust, psychology explains processes of empathy, trauma, and reflection, while game studies and gamification offer models of interactive structure and experiential learning.

Finally, it is important to emphasize the limitations of this study. As a theoretical, conceptual inquiry, its conclusions cannot be interpreted as empirically verified models of applying gamification in restorative justice. The paper does not present experimental results, interviews, focus groups, or quantitative measurements, but rather proposes a conceptual map of potential intersections between the two domains. Its primary contribution lies not in demonstrating that gamified restorative justice is already an established practice, but in showing that such a possibility has sufficient theoretical, psychological, and methodological grounding to warrant further research.

For this reason, the paper has a primarily exploratory, problem, oriented, and heuristic character. It represents an attempt to open a new field of inquiry based on existing knowledge from multiple disciplines and to propose a conceptual framework for its future theoretical and empirical development. In this sense, the methodology is not one of verifying a finished model, but of conceptually shaping a research problem.

Its value lies in enabling the question of gamifying restorative justice to be posed seriously, rigorously, and interdisciplinarily, as a legitimate topic of contemporary legal, social, and philosophical reflection.

Restorative Justice: Concept and Phases of the Process

The idea that social institutions can limit or transform the consequences of human evil has a long philosophical tradition (see: Plato, 2025; Aristotle, 1988; Augustine, 1988; Hegel, 1991; Durkheim, 1984; Arendt, 2000; Jaspers, 2000). In Christian thought, particularly in the work of Saint Augustine, evil is interpreted as a privation of the good (*privatio boni*), that is, as a disturbance of relationships that can be redirected toward a moral order. In modern philosophy, Immanuel Kant speaks of "radical evil" in human nature, while simultaneously emphasizing the importance of moral and legal institutions that enable the disciplining and limitation of such tendencies within social life. In contemporary political theory, Hannah Arendt warns of the phenomenon of the "banality of evil," pointing out that serious moral transgressions often emerge within everyday social practices and bureaucratic structures. Viewed within this broader context, restorative justice, as well as attempts at its methodological innovation through gamification, can be understood as a contemporary institutional response to the enduring question of how societies can limit the consequences of human evil and create space for responsibility and behavioral change.

Restorative justice represents an approach to conflict resolution based on the premise that crime is not merely a violation of a legal norm, but before anything else a disruption of relationships between individuals and the community. Unlike traditional punitive models that focus on establishing guilt and imposing sanctions, restorative justice seeks to involve all relevant actors in the process of understanding the harm caused and identifying ways to repair disrupted relationships. In this sense, the central aims of restorative justice are the assumption of responsibility, the articulation of the victim's experience, dialogue among participants, and, where possible, the restoration of trust within the community.

The theoretical framework of restorative justice has been developed through the work of numerous authors (Durkheim, 1984; Garland, 2001)[2] who pointed to the need to shift the focus of justice systems from punishment to the repair of harm. In this context, particular emphasis is placed on the idea that justice should not be understood exclusively as an institutional process managed by the state, but rather as a social process involving those directly affected by the conflict. For this reason, restorative practices often include various forms of victim–offender mediation, restorative conferences, or dialogue circles in which members of the community also participate. Although restorative programs vary depending on institutional and cultural contexts, most models can be described through several core phases that structure the restorative process.

The first phase concerns understanding the harm caused by the offense. At this stage, the victim is given the opportunity to express their experience and explain how the event has affected their life. At the same time, the offender is confronted with the consequences of their actions and is given the

[2] The development of restorative justice can also be viewed within the broader framework of sociological theories of punishment that emphasize the social function of judicial institutions. Émile Durkheim already argued that punishment in modern societies plays a symbolic role in reaffirming collective moral norms and social solidarity. Contemporary sociological analyses, such as the work of David Garland, show that in late modernity a plurality of approaches to crime has emerged, in which, alongside retributive models, restorative practices increasingly appear, oriented toward repairing harm and social reintegration of offenders. In this context, restorative justice can be understood as part of a broader transformation of contemporary systems of crime control, in which, alongside sanctioning, alternative models of social response to conflict are also being developed.

opportunity to consider the broader social and emotional implications of what they have done. This process of understanding constitutes the foundation for the development of empathy and responsibility.

The second phase of the restorative process involves perspective-taking. For the offender, this means attempting to understand the victim's experience, while for the victim it may involve considering the circumstances that led to the offense. This phase does not imply a relativization of responsibility, but rather the creation of space for a more complex understanding of the conflict. In practice, however, this stage often proves challenging, as participants frequently struggle to move beyond their own perspective and to grasp the experience of the other party.

The third phase relates to dialogue between participants. Restorative dialogue typically takes place with the assistance of a facilitator and represents a space in which participants exchange experiences, ask questions, and attempt to define a mutually acceptable resolution. The aim of this dialogue is not merely the exchange of information, but the creation of conditions for transforming relationships between participants.

The final phase of the restorative process concerns reparation and reflection. Reparation may take various forms, ranging from symbolic apology and agreements on compensation to joint activities that contribute to rebuilding trust. Reflection, on the other hand, involves critically examining the process itself and considering the possibilities for long, term changes in behavior and relationships. Psychological research (see: Herman, 1992; Batson, 2011; Staub, 2006) indicates that restorative approaches can have a significant impact on victims' experiences and on offenders' processes of assuming responsibility. For many victims of crime, the opportunity to directly articulate their experience and to hear acknowledgment of responsibility from the offender represents an important step in recovery from trauma. At the same time, confronting offenders with the concrete consequences of their actions can foster the development of empathy and reflection on their own behavior. These dimensions of restorative justice have been extensively analyzed in psychological studies dealing with trauma, empathy, and processes of reconciliation in social conflicts.

It is precisely this structure of the restorative process, understanding harm, perspective-taking, dialogue, and reparation, that indicates potential points at which different methodological tools could be introduced to support participants. Contemporary research increasingly focuses on methods that encourage experiential learning and reflection through the simulation of social situations. In this context, the concept of gamification opens the possibility of structuring certain elements of restorative justice through interactive scenarios that allow participants to explore different perspectives and the consequences of their decisions within a safe environment. Such an approach would not replace restorative dialogue, but could serve as an additional tool to help participants better prepare for the process itself.

Gamification: Theoretical Framework

In contemporary research on digital media (see more: Bjelajac & Bajac, 2022; Bjelajac & Filipović, 2020; Bjelajac et al., 2022), gamification is defined as the application of elements characteristic of games in contexts that are not games in themselves. In the broadest sense, gamification involves the use of structures such as role-playing, narrative scenarios, decision-making simulations, and feedback systems in order to foster engagement, motivation, and reflection among participants within a given process. Although this concept was initially developed in the fields of education, marketing, and digital platforms,

in recent years there has been increasing interest in its application within social and institutional practices that require active participation and experiential learning. The particular relevance of gamification in this context stems from the fact that games, unlike traditional forms of communication, enable participants to explore different situations through simulation and decision-making. Rather than addressing moral or social dilemmas solely at a theoretical level, gamification allows them to be "experienced" through interactive scenarios. Such experiential learning can have a significant impact on the development of empathy, the understanding of consequences, and the ability to adopt the perspectives of others.

In this sense, gamification can be understood as a potential methodological framework that supports certain phases of the restorative process. Although different authors employ varying terminologies, the literature on restorative justice broadly agrees that these processes consist of several sequential stages that enable the understanding of harm, the assumption of responsibility, and the attempt to restore disrupted relationships (see: Zehr, 2002; Umbreit et al., 2006; Johnstone, 2011; Marshall, 1999). For the purposes of this paper, restorative justice is understood as unfolding through four interconnected phases: understanding the harm, adopting the perspective of the other, engaging in dialogue, and, finally, reparation and reflection. Each of these phases entails specific forms of cognitive and emotional engagement that are not always successfully achieved in practice.

In the phase of understanding harm, one of the key challenges lies in the offender's ability to grasp the consequences of their actions beyond their own perspective. Gamified approaches may, in this context, employ narrative scenarios and simulations of events in order to enable participants to explore different dimensions of the conflict and its consequences. Interactive narratives allow participants to examine, through structured situations, how particular decisions affect other actors involved in the process.

The second phase, which involves perspective-taking, is particularly suitable for the application of role-playing mechanics. Role-play scenarios allow participants to temporarily assume the position of another actor in the conflict and, through simulation, to understand their motivations, emotions, and constraints. Such an approach can help overcome rigid interpretations of conflict and open space for a more complex understanding of the relationship between victim and offender.

In the phase of dialogue, gamification may function as a preparatory and facilitative tool. Simulations of restorative conversations or structured decision-making scenarios can help participants explore different modes of communication and potential outcomes in a safe environment. In this way, the emotional pressure that often accompanies direct encounters between conflicting parties may be reduced.

Finally, in the phase of reparation and reflection, gamified systems may incorporate various forms of feedback that allow participants to reflect on the consequences of their decisions and consider alternative outcomes. These reflective mechanisms do not function as systems of reward or punishment, but rather as tools for analyzing the process and understanding its implications.

In this sense, gamification does not appear as a substitute for restorative processes, but as a potential instrument that may support certain phases of those processes. Its primary value lies in its capacity to foster experiential learning and reflection through simulation and interactivity, thereby opening space for new methodological approaches in the development of restorative practices.

Gamification of Elements of Restorative Justice

If restorative justice is understood not merely as a normative model or institutional technique, but as a carefully structured social process in which the conditions are created for understanding harm, assuming responsibility, and restoring disrupted relationships, then the question of its possible gamification ceases to appear eccentric or technologically fashionable. It becomes a theoretically legitimate inquiry into whether certain components of a complex communicative and affective process can be methodologically strengthened through mechanics that have already demonstrated their capacity to foster engagement, imagination, perspective, taking, and reflection. In other words, the essential question is not whether restorative justice should "become a game", which it clearly must not, but whether certain elements of the restorative process can be structured through interactive and simulation, based patterns characteristic of games and gamified systems, without compromising the seriousness of the process itself.

This distinction is crucial. Restorative justice is grounded in real human harm, real damage, often profound emotional consequences, and social relationships that are neither abstract nor temporary. For this reason, any attempt at gamification must begin from a clear methodological and ethical premise: it must not gamify pain, trauma, or the criminal act itself. Rather, it may involve the gamification of specific procedural elements that can help participants better understand the situation, prepare for dialogue, consider multiple perspectives, and reflect on the consequences of their decisions. Only under such conditions can gamification be understood as a complementary tool within restorative justice, rather than as its trivialization.

The first point at which such reflection becomes possible is the phase of understanding harm. In restorative justice theory, it is often assumed that one of the fundamental preconditions for any further progress is that the offender at least partially understands the harm they have caused, while the victim is given the opportunity to articulate not only the factual but also the emotional and social dimensions of the injury. In practice, however, this is often where the process encounters obstacles. The offender may formally acknowledge the act without truly understanding its impact on another person's life. They may recognize what they have done, yet fail to imagine how that act alters the other person's sense of security, trust, social standing, or personal dignity. At the same time, the victim may feel that neither institutional language nor standard forms of communication adequately convey the full weight of their experience. It is precisely here that gamified models can play an important role, not by replacing the victim's testimony, but by enabling structured scenarios in which the consequences of a given action become visible, differentiated, and experientially accessible.

Interactive scenarios, narrative simulations, and decision-making systems can help translate what is often left at the level of verbal assertion into a more visible structure of consequences. When participants not only hear but also "trace" how a particular action generates chains of psychological, familial, social, and institutional reactions, they enter a different mode of understanding. This understanding may not be emotionally complete, nor does it automatically lead to remorse, but it alters the cognitive framework in which one's own actions are no longer perceived as isolated events, but as causes of complex relational disruption. In this sense, the gamification of the first phase would not involve awarding points for "correct understanding," but rather designing a process of experiential confrontation with consequences.

The second phase, perspective-taking, is even more conducive to gamification. In classical restorative practices, participants are expected to attempt to understand how the same event appears from different perspectives, that of the victim, the offender, the family, and the broader community. This capacity to shift from one's own perspective to that of another represents one of the most cognitively and emotionally complex dimensions of human sociality (see: Byom, 2013; Healey & Grossman, 2018; Samuel et al., 2022). It does not arise spontaneously, nor can it be simply prescribed. In situations of conflict, individuals are often most strongly attached to their own version of events, as it provides them with emotional and identity stability. For this reason, more than an appeal to empathy is required; what is needed is a method that allows participants to temporarily enter the logic of another position. Here, role-playing mechanics and perspective-shifting simulations demonstrate particular value. Role-play, in this context, is not performance for entertainment, but a controlled assumption of another position aimed at understanding motivations, constraints, fears, and consequences. When carefully designed, such procedures do not relativize responsibility or impose artificial reconciliation, but instead create conditions under which deeper understanding becomes possible.

The third phase, dialogue, represents the very core of restorative justice and is therefore both the most important and the most sensitive. It is here that not only two versions of events meet, but also two emotional economies, pain and defense, guilt and fear, the desire for recognition and the need for self-preservation. While in theory the process appears clear, in practice it is often burdened by tensions that limit its depth and spontaneity. Some participants struggle to speak, others to listen, some engage only formally, while others withdraw when emotional intensity becomes overwhelming. For this reason, preparation for dialogue is often more important than the dialogue itself.

Gamification in this phase would not replace the encounter, but rather model it in advance. Simulations of restorative conversations, branching communication scenarios, anticipation of the consequences of particular statements, and structured modules for practicing active listening can function as preparatory tools. They allow participants to explore different communicative strategies in a controlled environment, reducing uncertainty and emotional pressure before the actual encounter.

The fourth phase, reparation and reflection, also offers space for carefully considered gamification. Reparation is often understood as the act through which the offender demonstrates the assumption of responsibility, through apology, compensation, concrete actions, or symbolic gestures aimed at restoring trust. However, reparation is not merely an act, but a learning process. It requires participants to understand why certain gestures are meaningful, to whom they are addressed, and what their limitations are. Gamification can contribute through reflective feedback systems that do not evaluate moral worth, but instead demonstrate how different forms of reparation produce different social and emotional effects.

Reflection is perhaps the most underestimated element of the entire restorative process. Without reflection, reparation remains an external gesture; dialogue becomes a temporary event without lasting effect; and neither victim nor offender gains the opportunity to transform the experience into a basis for future behavior. Gamified approaches can offer tools for post-process analysis, such as decision mapping, reconstruction of key moments in the conflict, comparison of alternative outcomes, and reflection on how different choices might have led to different results. Such analysis is not merely a technical supplement; it is the point at which restorative justice connects with learning, and learning with behavioral transformation.

This opens a broader theoretical question. Restorative justice, the psychology of moral development, and the sociology of conflict share a common assumption: that human behavior is not a fixed entity, but a process shaped by experience, interaction, and interpretation. Gamification is particularly relevant because it allows this processual nature to be modeled. It introduces sequences, decisions, consequences, feedback loops, and alternative trajectories, elements that are especially important in contexts where participants tend to perceive their position as the only possible one. Through gamification, participants become aware that social situations are structured, that choices have consequences, and that alternative paths are not merely abstract possibilities, but conceivable and analyzable options.

At the same time, clear limits must be established. Gamification of restorative justice must not lead to trivialization, aestheticization of conflict, or technological determinism. Not every process is suitable for gamification, nor is every participant prepared for such an approach. It is particularly important to avoid any model that would transform the suffering of victims into a narrative resource for engagement. Equally unacceptable would be reducing complex moral and legal relationships to simplified systems of tasks and rewards. For this reason, it is essential to distinguish between superficial gamification and serious, methodologically grounded applications of interactive structures aimed at preparation, perspective-taking, communication training, and reflection.

Ultimately, the central issue is not technology, but the architecture of the process. The question is not whether digital tools are modern or attractive, but whether structured forms of interaction can strengthen those aspects of restorative justice that are most fragile in practice: understanding harm, developing empathy, enabling dialogue, and sustaining reflection. It is precisely here that the interests of multiple disciplines converge. Legal scholars see the potential for improved procedural design; psychologists recognize tools for perspective, taking, emotional regulation, and reflection; sociologists identify ways of modeling conflict as a relational and socially conditioned process. For this reason, the gamification of restorative justice is not a marginal topic, but one that opens space for new methodological imagination within an already established, yet still insufficiently explored field.

Accordingly, the central task of future research is not to determine in advance whether gamification “works” or “does not work,” but to specify which elements of the restorative process, in which types of cases, under which ethical and institutional conditions, and for which participant profiles, can be meaningfully supported by gamified instruments. Only then will it be possible to distinguish substantive conceptual contribution from superficial technological enthusiasm, and it is precisely this distinction that will determine whether gamification remains a suggestive metaphor or becomes a genuine contribution to the theory and practice of restorative justice. (Table 1)

Based on the preceding analysis, it is possible to identify several points within the restorative process at which gamification approaches could have a methodological function. The preceding analytical matrix illustrates the relationship between key elements of restorative justice, typical problems in their practical implementation, and possible gamification mechanics that could contribute to improving the process.

Limitations and Ethical Dilemmas of Gamifying Restorative Justice

Although the idea of gamifying certain elements of restorative justice opens up interesting methodological possibilities, any serious consideration of this topic must begin with an acknowledgment

Table 1. Analytical Matrix of Possible Gamification Points in a Restorative Process

Element of the restorative process	Typical problems in practice	Possible gamification mechanisms	Expected effects
Understanding harm	Offenders often minimize the consequences of their actions or view them exclusively from their own perspective; victims struggle to communicate the complexity of their experience	Interactive narratives, event simulations, branching decision scenarios showing social and emotional consequences of the conflict	Increased cognitive understanding of consequences of the act; clearer insight into chains of consequences in the lives of the victim and the community
Taking the perspective of the other side	Participants remain confined within their own interpretations of events; empathy is difficult to develop through classical dialogue	Role, play scenarios, perspective switching, simulation of situations from the viewpoint of the other party	Development of perspective-taking; reduction of rigid interpretations of conflict; increased empathic insight
Preparation for dialogue	Fear, mistrust, and emotional tension hinder open communication during the restorative encounter	Simulations of restorative conversations, interactive communication scenarios, branching dialogues with different outcomes	Greater readiness for dialogue; reduced participant anxiety; better communicative preparation
Dialogue between participants	Participants often struggle to articulate experiences or to listen to the other side without defensive reactions	Facilitated dialogue structures, simulations of active listening, modules for practicing communication strategies	Development of communication skills; greater stability of restorative dialogue
Repair (reparation of harm)	Repair is sometimes reduced to a formal gesture without deeper understanding of its meaning	Simulation of different forms of reparation; scenarios showing consequences of different reparative decisions	Better understanding of the symbolic and social meaning of reparation; greater authenticity of reparative actions
Post, process reflection	Participants often lack a structured way to reflect on what they learned during the restorative encounter	Reflective feedback systems, reconstruction of decisions and alternative outcomes, visualization of the conflict process	Deeper reflection on the process; potential for long-term learning and behavioral change

(Authors' research, 2026)

of its limitations and potential ethical challenges. Restorative justice deals with real conflicts, real harm, and often profound emotional trauma. For this reason, any methodological innovation that introduces elements characteristic of games must be carefully designed and critically examined. Otherwise, there is a risk that the seriousness of the conflict may be inadvertently relativized, or that a process intended to

foster understanding and reparation may be transformed into a technical or experimental procedure whose consequences are insufficiently considered, and, importantly, not fully transparent and accepted by all participants from the outset.

One of the most frequently emphasized dilemmas concerns the risk of trivializing conflict. In contemporary culture, games are often associated with entertainment, competition, and reward systems, which can create the impression that gamification necessarily involves elements that are inappropriate for serious social processes. In the context of restorative justice, such a perception can be particularly problematic, as any simplification or aestheticization of conflict may be experienced as a form of disrespect toward the victim's experience. It is therefore essential to clearly distinguish between superficial gamification, based on points, rewards, and competitive structures, and a methodologically grounded application of interactive scenarios that serve exclusively reflective and educational purposes. In other words, if gamification is to be used in a restorative context, it must not be oriented toward entertainment, but toward understanding and perspective-taking.

A second important limitation relates to the psychological dimension of conflict. Restorative processes often involve participants in emotionally sensitive situations, particularly in cases of violence, family conflict, or long-standing interpersonal disputes. In such contexts, any simulation of conflict must be carefully designed to avoid secondary traumatization. If, for example, scenarios that simulate a particular event are perceived as overly realistic or intrusive, they may produce effects contrary to those intended, provoking additional stress or withdrawal from the process rather than reflection and understanding. For this reason, it is essential that gamified tools, if used in restorative practices, be developed in collaboration with experts in psychology and psychotherapy.

A third limitation concerns the institutional context in which restorative justice is implemented. Restorative programs often operate within judicial systems or local communities that vary significantly in their institutional capacities. The introduction of gamified methods requires certain resources, technical infrastructure, and trained facilitators who understand both restorative processes and the logic of interactive tools. Otherwise, there is a risk that gamification will remain a purely theoretical idea without practical applicability. This problem is particularly pronounced in societies where restorative justice has not yet been fully institutionalized.

Additionally, we should consider the question of digital inequality[3]. Gamification in many cases relies on digital platforms and interactive technologies, which can create additional barriers for participants who lack experience with such tools or do not have equal access to them. In restorative processes, where the equal participation of all actors is of crucial importance, such asymmetries may generate new forms of inequality. For this reason, any application of gamified methods must take into account the social and technological context of the participants.

Another important issue concerns the boundaries between simulation and reality. Interactive scenarios can help participants explore different perspectives within a conflict, but they can never fully

[3] The concept of digital inequality refers to differences among social groups in access to digital technologies, digital skills, and the ability to use technology to achieve social and economic benefits. Contemporary research indicates that digital inequality does not only involve disparities in access to the internet or devices, but also differences in users' capacity to effectively use digital systems. These differences can have a significant impact on the implementation of digital or gamified models in various social institutions, including judicial processes. (See: van Dijk, 2020; Hargittai, 2002)

reproduce the complexity of real social relationships. There is a risk that simplified models of conflict may create an illusion of understanding, while simultaneously neglecting broader structural factors that have contributed to a given event. Sociological analyses of conflict often emphasize that individual actions cannot be fully separated from the social conditions in which they arise. For this reason, gamification must remain aware of its own limitations as a model, one that can illuminate certain aspects of conflict, but cannot exhaust its full complexity.

Finally, particular attention must also be given to the question of ethical responsibility in the design of gamified systems[4]. If interactive tools are to be developed for the purposes of restorative processes, they must be grounded in clear ethical principles that protect the dignity of participants and prevent any form of manipulation of their experiences. In this sense, the design of such systems cannot be left solely to technological experts or game designers, but must involve legal scholars, psychologists, sociologists, and practitioners of restorative justice.

These dilemmas do not imply that gamification has no place in the development of restorative methods. On the contrary, their careful consideration enables this idea to evolve in a responsible and methodologically grounded manner. Gamification can offer new tools for perspective, taking and understanding conflict, but only on the condition that it remains clearly subordinate to the core principles of restorative justice – particularly respect for participants' dignity, the authenticity of dialogue, and the pursuit of genuine reparation of social relationships. In this sense, the gamification of restorative justice should not be understood as a technological solution that automatically improves existing practices, but rather as a field of inquiry that requires careful theoretical and empirical examination. Only through such an approach will it be possible to determine under which conditions, and in what ways, interactive models can genuinely contribute to processes of understanding, dialogue, and reconciliation.

Gamification of Restorative Justice between Moral Anthropology and Social Reality

If evil, as previously noted, represents a persistent possibility of human behavior[5], a major anthropological and sociological dilemma arises: can the gamification of restorative justice realistically contribute to its reduction, or is this merely an optimistic assumption lacking deeper reach and substantive grounding? Any discussion of restorative justice, and especially of the possibilities of its methodological innovation through gamification, inevitably confronts an old and persistent question that transcends legal institutions and technological tools, the question of the relationship between good and evil in human relations. Criminal acts, violence, or any form of serious conflict are always part of a much broader anthropological narrative concerning the human capacity to inflict harm upon others, but also the capacity to recognize that harm, to understand it, and to attempt to repair it. In this sense, every theory of justice,

[4] Contemporary debates on the ethics of digital technologies emphasize that the design of interactive systems is not a neutral process, and that rules, choice architectures, and ways of presenting information can significantly influence users' behavior and experiences. For this reason, the literature increasingly highlights the need for ethically responsible design of digital systems, which must take into account user dignity, procedural transparency, and protection against manipulative mechanisms. These issues are particularly important in contexts involving sensitive social processes such as education, therapy, or restorative justice. (See: Floridi, 2013; Sicart, 2009; Salen & Zimmerman, 2004).

[5] According to Saint Augustine, "a world in which evil exists is better than a world in which moral evil would be impossible. A perfect world requires the existence of free beings, and some of those free beings choose evil through their free will. Yet a world with free beings and evil is still better than a world without freedom and without evil."

whether retributive or restorative, implicitly contains a certain conception of human nature and of the limits of moral transformation.

Skeptics of restorative justice often begin precisely from this point. Their argument is relatively simple: the evil that people inflict upon one another cannot be overcome through dialogue, and even less through methodological experiments involving simulations or interactive scenarios. From this standpoint, the only realistic response to serious social harm is a clear and decisive sanction that reaffirms the normative order of the community. From such a perspective, any proposal for additional methods of understanding conflict, including gamification, may be perceived as naïve or as an attempt to dilute the moral seriousness of wrongdoing through procedural innovation.

However, restorative justice has never rested on the assumption that dialogue alone can eliminate evil from human relations. Its foundational premise is much more modest, yet sociologically more realistic: conflict is an inevitable part of social life, but the ways in which societies respond to it may lead to different consequences. Retributive models of justice focus on sanction and the reaffirmation of norms, whereas restorative approaches seek to develop processes, alongside or instead of sanction, in which participants in a conflict can understand harm, assume responsibility, and attempt to restore disrupted relationships. In this context, the question of gamification in restorative justice should not be understood as an attempt to solve the moral problem of evil through technological means. Gamification is neither a moral doctrine nor a promise of social harmony. Its potential value lies in a much narrower but nevertheless significant domain: the creation of interactive frameworks that can help individuals better understand the consequences of their actions and the perspectives of other actors in conflict. In other words, gamification does not aim to transform human nature, but it may contribute to changing the ways in which people interpret and reflect upon their own actions.

In this sense, gamification of restorative justice can be understood as part of a broader tradition of social institutions that seek to shape moral behavior through experience rather than through norms alone. From educational systems to legal procedures, societies continuously develop different mechanisms to familiarize individuals with social rules and the consequences of their violation. Interactive models, including conflict simulations and perspective, taking role, play, can be seen as a contemporary continuation of this tradition. At the same time, a degree of realism must be maintained. It is unlikely that gamification alone will reduce crime or transform deeply entrenched patterns of violence. The social causes of conflict, such as economic inequality, cultural tensions, and institutional weaknesses, cannot be resolved through methodological innovation. However, within concrete restorative processes in which individuals confront the consequences of their actions, tools that foster perspective, taking and reflection may have tangible significance. For this reason, the question of gamification in restorative justice should not be framed in terms of utopia or skeptical rejection. It is more productive to view gamification as an experimental method that may contribute to the development of new forms of restorative pedagogy. If interactive scenarios can indeed help participants in conflict better understand the complexity of the situations in which they are involved, they may become one of the tools that support processes of responsibility, dialogue, and reconciliation.

Finally, it is important to emphasize that restorative justice, with or without gamification, does not seek to eliminate conflict from society. Conflict is a permanent fact of social life. What can change, however, is the way in which societies learn to deal with such conflicts. If gamification can contribute to enabling

individuals to more clearly perceive the consequences of their actions and the reality of others' experiences, then it does not resolve the problem of evil in human relations, but it may help us confront it in a more reflective and responsible manner.

Critical objections to the gamification of restorative justice

Every discussion of the possibilities of gamifying restorative justice must inevitably take into account the strong objections that can be raised against such an approach. A skeptical legal theorist or criminologist might, for instance, present several serious arguments against the idea of supplementing processes that deal with real human suffering with mechanisms characteristic of games.

The first objection may concern the risk of trivializing conflict. A critic might argue that any application of gamification in the context of restorative justice necessarily carries the risk of diminishing the seriousness of the offense or aestheticizing it through interactive scenarios. If games in contemporary culture are primarily associated with entertainment and competition, then how can a method that uses game elements be appropriate for a process dealing with real violence, trauma, and social injustice?

The second objection could be of a sociological nature. From this standpoint, the problem of crime cannot be understood exclusively at the level of individual decisions and interpersonal conflicts. Criminal acts are often linked to broader social factors such as economic inequality, marginalization, or institutional weaknesses. In such a context, a critic might argue that gamification risks reducing complex social causes of conflict to individual moral dilemmas resolved through the simulation of choices.

The third objection could be normative in nature. According to this argument, the fundamental function of the legal system is the reaffirmation of social norms through sanction and the public acknowledgment of responsibility. If too much attention is given to psychological understanding of offenders or to experimental methods such as gamification, there is a risk of weakening the clear message about the unacceptability of certain behaviors. In other words, restorative processes, especially when supplemented with innovative methods, could be interpreted as a form of unjustified leniency toward those who have violated social norms.

These objections deserve serious consideration and cannot simply be dismissed. However, they often rest on the assumption that gamification seeks to replace existing institutions of justice or to relativize the seriousness of conflict. Such an assumption does not correspond to the actual scope of this concept. As shown in the previous analysis, gamification of restorative justice is not an attempt to "turn a criminal act into a game," nor to absolve offenders of responsibility through interactive experiments. On the contrary, its potential lies in a much more modest but methodologically significant domain. Gamification can serve as a tool for participant preparation, for the development of perspective-taking, and for reflection on the consequences of conflict. It does not replace sanction or dialogue between participants but may help make these processes more understandable and reflective. Understood in this way, gamification does not diminish the seriousness of restorative justice, but may contribute to its greater effectiveness. In this sense, skeptical objections should not be seen as a reason to reject the idea of gamification, but as an incentive for its careful, critical development within clearly defined ethical and institutional boundaries. Such an approach allows gamification to be viewed not as a substitute for existing models of justice, but as one of the possible instruments that can contribute to their further development.

The Paradox of Restorative Justice

One of the most interesting sociological problems of restorative justice can be described as a kind of paradox of contemporary societies. This "paradox of restorative justice" links the sociology of punishment, the psychology of victims, and the political legitimacy of justice, and is based on the assumption that societies often trust punishment more than reconciliation, even when empirical evidence shows that restorative approaches can have better long, term effects. Empirical research in different legal systems has shown that restorative programs often lead to greater victim satisfaction, a stronger sense of offender responsibility, and in some cases a reduction in recidivism. Despite this, restorative approaches frequently encounter skepticism from the public and political actors, who often perceive them as too lenient or insufficiently decisive toward offenders. This tension points to a deeper sociological fact: punishment in modern societies has not only a legal but also a symbolic function. It represents a public act of reaffirming social norms and confirming that certain behavior is unacceptable. When the state punishes an offender, it responds not only to a specific criminal act but simultaneously sends a message to the entire community about the boundaries of permissible behavior. Precisely because of this symbolic dimension, societies often perceive restorative models as potentially weakening the moral clarity of the legal system.

The paradox of restorative justice therefore arises from a conflict between two legitimate needs. On the one hand, there is the societal need to clearly condemn wrongdoing and reaffirm normative order. On the other hand, there is the need to resolve conflicts in a way that genuinely contributes to understanding harm, responsibility, and the restoration of relationships between people. While retributive models of justice strongly satisfy the first need, restorative approaches often provide better tools for achieving the second. It is precisely within this tension that the potential of gamification of restorative processes can be considered. If social skepticism toward restorative justice partly stems from a lack of understanding of its aims and functioning, then interactive models that allow citizens to explore different perspectives through simulated conflict may have an important educational function. In this sense, gamification would not serve only participants in restorative processes but could also contribute to a broader societal understanding of restorative justice logic. In other words, gamification may help bridge the gap between two intuitive conceptions of justice that often coexist in public discourse: justice as punishment and justice as restoration of relationships. Through simulation of conflict and its consequences, interactive models can show that these two dimensions are not necessarily opposed. Sanction may reaffirm norms, while understanding harm and dialogue may contribute to their long, term social effectiveness.

The paradox of restorative justice should therefore not be understood as evidence of its weakness, but as an indicator of the complexity of social expectations attached to justice. Contemporary societies simultaneously expect moral condemnation of wrongdoing and the possibility of social reintegration of offenders. For this reason, restorative justice, especially when supplemented by new methodological approaches such as gamification, can be understood as an attempt to reconcile these two demands within a broader concept of social responsibility.

Restorative Justice and the Question of Evil After Punishment

The subject of justice, and in principle also of restorative justice, is always a human being who has committed a *magnum crimen*, thereby inflicting severe and conscious harm and suffering upon a

victim. Society, by applying justice, has already punished this individual, and he or she is serving that punishment. In this sense, retributive justice has completed its task. The question then arises: what does restorative justice do, given that it must not interfere with the justice already enacted by society? What is, in this case, the subject or object of its action, the already punished person, or the evil within the person that, independently of legal sanction, may remain intact, sometimes until the end of life? This is why the present inquiry must consider the relationship, not toward the punished individual, but toward the evil within the already punished individual, as addressed by restorative justice and, in particular, by the gamification of restorative justice. These are ontological, and even metaphysical questions, yet one may attempt to describe this dimension of the present epoch in a Heideggerian sense.

At the moment when a court issues a verdict and the sentence begins to be served, retributive justice has, in a formal sense, completed its work: society has reaffirmed the norm, marked the act as unacceptable, and imposed a sanction. In this sense, justice has "spoken." However, punishment does not resolve a deeper question: what happens to the evil that the offender has introduced into the world of human relations? This question opens the space for restorative justice. It does not negate punishment, nor does it challenge the authority of the legal order. Its focus lies elsewhere, on the relationship between offender, victim, and the disrupted world of relations created by the offense. In this sense, restorative justice operates not primarily at the level of sanction, but at the level of understanding and responsibility. It seeks to render visible what legal procedure often cannot fully capture: the concrete experience of harm, broken relationships, and the moral disruption produced by an act of violence.

If viewed within a Heideggerian horizon, one might say that the evil committed by the offender appears as a disturbance in the way a human being exists among others. A human being is a being that is always already existing in a world with others (*Mitsein*)[6]. When a person commits evil, they do not merely violate a norm but disrupt their very mode of being, with, others. Punishment responds to the violation of normativity, yet it does not necessarily restore this disrupted relation of being, with, others. In this sense, restorative justice can be understood as an attempt to open a space in which the offender may confront the real consequences of their act and of the evil they have committed. Not in order for punishment to be annulled, but so that the committed evil may become intelligible as part of a concrete human situation. This confrontation does not erase evil, but it may change how the offender understands their own actions and their impact on others. Within this context arises the question of the gamification of restorative processes. At first glance, it may appear paradoxical to connect serious moral conflicts with interactive models characteristic of games. However, if gamification is understood not as the transformation of conflict into a game, but as a method of simulating perspectives and the consequences of action, it may open an additional space for reflection. Interactive scenarios enable participants to perceive different positions within a conflict and, through the experience of decisions and their consequences, to understand the complexity of the relations that have been disrupted.

Viewed within the broader horizon of the contemporary epoch, this indicates an interesting shift in the ways societies attempt to confront evil. Traditional institutions of justice focus on norm and sanction, while contemporary approaches increasingly seek to incorporate dimensions of understanding and

[6] The concept of *Mitsein* is developed by Heidegger in *Sein und Zeit*, particularly in §26 ("Das Mitdasein der Anderen und das alltägliche Mitsein"), where he argues that the being-in-the-world of human existence is, in its essence, always already a being-with-others: "Das In-der-Welt-sein des Daseins ist wesenhaft Mitsein." (see: Heidegger, 1977)

reflection. In this process, digital and interactive media become new instruments through which society attempts to make the moral consequences of human action visible. Of course, neither restorative justice nor its possible gamification can eliminate the possibility of evil in the human world. What they can do is open a space in which evil is no longer only an object of punishment, but also an object of understanding and responsibility. It is precisely in this space between sanction and understanding that the possibility emerges for the offender to rediscover a way of being-with-others in a world they have disrupted through their actions.

Guilt as Legal Status and Existential Situation

In classical legal order, guilt has a relatively clear meaning: it represents a legal status established in judicial proceedings. When a court determines that a person has committed a criminal act and imposes a sentence, guilt acquires its formal shape and is integrated into the normative order of society. In this sense, guilt is a legally defined fact that entails certain consequences, primarily punishment and other forms of legal responsibility. Once the judgment is delivered and the sentence imposed, the legal system considers the question of guilt resolved.

However, from a philosophical perspective, guilt is not exhausted by its legal meaning. In his analysis of human existence, Heidegger speaks of guilt as an existential structure of human being. According to this view, human beings are entities that constantly make decisions and thereby assume responsibility for the way they exist in a shared world with others. In this sense, guilt does not merely indicate a violation of law, but a condition in which a person confronts the consequences of their actions and the relations they have shaped or disrupted through them.

This distinction becomes especially visible after sentencing. Legal guilt then reaches its institutional closure: society has identified the offense, imposed a sanction, and thereby reaffirmed the norm. However, the existential dimension of guilt does not necessarily disappear with the judgment. The person who has committed a crime continues to exist in a world in which their actions have left traces in relations with others. In this sense, the question of guilt moves from the domain of legal procedure into the domain of moral and existential confrontation with the consequences of action. It is precisely in this space between the legal and existential dimensions of guilt that the role of restorative justice can be understood. While the legal system responds to norm violation, restorative processes attempt to address the damaged relations that remain after sentencing. Restorative justice therefore does not annul legal guilt nor question punishment, but opens the possibility of understanding its existential dimension through dialogue between offender, victim, and community. Within this context, gamification of restorative processes may acquire a specific meaning. If interactive models are used to simulate perspectives and consequences of action, they may help the offender perceive what legal proceedings often cannot fully capture: the concrete way in which their actions have altered the world of others. Such experiential reflection does not change the legal status of guilt, but it may deepen understanding of its existential meaning. In this way, the distinction between legal and existential guilt reveals a broader sense of restorative justice. It does not aim to replace punishment or relativize the legal order. Its function is different: it opens a space in which a person may confront the evil they have committed not only as a legal offense, but as an action that has transformed their relationship to others in a shared world.

What Happens to Evil During and After Punishment

When a court imposes a sentence and its execution begins, the legal system considers the question of guilt resolved at the normative level. Punishment serves to reaffirm social norms and signal that certain behavior is unacceptable. However, punishment cannot automatically eliminate the evil that the offender has introduced into relations between people. Punishment affects the offender's legal status, but the committed evil remains part of their biography, their relation to others, and to themselves. In this sense, evil does not disappear with sentencing. It is transformed into a form of moral and existential residue carried by the offender during punishment and after its completion. During incarceration, it may operate in different ways. For some, punishment leads to reflection and confrontation with the consequences of their actions. For others, it produces the opposite effect: resentment, self, defense, or moral disengagement from the act. Therefore, punishment alone does not guarantee a change in how the offender understands their actions.

After the sentence is served, the committed evil continues to exist in a social and moral sense. It remains present in the memory of the victim, in collective remembrance, and in the identity of the offender. A person who has committed a serious offense cannot simply "turn back time," and the act becomes part of their life narrative. Future decisions of such a person often depend on how they interpret their past, whether as something they understand and take responsibility for, or as an injustice inflicted upon them by society. This is where the significance of restorative justice emerges. Its function is not to erase evil or annul punishment, but to open a space in which the offender may understand the consequences of their actions in concrete human terms. Such confrontation may change how they carry their past. The evil committed does not disappear, but it may become an object of understanding and responsibility rather than denial or repression. Within this context, gamification of restorative processes may also play a role. If interactive scenarios allow offenders to perceive the perspective of victims and the broader consequences of their actions, they may contribute to a reflective process that punishment alone often does not initiate. Such tools do not remove evil, but they may influence how responsibility is understood and how future decisions are made. Ultimately, the question of what happens to evil after punishment has no simple answer. It does not disappear from the world, but it may change its meaning in the life of the offender. In the best case, restorative processes may help transform committed evil into a source of moral insight and responsibility, rather than a persistent source of denial or repetition of violence.

Evil as Event and Evil as Identity

One of the most difficult questions after punishment concerns how society and the offender themselves understand the relationship between the committed evil and the identity of the person who committed it. In legal terms, judgment formally separates these two levels: the court determines guilt for a specific act and imposes a sentence for that act. However, in social perception and in the offender's own experience, this boundary often becomes blurred. The committed crime easily becomes a permanent identity marker, so that the person is no longer merely someone who committed evil, but becomes and remains a "criminal."

Philosophically, this identification between person and act has serious consequences. If committed evil is equated with identity, the possibility of moral transformation becomes almost inconceivable. The

person remains permanently bound to their most serious act, and society views them through that event regardless of later changes in their life.

Restorative justice seeks to establish a different perspective. It does not deny the committed evil nor diminish responsibility, but attempts to separate the person from the act. Evil is understood as an event with real and often severe consequences, but not necessarily as a defining feature of the offender's identity. This distinction allows processes of confrontation with evil to focus on responsibility and understanding rather than permanent stigmatization. In this sense, restorative justice does not attempt to erase the past, but to change the way it is integrated into the offender's biography and collective memory. The crime remains an irreducible fact, but how it is understood by the offender and responded to by society can open space for change. Within this framework, gamification of restorative processes may also play a role. Interactive scenarios and simulations of perspective can help participants perceive the difference between act and person. When offenders see the consequences of their actions on others through such models, evil appears as a concrete act with consequences, rather than an unchangeable identity marker. This opens space for reflection on responsibility and the possibility of different future choices. Ultimately, the distinction between evil as event and evil as identity points to the broader aim of restorative justice. It does not seek to erase the past or relativize the seriousness of the offense, but to ensure that committed evil does not become a permanent ontological definition of the person. In the space between acknowledgment of harm and the possibility of change lies the possibility that justice becomes not only an act of punishment, but also a process of restoring relations between people.

Final Reflection: Evil, Responsibility, and the Possibility of Change

The discussion on restorative justice and its possible methodological innovations, including gamification, ultimately cannot be fully separated from the long, standing philosophical question concerning the nature of evil in human relations. From ancient and Christian philosophy to contemporary social theories, thinkers have sought to understand why human beings inflict harm upon one another and whether it is possible to establish social institutions capable of limiting or transforming such harm. Across these traditions, we find different answers, ranging from the idea that evil stems from human weakness or ignorance to the view that it may be produced by social structures or by the banality of everyday action. Within this broader framework, restorative justice can be understood as one of the modern attempts to address the problem of evil not exclusively through punishment, but through processes in which individuals are enabled to understand the consequences of their actions and assume responsibility for them. Such an approach does not rest on the assumption that societies will ever fully eliminate violence or injustice. It is grounded in a more modest, yet perhaps more realistic idea: that societies can develop institutions which foster understanding, dialogue, and the possibility of behavioral change.

In this sense, the gamification of restorative processes may be understood as a contemporary attempt to support the traditional aims of justice, understanding harm, assuming responsibility, and enabling social reintegration through new methodological instruments that encourage experiential learning and perspectival understanding. It does not offer a final solution to the problem of evil in human relations, nor can it replace the moral and legal foundations of the social order. However, if interactive models can help individuals more clearly grasp the consequences of their actions and the reality of others' experiences, they may become a modest yet meaningful step in the long societal effort to ensure that conflict is not

addressed solely through punishment, but also through understanding and responsibility. In this sense, the question of gamifying restorative justice does not lead toward technological optimism, but rather toward an older and deeper idea that accompanies the history of political and legal thought: that societies, despite the persistent presence of conflict, can develop institutions that help individuals learn from experiences of harm in order to better limit it in the future.

Contemporary theories of restorative justice proceed from the assumption that a criminal act is not only a violation of legal norms, but also a disruption of interpersonal relations, trust, and social balance. For this reason, restorative approaches seek to include all actors affected by the conflict: the offender, the victim, and the wider community. However, the practical implementation of restorative justice shows that these goals are not easily achieved. Empathy, understanding of consequences, and willingness to engage in dialogue cannot simply be assumed or institutionally produced. They depend on complex psychological and social processes that shape how individuals and communities interpret experiences of harm.

From a psychological perspective, the position of the individual victim in restorative processes is particularly sensitive. For many victims of criminal acts, the very acknowledgment and understanding of harm by the offender can have a strong therapeutic effect, as it allows their experience to be socially recognized and validated. At the same time, however, there is a real risk that restorative processes may be experienced as additional pressure on victims to forgive or relativize their suffering. For this reason, any methodological innovation in this field, including potential gamification, must first and foremost protect the psychological integrity of victims and ensure that their voice remains a central element of the process.

Beyond the individual dimension of the victim, restorative justice also has a broader sociological dimension. A criminal act rarely affects only an individual; it also disrupts trust within the community in which it occurs. In this sense, society itself can often be seen as a secondary or collective victim of conflict. For this reason, public acceptance of restorative justice frequently depends on whether it is perceived as a fair process that contributes to the restoration of social order, or as an unjust reduction of offender accountability. If restorative models are interpreted in public discourse as forgiveness without responsibility, they may provoke strong resistance and undermine trust in the justice system.

Within this context, the potential of gamification in restorative processes should not be understood as a technological solution, but as a methodological instrument that may contribute to a better understanding of conflict and its consequences. Interactive scenarios, perspectival simulations, and reflective decision, making models can help participants grasp the complexity of the relationships between offender, victim, and community. Such tools may be particularly useful in preparatory stages of restorative processes, as they allow participants to explore different perspectives of the conflict in a safe environment and to better understand the consequences of their actions.

However, it is important to emphasize that gamification cannot replace authentic restorative dialogue. Its value lies in its capacity to support processes of perspectival understanding, reflection, and preparation for encounters in which real conflict is addressed. When applied in a responsible and methodologically grounded manner, gamification may contribute to the development of new approaches that integrate legal, psychological, and sociological insights into a coherent framework of restorative practice.

The theoretical contribution of this work lies precisely in identifying points of intersection between restorative justice and gamification models, as well as in proposing a conceptual framework that allows

these two domains to be understood as complementary rather than opposed. Future research should continue in this direction through interdisciplinary projects that empirically examine how interactive models may contribute to conflict understanding, the development of empathy, and the restoration of social trust. Only through such research will it become possible to determine under which conditions and in what contexts gamification can become a useful tool in the development of contemporary restorative practices.

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Gejmifikacija procesa restorativne pravde: konceptualni okvir i mogućnosti primene

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Sažetak

Rad razmatra mogućnosti i ograničenja primene gejmifikacije u okviru procesa restorativne pravde, polazeći od pretpostavke da savremeni interaktivni modeli mogu doprineti unapređenju razumevanja konflikta, razvoja empatije i refleksije učesnika. Restorativna pravda se zasniva na dijalogu između prestupnika, žrtve i zajednice, sa ciljem preuzimanja odgovornosti, razumevanja štete i obnove narušenih odnosa. Međutim, njena praktična primena često je otežana nedovoljnom spremnošću učesnika za perspektivno razumevanje, emocionalnim barijerama i nedostatkom adekvatnih metodoloških alata za pripremu i omogućavanje procesa. U tom kontekstu, rad ispituje potencijal gejmifikacije kao pristupa koji koristi mehanike igara, poput igranja uloga, interaktivnih narativa i simulacije odluka, kako bi podstakao iskustveno učenje i angažman. Kroz teorijsku analizu, identifikuju se ključne faze restorativnog procesa, razumevanje štete, preuzimanje perspektive druge strane, dijalog, reparacija i refleksija, i razmatraju načini na koje bi gejmifikacioni modeli mogli podržati svaku od njih. Posebna pažnja posvećena je ulozi simulacija u razvoju empatije i pripremi za restorativni susret, kao i potencijalu refleksivnih mehanizama za dublje razumevanje posledica konflikta. Istovremeno, rad ukazuje na značajna etička i metodološka ograničenja, uključujući rizik trivijalizacije konflikta, psihološke osetljivosti učesnika i institucionalne prepreke primeni ovakvih pristupa. Zaključno, gejmifikacija se ne može posmatrati kao zamena za restorativni dijalog, već kao dopunski alat koji može unaprediti pojedine faze procesa. Njena vrednost leži u proširenju prostora za refleksiju, perspektivno razumevanje i pripremu učesnika, čime doprinosi razvoju savremenih metodoloških pristupa u restorativnoj pravdi.

Ključne reči: restorativna pravda, gejmifikacija, perspektivno razumevanje, empatija, interaktivne simulacije, dijalog, refleksija

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self-regulating consensus rules governing the platform, and finally a personalized article selection mechanism for users – personalized journalism.

In the case when there were a small number of publishing houses on the journalistic market, they behaved monopolistically.

> The press had authority over setting agendas, and readers had no choice but to receive the news that the press decided was important to them. At that time, the press called readers 'the masses' and treated them as one mass (Figure 1). A mass by definition is not able to choose the news according to personal wishes (Kim & Yongik, 2018).

When they took positions, it was very difficult for the competition to enter the market, so they

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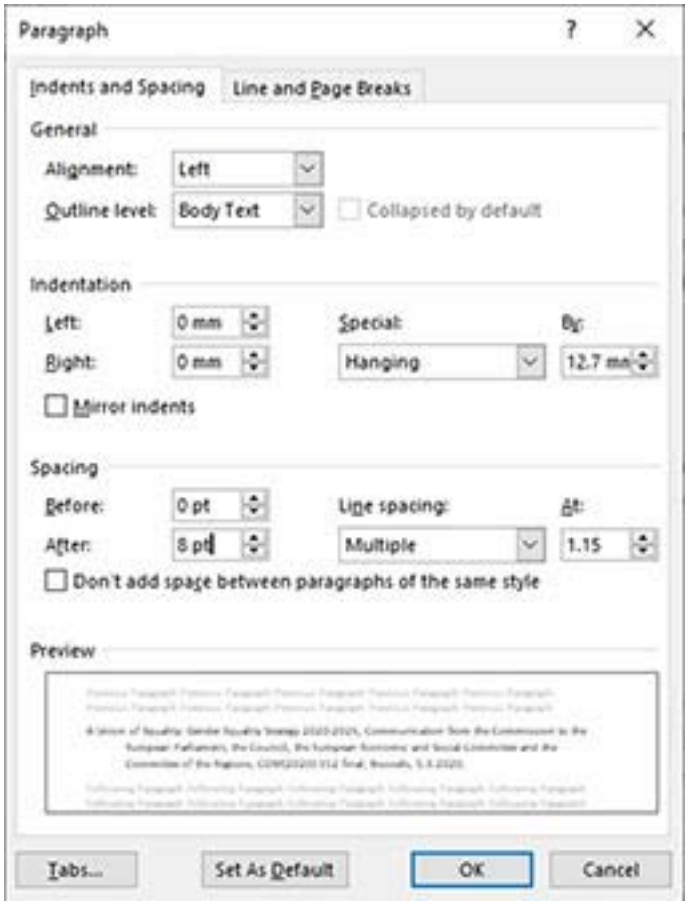

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Univerzitet Privredna akademija u Novom Sadu: Pravni fakultet za privredu i pravosuđe u Novom Sadu. (Bjelajac, 2017, p. 25)

Fukuyama, F. (1992). *The end of history and the last man.* Free Press. (Fukuyama, 1992, p. 65)

Two authors

Author Surname, Initial(s)., & Author Surname, Initial(s). (Year). *Title.* Publisher.

Despotović, Lj., & Jevtović, Z. (2010). *Geopolitika i mediji* [Geopolitics and media]. Grafomarketing.

(Despotović & Jevtović, 2010, pp. 34–36)

Krastev, I., & Holmes, S. (2019). *The light that failed.* Allen Lane.

(Krastev & Holmes, 2019, pp. 23–24)

Three or more authors

Author Surname, Initial(s)., Author Surname, Initial(s)., & Author Surname, Initial(s). (Year). *Title*. Publisher.

Milisavljević, B., Varinac, S., Litričin, A., Jovanović, A., & Blagojević, B. (2017). *Komentar Zakona o javno-privatnom partnerstvu i koncesijama: prema stanju zakonodavstva od 7. januara 2017. godine* [Commentary on the Law on public-private partnerships and concessions: According to the state of legislation from January 7, 2017]. Službeni glasnik & Pravni fakultet Univerziteta u Beogradu.

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(Kaltwasser et al., 2017)

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(Stepić 2012, 2015) or (Stepić 2012, p. 30; 2015, p. 69)

3) Different authors, same last name - Some authors have the same last name, if this happens the initials (s) of the author should be added in all citations, even if the year of publication is different.

(Subotić, D., 2010, p. 97), (Subotić, M., 2010, p. 302)

(Williams, A., 2009), (Williams, J., 2010)

Book / Proceedings – Chapter

Author of chapter Surname, Initial(s). (Year). Title of chapter. In Editor of book Initial(s). Editor of book Surname (Ed(s).), Title of book (Edition if not first., Page numbers). Publisher.

Stepić, M. (2015). Pozicija Srbije pred početak Velikog rata sa stanovišta Prvog i Drugog zakona geopolitike. In M. Stepić & Lj. P. Ristić (Eds.), *Srbija i geopolitičke prilike u Evropi 1914. godine* (pp. 55–78). Gradska biblioteka u Lajkovcu & Institut za političke studije u Beogradu.

(Stepić, 2015, p. 61)

Lošonc, A. (Ed.). (2019). Discursive dependence of politics with the confrontation between republicanism and neoliberalism. In D. M. Vukasović & P. Matić (Eds.), *Discourse and politics* (pp. 23–46). Institute for Political Studies in Belgrade.

(Lošonc, 2019, p. 31)

Journal article

Regular edition

Author of chapter Surname, Initial(s). (Year). *Title of journal/periodical*, *Volume*(Number), page range.

DOI (if available)

Gaćinović, R. (2020). Sistem kao izraz uređenosti određene delatnosti u društvu [The system as an expression of the orderliness of certain activity in society]. *Kultura polisa*, *17*(41), 247–258.

(Gaćinović, 2020, p. 253)

Bjelajac, Ž. Đ., Dašić, D., & Spasović, M. (2011). EU environmental policy and its criminal law framework. *Medjunarodni problemi*, *63*(4), 567–582. https://doi.org/10.2298/MEDJP1104567B (Bjelajac et al., 2011, p. 571)

Special issue or special section in a journal

Editor Surname, Initial(s)., Editor surname, Initial(s)., & Editor Surname, Initial(s). (Eds.). (Year). Title of the special issue [Special issue]. Journal title, volume(issue). DOI broj (if available)

Bjelajac, Ž. Đ., & Filipović, A. M. (Eds.). (2020). Pedofilija – Uzroci i posledice [Pedophilia – Causes and consequences] [Special Issue]. *Kultura polisa*, *17*(1).

(Bjelajac & Filipovič, 2020).

Campbell, K., Lustig, C., & Hasher, L. (Eds.). (2020). Aging and inhibition: The view ahead [Special issue]. *Psychology and Aging*, *35*(5).

(Campbell et al., 2020)

If you are citing an article within a special section or issue (rather than the entire issue or section), use the format for a journal article. You do not need to include the title of the special section or issue.

Delibašić , V. (2020). Krivičnopravna zaštita dece od seksualnih zloupotreba [Criminal protection of children from sexual abuse]. *Kultura polisa*, *17*(1), 53–67.

(Delibašić, 2020, p. 58)

Blog

Author Surname, Initial(s). (Date in full). Title of the blog post. *Name of the blog*. URL

Lee, C. (2010, November 18). How to cite something you found on a website in APA style. *APA Style Blog*. http://blog.apastyle.org/apastyle/2010/11/how-to-cite-something-you-found-on-a-website-in-apastyle.html

(Lee, 2010)

The author of the blog may use a screen name, if this is the case then use the screen name in place of the author.

If the author is not indicated on the blog, the name of the blog is used, as well as when quoting a reference with a corporate author.

JCU Library News. (2019, May 28). Reading challenge reviews: Football heroes and tragics. *JCU Library News*. https://jculibrarynews.blogspot.com/2019/05/reading-challenge-reviews-football.html

(JCU Library News, 2019)

Encyclopedias and dictionaries

Unknown author

Surname, Initial(s). (Ed(s).). (Year of Publication). *Title of encyclopedia/dictionary*. Volume (if there is more than one). Publisher Name. URL (if available)

Manning, M. J., & Wyatt, C. R. (Eds.). (2011). *Encyclopedia of media and propaganda in wartime America*. ABC-CLIO.

(Maning & Wyatt, 2011)

Title of entry. (Year of Publication). In Editor's initial(s). Last Name. (Ed(s).). *Name of encyclopedia or dictionary* (edition if given and not the first edition). Publisher Name. URL

Nirvana. (2001). In S. Sadie (Ed.). *The new Grove dictionary of music and musicians* (2nd ed., Vol. 17). Macmillan Publishers.

(Sadie, 2001)

Known author(s)

Author's Last name, First Initial. Second Initial if Given. (Year of Publication). Title of entry. In Editor's First Initial. Second Initial if given. Last Name (Ed.), *Name of encyclopedia or dictionary* (edition if given and is not first edition., p. or pp. page number or numbers). Publisher name. DOI or URL if given

Bowman, S., & Johnson, S. (2007). Age stratification and the elderly. In K. Christensen & D. Levinson (Eds.), *Encyclopedia of community: From the village to the virtual world.* SAGE Publications. https://doi.org/10.4135/9781412952583.n7 (Original work published 2003)

(Bowman & Johnson, 2003/2007)

Corporate or group author

Name of Institution or Group. (Year of Publication, or n.d. if uknown). *Name of encyclopedia or dictionary* (edition if given and is not the first edition) prvo). Publisher Name. DOI of URL if available.

Oxford University Press. (n.d.). Zombie. In *Oxford English dictionary*. Oxford University Press.

Retrieved January 4, 2020, from https://oed.com/view/Entry/232982 (Oxford University Press, n.d.)

Doctoral dissertation

Surname, Initial(s). (Year of Publication). *Title of dissertation: subtitle*. [Description, Name of University: Faculty (if necessary)]. Name of archive or website. URL

Filipović, A. (2016). *Paradigma kulturološkog pozicioniranja video igre* [The paradigm of cultural positioning of video games]. [Unpublished doctoral dissertation, Univerzitet umetnosti: Fakultet dramskih umetnosti].

(Filipović 2019, 145–147)

Axford J.C. (2007). *What constitutes success in Pacific Island community conserved areas?* [Doctoral dissertation, University of Queensland]. UQ eSpace. http://espace.library.uq.edu.au/view/UQ:158747
(Axford, 2007)

Newspaper or magazine article

Known author(s)

Author Surname, Initial(s). (Full date of publication). Title of Article. *Title of newspaper or magazine*, page numbers. (for printed edition). URL (for online edition)

Avakumović, M. (2019, December 8). Platni razredi – 2021. godine [Salary classes – 2021]. *Politika*.
https://www.politika.rs/sr/clanak/443548/Ekonomija/Platni-razredi-2021-godine (Avakumović, 2019)

Unknown author(s)

Title of article: subtitle, if it is given. (Full date). *Title of newspaper or magazine*, page numbers (for printed edition). URL (for online edition)

Get on board for train safety. (2012, June 17). *Toronto Star*, A14.

In text – ("one two or three words from the title", year, page numbers) ("Get on board", 2012, p. A14)

Corporate as author

Name of Institution [acronim, if necessary]. (Year of Publication). *Title* (edition, if it is not the first). Name of Publisher (not if the same organization is the author and the publisher).

Ministarstvo za evropske integracije Republike Srbije [Ministry of European Integration of the Republic of Serbia [MEI]]. (2018). *Vodič za korišćenje EU fondova u Srbiji; IPA II (2014–2020. god)* [Guide to the use of EU funds in Serbia; IPA II (2014–2020)].

First citing

(Ministarstvo za evropske integracije Republike Srbije [MEI], 2018)

Next citings

(MEI, 2018)

National Fire Protection Association. (2009). *Fundamentals of fire fighting skills* (2nd ed.). Jones and Bartlett.

First citing

(National Fire Protection Association [NFPA], 2009)

Next citings

(NFPA, 2009)

Legal acts

Constitution and laws, decisions of state bodies and institutions

Author [Abbreviated form as needed]. (Year of adoption). *Name of the act.* (Name of the official gazette and number with numbers of amendments). Publisher (if the author and the publisher are the same, then this is omitted). URL

Narodna skupština Republike Srbije [Narodna skupština]. (2006). *Ustav Republike Srbije* [Constitution of the Republic of Serbia]. (Službeni glasnik Republike Srbije, br. 98/06). https://www.srbija.gov.rs/view_file.php?file_id=2391 &cache = sr

First citing

(Narodna skupština Republike Srbije, 2006, Art. 33)

Next citings

(Narodna skupština, 2006, Art. 25)

Narodna skupština Republike Srbije. (2019). *Zakon o osnovama sistema obrazovanja i vaspitanja* [Law on the Fundamentals of the Education System]. (Službeni glasnik Republike Srbije, br. 88/2017, 27/2018 – dr. zakon, 10/2019 i 27/2018 – dr. zakon). Paragraf.

https://www.paragraf.rs/propisi/zakon_o_osnovama_sistema_obrazovanja_i_vaspitanja.html

(Narodna skupština republike Srbije, 2019, Art. 17, para. 4)

(Narodna skupština, 2019, Art. 23)

National Institute of Mental Health. (1990). *Clinical training in serious mental illness* (DHHS Publication No. ADM 90–1679). US Government.

(National Institute of Mental Health, 1990)

Zaštitnik građana Republike Srbije [Zaštitnik građana]. (2012, October 22). Mišljenje br. 15–3314/12 [Opinion No. 15–3314/12]. https://www.osobesainvaliditetom.rs/attachments/083_misljenje%20ZG%20DZ.pdf

(Zaštitnik građana Republike Srbije, 15–3314/12)

(Zaštitnik građana, 15–3314/12)

Legislative acts of the European Union

Legislation type and Number of Legislation. *Name of the act*. EU Body/Agency. Official Journal of the European Union. Series, Issue Number. URL.

Regulation (EU) No 182/2011. *Laying down the rules and general principles concerning mechanisms for control by Member states of the Commission's exercise of implementing powers*. The European Parliament & the Council of the European Union. Official Journal of the European Union, L 55. http://data.europa.eu/eli/reg/2011/182/oj

(Regulation 182/2011, Art. 3)

European Union treaties and founding agreements

Name of the act [Acronym if necessary]. (Year). Official Journal of the European Union. Series, Issue Number. URL

Consolidated version of the Treaty on European Union [TEU]. (2012). Official Journal C 326, 26/10/2012 P. 0001 – 0390. http://data.europa.eu/eli/treaty/teu_2012/oj.

(TEU, 2012, Art. 3)

International treaties of the United Nations

Treaty Title [Acronym or abbreviated name]. (Date of signing or entering into force). Registration in the UN – UNTS number, registration number from the website *United Nations Treaty Collection*: https://treaties.un.org. URL

Marrakesh agreement establishing the World Trade Organization [Marrakesh Agreement]. (1994, April 15). UNTS 1867, I-31874. https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867A-31874-English.pdf

(Marrakesh Agreement, 1994)

Court practice

Court practice in the Republic of Serbia

Legislation type and name of the court [acronym of the court], case number and date. Name and number of the official gazette or other publication in which the judgment was published – if applicable. URL

Odluka Ustavnog suda Republike Srbije [USRS] [Decision of the Constitutional court of the Republic of Serbia], IUa-2/2009 od 13. juna 2009. Službeni glasnik RS, br. 68/2012.

(Odluka USRS, IUa-2/2009)

Rešenje Apelacionog suda u Novom Sadu [ASNS] [Decision of the Court of appeals in Novi Sad], Ržr–1/16 od 27. aprila 2016. godine.

(Rešenje ASNS, Ržr–1/16)

The case law of the International Court of Justice

Types of decisions can be Order, Judgment, Jurisdiction Judgment, Merits Judgment, and Advisory Opinion.

Name of the case (Parties, often abbreviated), type of hearing, type of decision (if applicable), I.C.J. Rep. Year of the reporter (volume, if applicable) (date of the decision), first page of the decision (if published), page and paragraph referenced (if applicable).

Legality of use of force (Yugoslavia v. United Kingdom), Provisional Measures Order, I.C.J. Rep. 1999 (June 2), p. 826.

(Yugoslavia v. United Kingdom, 1999)
Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Rep. 2002 (I) (Feb. 14).

(Democratic Republic of the Congo v. Belgium, 2002)

Legality of the use by a state of nuclear weapons in armed conflict, advisory opinion, I.C.J. Rep. 1996 (July 8), p. 66.

(I.C.J. Rep. 1996)

Jurisprudence: European Court of Justice (ECJ) & Court of First Instance (EFI)

Cite cases introduced before January 1, 1989 by "Case", case number [number/year of filing], name of the parties (italicized and separated by "v"), year of decision (in square brackets), title of the reporter ("ECR"), volume (if necessary), and page and paragraph referenced:

Case 120/88. *Commission v Italy* [1991]. ECR I-621.

(Case 120/88)

Cite cases introduced after January 1, 1989 by "Case", followed by "T" (for the Court of First Instance) or "C" (for the European Court of Justice), case number [number/year of filing], name of the parties (italicized and separated by "v"), year of decision (in square brackets), title of the reporter ("ECR"), volume, and page and paragraph referenced:

Case T-224/95. Tremblay and Others v C*ommission* [1997]. ECR , II-2215.

(Case T-224/95)

Case C-242/95. *GT-Link* [1997]. ECR , I-4449, para. 36.

(Case C-242/95)

Jurisprudence: European Court of Human Rights (ECHR)

Cite cases decided on or after November 1, 1998, by *name of parties* (italicized and separated by "v") [type of decision (note: a judgment on the merits has no designation), or, if decided by the Grand Chamber, [GC]], case number, section(s) referenced, date (optional), and abbreviated title of the reporter in which the case is published (ECHR), year, and volume:

Brumarescu v. Romania [GC], no. 28342/95, § § 52-53, ECHR 1999-VII.

(Brumarescu v. Romania, 1995/1999)

Messina v. Italy (dec.), no. 25498/94, ECHR 1999-V.

(Messina v. Italy, 1994/1999)

Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 13, 25 July 2000, ECHR 2000-IX.

(Smith and Grady v. the United Kingdom, 1996/2000)

Akman v. Turkey (striking out), no. 37453/97, ECHR 2001-VI.

(Akman v. Turkey, 1997/2001)

Jurisprudence of other international courts and tribunals

Look at: https://www.law.nyu.edu/sites/default/files/upload_documents/Final_GFILC_pdf.pdf

Video – Sharing website (e.g. You Tube, Vimeo)

Video

Author surname, initial(s) [Screen name]. (Year, month day). *Title of video* [Video]. Source. URL

University of Sheffield Library [uniSheffieldLib]. (2019, January 30). *Information and digital literacy workshops* [Video]. YouTube.
https://www.youtube.com/watch?v=Lm7bLmbKOk0

(University of Sheffield Library, 2019)

Radiohead (2009, April 22). Radiohead – No surprises [Video]. YouTube.
https://www.youtube.com/watch?v=u5CVsCnxyXg

(Radiohead, 2009)

Video channel

Author surname, initial(s) [Screen name]. (n.d.). Tab name [Source]. Retrieved date, from URL

Universitiy of Sheffield Library [uniSheffieldLib]. (n .d). Home [YouTube channel]. Retrieved August 12, 2020, from htttps://www.youtube.com/user/uniSheffieldLib

(University of Sheffield Library, n.d.)

Website (Internet page)

Author Surname, Initials. or Name of organisation. (Date Year, Month day). *Title of webpage*. Site name (if not the same as the Name of organisation). URL

Binding, L. (2020, July 21). *River Thames has higher density of microplastics than other major European rivers*. Sky News. https://news.sky.com/story/river-thames-has-higherdensity-ofmicroplastics-than-other-major-european-rivers-12033067

(Binding, 2020)

World Health Organisation. (2018, May 18). *Assistive technology*. https://www.who.int/news-room/factsheets/detail/assistive-technology

(World Health Organisation, 2018)

(WHO, 2018)

Tables and figures

The title of a table/figure is written above it, and below the word Table/Figure with a number indicating the order in the text, with one space – spacing 1.15, space 6pt Before and After – alignment justify, without indenting the text, according to the following example:

Table 2

Title

Figure 1

Title

Below the table/figure, with one space – line spacing 1.15, space 6pt Before – a note is added. There are three types of notes - those describing the contents of a figure that cannot be understood from the figure title, an image and/or legend alone (e.g., definitions of abbreviations or explanations of asterisks used to indicate certain values), and those attributing copyright. Examples:

Note. The map does not include data for Puerto Rico. Adapted from 2017 poverty rate in the United States, by U.S. Census Bureau, 2017 (https://www.census.gov/library/visualizations/2018/comm/acspoverty-map.html). In the public domain.

Note. Number of studies = 120, number of effects = 782, total N = 52,578. CI = confidence interval; LL = lower limit; UL = upper limit.

Note. Lyamouri–Bajja et al. (2012, p. 57).

Tables and figures help authors present a large amount of information to readers in an easier and more understandable way. The tables show numerical values and/or textual information arranged in rows and columns. An image is an illustrative presentation of information using charts, diagrams, infographics, drawings, photographs, etc. In order for the tables and figures to help readers understand your work more easily, the data in them needs to be presented in a way that readers do not need to read the text to understand.

Use the tables feature of your word-processing program to create a table. Do not use the tab key or space bar to manually create the look of a table. The parameters being compared should not be displayed in

the same column. Use the same font type in the tables as in the rest of the article. Do not use vertical borders to separate data. For the necessary clarity of the display, it is enough to use horizontal edges at the top and bottom of the table, below column headings, and if necessary, to separate a row containing totals or other summary information from other rows in the table. Use spacing between columns and rows and strict alignment to clarify relations among the elements in a table. If a table is longer than one page, use the tables feature of your word-processing program to make the headings row repeat on the second and any subsequent pages.

Make sure the axes shown are clearly visible and the images are sharp enough. The legend is entered inside the edges of the figure. Use graphics software to create figures in APA Style papers – the built-in graphics features of your word-processing program (e.g., Microsoft Word or Excel) or special programs such as Photoshop or Inkscape.

Special cases of citing references *Citing the second and each subsequent edition* Surname, Initial(s). (Year of publication). *Title* (edition note). Publisher.

Gaćinović, R. (2018). *Mlada Bosna* (drugo dopunjeno i izmenjeno izdanje) [Young Bosnia, (2nd edition)]. Evro Book.

Multiple references by the same author

1) Same author, different years – Sort by year of publication, starting from the earliest.

2) Same author, same year – Arrange in alphabetical order of the initial letter of the reference's name. In addition to the year of publication, put the initial letters of the alphabet, which are also used in bibliographic parentheses.

Gaćinović, R. (2018a). Vojna neutralnost i budućnost Srbije [Military neutrality and the future of Serbia]. *Politika nacionalne bezbednosti*, 14 (1), 23–38. https://doi.org/10.22182/pnb.1412018.2

Gaćinović, R. (2018b). *Mlada Bosna* (drugo dopunjeno i izmenjeno izdanje) [Young Bosnia (2nd edition)]. Evro Book.

(Gaćinović, 2018a, p. 25), (Gaćinović 2018b)

3) The same author as an independent author and as a co-author – First list the references in which he is an independent author, and then those in which he is a co-author.

4) The same author as the first co-author in several different references – Arrange in alphabetical order the surname of the second co-author.

Pollitt, C., Birchall, J., & Putman, K. (1998). *Decentralising public service management*. Macmillan Press.

Pollitt, C., Talbot, C., Caulfield, J., & Smullen., A. (2005). *Agencies: How governments do things through semi-autonomous organizations*. Palgrave Macmillan.

Special cases of citing bibliographic parentheses

Exceptions to citing bibliographic parentheses at the end of a sentence

1) Citing the author's surname within the sentence – Put the year of publication in brackets after stating the surname, and the page number at the end of the sentence in brackets.

According to Bjelajac (2017), ... (30).

2) Citing the author's surname within the sentence before the citation from the reference – After citing the surname, state the year and page number in the bibliographic parenthesis, and then cite the citation.

As Bjelajac (2017, p. 45) states: " ... "

Fukuyama (1992, p. 57) explicitly states: " ... "

3) Citing the same reference several times in one paragraph – If the same page or range of pages is cited, enter the bibliographic parenthesis at the last citation or at the end of the paragraph before the punctuation mark. If different pages are cited, state the reference when quoting the specific page for the first time, and then, until the end of the paragraph, put out only different page numbers in parentheses. If the next citation refers to the same reference as the previous citation, do not enter the author's name in parentheses, but only the year and page.

(Bjelajac, 2017, p. 34)

.....

(2017, p. 46)

Do not use "the same", "*ibid*", or "*op. cit*." for multiple citing of a reference.

Citing the terms "see", "compare", etc.

Enter these expressions in bibliographic parenthesis.

(see Bjelajac 2017, p. 153)

(Stepić, 2015; compare Knežević, 2014)

Secondary referencing

This is when you reference one author who is referring to the work of another, and the primary source is not available. *Secondary referencing should be avoided if possible.*

If you have only read the latter publication you are accepting someone else's opinion and interpretation of the author's original intention. You cannot have formed your own view or critically appraised whether the secondary author has adequately presented the original material.

You must make it clear to your reader which author you have read whilst giving details of the original.

Use 'as cited in' if the author has cited the work of another, e.g.

(Chomsky, 1999 as cited in Đurić & Stojadinović, 2018, p. 47)

If the author has directly quoted from an original piece of work then you would use 'as quoted in' e.g.

„Tom prilikom neoliberalizam se od strane najvećeg broja njegovih protagonista najčešće određuje kao politika slobodnog tržišta" (Chomsky, 1999, p. 7, as quoted in Đurić & Stojadinović, 2018, p. 47).

In the references, list only the secondary reference.

Đurić, Ž., & Stojadinović, M. (2018). Država i neoliberalni modeli urušavanja nacionalnih političkih institucija [The state and neoliberal models of collapsing national political institutions]. *Srpska politička misao*, *62*(4), 41–57.
https://doi.org/10.22182/spm.6242018.2

Same bibliographic parenthesis, multiple references

2) *Different authors* – Separate references with semicolons.
(Stepić, 2015, p. 61; Knežević, 2014, p. 158)

3) Same author, different years – Give the author's last name, and then the year of publication of the various references in order from earliest to most recent, and separate them with a comma, i.e., a semicolon when stating the number of pages.

(Stepić 2012, 2015) or (Stepić 2012, p. 30; 2015, p. 69)

4) Different authors, same last name – Some authors have the same last name, and if this happens the author's name initial(s) should be added in all citations, even if the year of publication is different.

(Subotić, D., 2010, p. 97), (Subotić, M., 2010, p. 302)

(Williams, A., 2009), (Williams, J., 2010)

Application of spelling rules Align the papers with the spelling rules of the English language.

Please, pay special attention to the following:

– Some well-known foreign expressions should be written only in the original language in italics, e.g.: *de iure*, *de facto*, *a priori*, *a posteriori*, *sui generis*, etc.
– Do not start a sentence with an acronym, abbreviation or number.
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– URLs among the sources in the list of references should be linked to the hyperlink, without putting a full stop at the end of the link.
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– Write a hyphen with space before and after or without space, never with space only before or only after. When enumerating, as well as between numbers, including page numbers, use a dash (–) instead of a hyphen (-). For dash use the keyboard command: Alt+150.
– Do not use bold or underline to emphasize certain words, but only italics or quotation marks or quotation marks (‘ ’).
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