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# PRESECULAR CHARACHTER OF MONTENEGRIN LAW ON FREEDOM OF RELIGION IN CONTEXT OF FULLER'S DEMANDS FOR INTERNAL MORALITY OF LAW

***Abstract***

*The authors analyse the new Montenegrin Law on Freedom of Religion or Belief and the Legal Status of Religious Communities from two aspects: the aspect of the socio-political context of its adoption (material sources of law) and formal aspects of the provisions of the Law itself (formal source of law) in order to point out the serious imperfections of that Law. Regarding the first aspect, wider social context in Montenegro is analysed in comparison with European regulative principles of area of religious freedoms. As for the provisions of the Law itself, they are considered in the context of Fuller's theory of the internal morality of law and its 8 requirements that make law possible in order to examine in detail whether and to what extent the Law fulfils the principles of legality as a basic principle for realization of the rule of law. The conclusion of the analysis from both aspects is that the analysed Law is also full of imperfections and obviously incompatible with the values of the rule of law.*

***Keywords:*** *morality of law, Fuller, Montenegro, Law on freedom of religion, post secularity.*

## 1. Introduction

The new 2020 Law on Freedom of Religion or Belief and the Legal Status of Religious Communities (hereinafter the Law) came into force in a tense atmosphere. The clearly expressed disagreement with the proposed solutions in this Law, which was repeated several times before by representatives of the opposition and highly ranking clergy and believers of the Serbian Orthodox Church (hereinafter SOC) as the largest religious community in Montenegro, after the resistance on the night of the vote, turned into massive and peaceful protests. The Law provisions and the motives for its adoption have been the most important legal and political topic of Montenegrin public discourse in recent months and the key factor that contributed to the political changes that followed the August 2020 parliamentary elections. At the time of writing of this article, it is predictable

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that the provisions of the Law that has been considered controversial and which are still in force will be abolished or at least revised. That will put an end to the process that has lasted since the publication of the Bill. In that sense, the relevance of this article lies, although the Law will soon be revised, in the exposure of the all unsustainability of certain legal solutions from one slightly different, theoretical angle.

The methodological approach that has been chosen in this article covers the entire phenomenon of this act - from social facts and political forces and motives as material sources of law that determined this act to the treatment of the provisions of the act itself as a formal source of law, with the unique aim of presenting *in toto* its retrograde nature in both these aspects. Retrogradation within the material sources of law could be seen as rough interference in the most refined issues of church self-determination and identity in the context of church-state separation. Instead of promoting what de la Ravière, the French physiocrat, summed up through the sentence "to attack property means to attack freedom […] and that the fight for one's security, property and freedom should be the primary reason for all laws" (according to Tadić, 2006, pp. 98-99) this act in fact is the emanation of quite the opposite direction, because some of its provisions violate the right to peaceful enjoyment of property and the right to freedom of thought, conscience and religion - two cornerstones of the law and legal security and liberal democracy. Its property provisions on *ex lege* nationalization of church property nullify the legal reality. The registration provisions reduce SOC's acquired rights to their abolition and make the Law to abolish even the ideality of law which, according to Tadić (2006, pp. 248-249), is expressed in a legal entity whose essence lies exactly in self - determination and autonomy.

### *1.1. Why Fuller?*

Before further elaboration it is necessary to make another methodological note regarding our determination to "pass" the Law and its disputed provisions through the "test" established by L.L. Fuller in his book *Morality of Law*. There are multiple reasons why Fuller's teaching was so suitable for the analysis of the provisions of the Law. Few apologies of such legal solutions were reduced in the previous period to one single positivistic argument - the period of *vacatio legis* has passed, *ergo* the Law has become part of the Montenegrin legal system and there is nothing left to do but to obey it.[1] To oppose such a truncated[2] positivist

[1] An example of such attitude can be seen here: https://www.youtube.com/watch?v=0kXnf5gXmbw&t=1804s, accessed 11 .9. 2020.

[2] Truncated because this attitude, taking into account the atmosphere and the course of the legislative process in this concrete case, does not fulfil the basic and minimalist positivist principle according to which the law is to be considered an act that has been adopted by a valid procedure in accordance with legislation rules. But that was not the case here. The entire legislative process was accompanied by: failure to organize public debates on the 2015 Draft Law, and there was a complete lack of public and inclusive public consultations on the Bill, primarily with religious communities as direct addressees of this Law, which was act of noncomplying with the recommendations given by the Venice Commission (2019, p. 7, par. 22), also the non-transparency of the process could be seen in the fact that the identity of the members of the working group that wrote the law was not disclosed to the public, and in the end the very act of adopting the law was accompanied by constitutionally dubious detention of MPs from opposition without lifting their immunity first. The position

attitude anyone from the plethora of authors of essential jusnaturalism would simply not be purposeful. Arguments and criticisms from the point of view of natural law might be quite appropriate, but they would miss the point. Instead of this inadequate dichotomy of positive and natural law, Fuller creates, by his own confession, special, procedural version of natural law, which tends to describe the endeavour of subordinating human behaviour to the rule of law and whose naturalness is reflected in purpose and permanence just as much as the carpenter or any other craftsman uses natural laws in his endeavours (Fuler, 2011, p. 105). To this goal law is dedicated as an endeavour - an endeavour to achieve the fullest possible legality, and what is especially important for the issue that we deal with in this paper is the fact that Fuller's idea of procedural jusnaturalism is completely secularized and deprived of any metaphysical or divine background or cause, and concentrated only on practical activity of a person i.e. legislator (Budisavljević, 2017, p. 190), since Fuller was one of those people who rejected traditional religious approach of natural law theories (Summers, 1984, p. 64). Therefore, it is a particularly tempting challenge to show within the framework of such Fuller's theory, the whole unsustainability of legal solutions related to the position of religious communities and to refute the criticism that the SOC in Montenegro is acting like it is placed above legal order and the state by invoking some of its divine prerogatives.

Fuller's guiding idea comes down to the view that for the rule of law it is necessary to respect procedure, institutions and form, and that, therefore, this internal morality is a necessary precondition for the successful realization of the essential aims of law. Vice versa, if there is no such presumption, which is embodied in eight requirements or qualities that the law must fulfil, there will be no talk of bad law, but the law will not exist at all (Đurđić, 2008, p. 76).[3]

And finally, equally important reason that led us to reach out for Fuller's procedural jusnaturalism is that we have recognized in Fuller's story about a fictional country and its equally fictional ruler Rex who takes on the ambitious task of a legislator the striking level of similarity with the authorities of Montenegro.[4] The casuistry combined with the

reached by the mature Radbruch that equalization of force and law nullifies the character of an Act as part of the rule of law and the law then becomes violent in spite of its correct form (Vasić, 2018, p. 52) remained unattainable in this situation because even the form was not properly respected. Therefore, there can be no question of what Fuller calls parliamentary sovereignty, which is only a more refined formulation of the positivist apologies of this law that we criticize, because when asked whether the state gives parliament unbridled power to go against its own laws that still exist in the legal order, Fuller answers in the negative because, as he states, the parliament is limited by the law of its own internal procedure (Fuler, 2011, pp. 49, 123).

[3] Even the authors who criticize Fuller's views gave him the credit for the affirmation of necessary connection between law and moral through control by rules. That control was considered as request of justice, i.e. legality principle (Hart, 1994, p. 207). Furthermore, Fuller's minimalism of morality (Mitrović & Vukadinović, 2017, p. 12) is in many ways complementary with the standards and understanding of the law that the European Court for Human Rights has later developed in its practice (Marinković, 2018, p. 323) and thus, taking into account Fuller's theory regarding Montenegrin law becomes even more relevant if it is known that Montenegro has ratified the European Human Rights Convention (ECHR) and is part of the human rights protection system whose ECHR is a crucial factor.

[4] President of Montenegro expressed politically motivated desire to work until his last breath on reorganizing the church structure for which purpose this Law should serve on the legal ground (RTS, 2020a).

Rex's scarce legal knowledge from Fuller's allegory (Marinković, 2018, p. 327) and the no less incompetence of the Montenegrin authorities ultimately had an identical result: legal solutions, in both imaginary and real case were such that they could hardly be understood by either a layman or a legal expert (Fuler, 2011, p. 51).

## 2. Presecular character of the political and legislative process

The ruling party announced at the 2019 party congress that one of their future priorities will be to restore the autocephaly of the Montenegrin Orthodox Church (see Mandić, 2019) in order to overcome the situation of division among the Orthodox population in Montenegro by forming a unique and organizationally independent Orthodox Church (Democratic Party of Socialists, 2015). The existence of such a political aspiration of one of the political parties is (il)legitimate in a pluralistic society, but the legal implementation of such an idea certainly causes multiple difficulties, both in terms of the constitutional order of Montenegro and in wider European framework. One of the basic principles that act like the Law should promote is the respect for the legal self-determination right of the church, which has its correlate in the obligation of the state to recognize and protect that right (Šijaković, 2011a, p. 456). It is important to emphasize that, philosophically speaking, regarding that recognition the state does not produce ontological reality but legal reality (Šijaković, 2011b, p. 466). Therefore, legally speaking, the character of such recognition remains exclusively declarative. This principle was roughly violated by the adoption of the provisions which purpose is to be a lever of interference in the deepest issues of church identity, organization and self-understanding. The product of such state intervention would be a religious entity which, in terms of nationalist projections and co-optation (which according to Pedro Ramet are two of the three key characteristics behind modern demands for autocephaly, (stated according to: Jevtić & Veković, 2019, p. 599)) would in everything be servile to the postmodern autocracy in Montenegro (Šijaković, 2011a, p. 455). The intention to reorganize the church structure (i.e. to establish a new one) is in clear contradiction with the constitutional principle of separation of state and church (Art. 14 of the Constitution of Montenegro) a principle that is also one of the most significant civilizational achievements of modern Europe. Therefore, this Law is a major step backwards in relation to the proclaimed aspiration to achieve European values. Instead of considering becoming a part of post-secular Europe, Montenegro with such a Law remains stuck with pre-secular topics.

Such conclusion can be also reached in the field of another important principle of state-church relations - the principle of neutrality. The principle of state neutrality in the case law of the European Court of Human Rights (ECHR) implies that the autonomy of religious communities is an integral part of pluralism in democratic societies (*Supreme Council of the Muslim Community v. Bulgaria*), as well as that they must not support one of the conflicted parties and in cases of the division and conflicts between two groups within the same religious community. So the state must maintain its neutral character even at the cost of political tensions which are, in fact, an inevitable consequence of pluralism. The role

of state authorities in such cases is not to eliminate the cause of tension, thus eliminating pluralism, but the mutual tolerance of the opposing groups (*Sheriff v. Greece*). What contribution can be made to the principle of neutrality when the Law, whose provisions and the manner and motives for its adoption do not show that the goal is to eliminate but on the contrary, to induce tensions and undermine pluralism? This is all the more so because the ECHR cited case law referred to those cases when, within the factual situation, there were indeed serious legal and dogmatic disputes between two fractions, both seriously claiming the right on the legitimacy and heritage of the religious community. None of that is the case in Montenegro, since there are no disputable issues in the field of church life and the dogmatic-canonical field.[5]

More than a decade ago, prof. Tanasković (2009, p. 78) was the first to present a thesis and define the ambience of legal regulation of the position of churches and religious communities in Montenegro as an ambience of pre-secularism as opposed to the tendencies of post-secularity that characterized Europe. He saw the reasons of pre-secularity or the gap in relation to the European legacy, in state-national (or nationalist?) reasons and post-communist heritage. Unfortunately, the events that followed, which culminated in the adoption of the Law in the described atmosphere showed that Professor Tanasković was right.

## 3. Montenegrin Law on freedom of religion and requirements for internal morality of law

The internal morality of law covers both types of morality by Fuller- the morality of duty (embodied in prohibitions) and the morality of aspiration (embodied in affirmation

[5] To make the absurd even bigger and the situation to get discriminatory tones, Montenegrin state authorities knew how to show maturity and understanding of these principles, respecting autonomy on the example of other religious communities. Thus, for example, the text of Article 5 of the Agreement on the Regulation of Relations between the Islamic Community and the Government of Montenegro can be illustrative, because stipulates that free regulation of the internal organization of the Islamic Community in Montenegro and establishment, change and abolition of legal entities belongs exclusively to the *Meshihat* (emphasis added) and in paragraph 2 that Montenegro guarantees the right of the Islamic community in Montenegro to freely communicate and maintain ties with Islamic communities in other countries, especially respecting the historical ties with the Islamic community in the Republic of Turkey. Such a text really represents fulfilled high standards and an example of good practice, but the question justifiably arises why an identical or at least similar agreement was not signed with the Serbian Orthodox Church. The reasons for endangered national security, which will be discussed below, which are offered in response, can hardly be a valid justification since this reason is not mentioned as one of the possible grounds for restricting the right to freedom of religion from Article 9 paragraph 2 of the ECHR, and the European Court in its judgment in the case of the *Metropolitan Church of Bessarabia and others v. Moldova*, based on its position on the text of the Convention, confirmed that reasons of national security, especially if not substantiated by convincing evidence, could not be grounds for restricting religious freedom (cited according to Marković, 2020, p.120). Of course, in this case in Montenegro we cannot talk about evidence, let alone evidence that would be confirmed and convincing about the alleged threat to national security by the Serbian Orthodox Church, but mostly it came down to unfounded political assessments supported by discriminatory intentions. In this way, the standpoints of the UN from 2011 were ignored, according to which discrimination against religious communities is prohibited, especially if it is carried out with the aim of bringing churches and believers who are considered not to correspond to the state's religious or political program under control (OHCHR, 2011, par. 57).

and creation). Although the second predominates, both aim to enable the realization of not just any but good legal system (Đurđić, 2012, p. 707). That is why the provisions of the Law will be analysed in the context of both types of claims, with special emphasis on the two most problematic groups of issues - those dealing with the issue of legal subjectivity and those dealing with the property issues.

*3.1. Generality*

The generality of a legal act is considered to be the primary and fundamental aspect of the principle of legality. Fuller's standing point regarding this requirement of the internal morality of law is that the generality is satisfied if the rules exist (Fuler, 2011, p. 61). Thus, at first glance, it could be said that the fact of the existence of rules prescribed by this Law means that the generality requirement in this case is satisfied, especially since in Fuller's view equal treatment that can be subsumed under the existing norm is not generality but fairness (Đurđić, 2008, p. 62). But this is *prima facie* inference, since the requirement of generality has other qualities that must not be ignored. Thus, it is a condition for the effectiveness of the rule of law and the impartiality of the legislator, and more precisely, a condition and guarantor of the protective effect of a law whose injustice is being amortized by the generality (Đurđić, 2008, p. 62). Also, generality is a feature that prevents law's effect on certain goals and individuals from being known in advance (Hajek, 2012, p. 119). Closer look at certain legal solutions will show that the request of the generality has not actually been fulfilled in the case.

The Registration section of the Law (Article 18-34) and especially Art. 25, par. 3[6] which carries the danger of abolishing the legal personality of the SOC, as well as Article 62[7] which provides *ex lege* nationalization of religious buildings achieved only apparent abstractness of norms since their effect is to hit only the SOC in Montenegro as one of the addressees of this Law. This is because with other religious communities agreements have been signed.[8] By these agreements the legal personality of those communities have been recognized and even the public law subjectivity of these communities, as the provisions on restitution implicitly recognize their property rights before 1945 and communist

[6] It stipulates that a part of a religious organization whose centre is abroad and who operates in Montenegro may acquire the status of a legal entity by entering it in the Register or *Evidence* [underlining ours], by which is excluded the possibility that a religious community based abroad in Montenegro has had legal personality even before this Law, which would be confirmed by admission for entry in the Evidence (of already existing religious communities) in accordance with Article 24.

[7] It stipulates that religious facilities and land used by religious communities in the territory of Montenegro which is found to have been built or obtained from public resources or have been in state ownership until December 1, 1918 and for which there is no evidence of property rights, as cultural heritage of Montenegro, are the property of the state.

[8] The Agreement on the Regulation of Relations of Common Interest (with the Islamic Community) and The Fundamental Agreement, which has the nature of an international treaty, since it has been signed with the Holy See, and the Catholic Church is example par excellence of a religious community that operates in Montenegro and has its headquarters abroad.

nationalization.[9] There is no doubt that these are quite sufficient guarantees in terms of protection from possible adverse effects of these articles of the Law, guarantees that the SOC has not been provided since it is the only existing religious community with which the Agreement on relations of this kind has not been signed.[10] From the above said, it is obvious that such solutions and constellations of political and legal decisions entered into the domain of discrimination, and open opposition to Art. 8, par. 1 of the Constitution of Montenegro which prohibits discrimination on any grounds, but also Art. 17, par. 2 of the Constitution which guarantees equality before law regardless of any particularity or personal property. In addition, the presented facts and arguments seem sufficient to conclude that the requirements of the generality have not been reached, at least, in terms of *ratione personae.*

*3.2. Promulgation*

The request for promulgation can be considered fulfilled if the law has been successfully published or otherwise made available, with the aim that the addressees of the law adjust their conduct to the known rules (Đurđić, 2008, p. 63). If we know that this procedure was duly followed in the case of the Law in question, it seems that there should be no special dilemmas whether the Law has been properly promulgated. But, if we analyse this specific issue in a broader context, then the question could justifiably be asked whether the multiyear continuity of non-transparency of the legislative process we wrote about in previous sections could blur the seemingly clear picture of a complied with promulgation requirement. This is all the more so because the shortcomings of the legislative process in the form of closeness to dialogue and public debate on the proposed solutions have been continuously pointed out by the immediate addressees of the Law. It seems that the basis for such an extensive interpretation of the promulgation requirements could be found in Fuller himself, who writes "that laws should be published appropriately and therefore be subject to public scrutiny, which includes the kind of appraisement according to which they represent such laws that should not be enacted" (Fuler, 2011, p. 66).

*3.3. Clarity*

The requirement of clarity, i.e. the standard of a clear legal norm, is another crucial condition of legality. Here, Fuller emphasizes that a situation is possible that the legislator himself, by performing his activity, violates the legality principle. This happens in those cases when the legislator not only exceeds his constitutional powers, but also enacts unclear and/or unrelated legislation. Thus, Fuller concludes that ambiguity and incompleteness

[9] Moreover, particularly interesting in comparative terms is the provision from Article 10 of the Agreement on the regulation of relation of common interest between Montenegro and the Islamic Community which states that the existing property of the Islamic Community that is not registered at the time of signing the Agreement will be registered at the request of the Islamic Community.

[10] Reason for that as said by the people of the political leadership of the state, lays in fact that SOC is treated as a relic of the past which should have stayed there. See (IN4S, 2019).

enable that even legislator and not only the administration or the court can make legality unattainable (Fuler, 2011, p. 77).

This requirement also has remained mostly unfulfilled by the provisions of the Law. Thus, as an example of unrelated legislative action, a systemic ambiguity can be attached, which is obvious if Art. 30, par. 1 and Art. 32, paras. 1 and 2 of the Law are brought in correlation. Namely, Art. 30, par. 1 prescribes numerous reasons why a religious community may be banned from acting, and Art. 32, par. 1 prescribes a procedure for banning activities if the legitimate goal is constrained in the interest of public safety, protection of public order, health or morals and rights and freedoms of others could not be achieved by milder measures of restraint. Furthermore, par. 2 of the same article states that before making a decision on prohibition, the court has the opportunity to give the religious community a reasonable deadline to harmonize its actions with public order and morals. It is not clear from the comparison of the text of the stated paragraphs whether in the prohibition procedure the court can leave an appropriate deadline in all the mentioned cases from par. 1 or only in two cases from par. 2 (Pravni savjet i grupa autora, 2019, p. 55) that are especially emphasised. Also, the cause of such special emphasis on certain reasons is further unclear, especially if it is known that the list of reasons from par. 1 is a standardized *numerus clausus* way of prescribing restrictive reasons, widely accepted in international human rights law.

These articles fall under the criticism from Fuller's point of view on another ground. Namely, in Art. 32, par. 2, the standard "appropriate deadline" is used without absolutely any closer indication on how much time is to be considered appropriate, which is only one of many other examples in this Law in which there can be unjustifiably wide discretion for, in this case judicial body, which could further serve to the arbitrary restriction of individual freedom (Đurđić, 2008, p. 68). Following up on Hayek's critical assessment of the role of hyper production of such uncertain legal standards in degrading the rule of law, Fuller rejects as risky a legislative policy that relies on a passive wait for administrative or judicial authorities to understand and apply a broad legal standard and recommends action in legislative "hall" (Fuler, 2011, p. 78). This is completely missing in the concerning case.

There is no more obvious example of lack of clarity *strictu sensu* than in one part of the Art. 62, par. 1, which states that religious facilities and land used by religious communities in the *territory* of Montenegro which is found to have been built or obtained from public resources *or have been in state ownership* until December 1, 1918, from the moment of entry into force of this Law shall be considered as state property.[11] What is unclear to the point of complete obscurity in this article is that it is not known what the legislator meant by the terms of territory of Montenegro and the state. Namely, it is a notorious historical fact that the borders of the state of Montenegro have changed

[11] Arguments of linguistic interpretation lead to this interpretation of the provision because in the quoted paragraph was used the verb form of the present in the 3rd person plural, and it can be understood that church property which, according to the legislator, churches and religious communities only use, has become *ex lege* state property. In this regard, it is completely unclear what else, apart from the role of the "fig leaf", the procedure provided for in par. 3 of the same article should serve. In this envisaged procedure, equally vaguely, has been given priority to 2017 Administrative procedure Law over the 2004 Civil Procedure Law.

throughout history. Therefore, the territory that is to today of the state of Montenegro includes parts that weren't recognized as pertaining to Montenegro's legal system before 1918. At the same time, it is equally unclear what is meant by the term citizen (whether only a citizen of the Principality and Kingdom of Montenegro or any person regardless of his citizenship) (see Stjepanović, 2019, pp. 911-914, 917, as well as Pravni savjet i grupa autora, 2019, pp. 151-155, 166) The striking lack of clarity of this provision thus leaves us with a difficulty in attempts to properly understand it, halfway between the unfounded expansion of its scope and the unexplained and insufficiently guaranteed particularism in application. The cited examples of incompleteness and ambiguity *ratione territoriae* have proved Fuller's remark that apparent clarity can be more harmful than sincere vagueness (Fuler, 2011, p. 77).

*3.4. Congruence between declared rule and official action*

The question of the existence of congruence between a declared rule and an official action is the most complex of all the requirements of the internal morality of law (Fuler, 2011, p. 92). This requirement status in Fuller's thought is deserved by its correlation with the refined issues of interpretation and the role of judges, but also because the consistent application of law and preservation of legal security through avoiding arbitrariness largely depends on it (Đurđić, 2008, p. 72). Fuller sees a dangerous threat to this principle in a number of reasons, from those concerning the text of law (such as misinterpretation or misunderstanding) to those concerning the characteristics of the people who are called to enforce the law (prejudice, corruption, drive for power) (Fuler, 2011, p. 93)

*Ratio legis* of the specific provisions of Law (Art. 62-65) show us how it looks when one of Fuller's fears comes true: it is not ambiguity as to the intent of the law itself, but the ambiguity which makes every later interpretive bravura useless (Fuler, 2011, p. 99). The deadline from Art. 63, par. 1 has not yet expired, so we have not reached to the official action from the declared rule. Despite that, the anatomy of provisions of Art. 62-65 together with the statements of high state officials, provide quite a sufficient ground for making a diagnosis on an interpretive level which reads: (clumsy) simulation of the *ratio legis*. What is this really about? The linguistic interpretation of the provision of Art. 62, par. 1 unequivocally leads to the conclusion that the *ratio legis* of church property nationalization *ex lege* is that the state considers it as its cultural heritage. This provision is an example of systemic inconsistency and is directly opposite to the 2010 Law on Cultural Heritage (see section 3.6). Instead of that, two explanations appeared in the public as the real *ratio legis* of nationalization of property, while at the same time there was no mention about them in the text of the Law. The first apology of *ex lege* nationalization referred to the need to correct the allegedly illegal entries of the SOC in the Real Estate Cadastre during the last decade of the 20th century, so that the order in that area could finally be restored (RTS, 2020b). The legislator ignored the fact that the SOC[12] is not the only entity that submitted applications for entries under the then applicable laws and that there had been (and still

[12] But also other religious communities to which this Law should equally refer to.

are) already valid positive legal regulations within the legal system of Montenegro to resolve this issue. Another apology, which was certainly the essential *ratio legis* of these provisions, is the process we briefly explained in the previous chapter. The state project of the restoration of the autocephaly of the Montenegrin church has been repeatedly underlined as the most important goal that this Law seeks to achieve and to which alleged corrections of the situation in the Cadastre and concern about cultural heritage should be subordinated. Therefore, the *ratio legis* of these provisions is inversely proportional to the presence of the reasons stated in the text of the Law. The exposed mimicry of the true intentions of the law, which came as a consequence of the insincerity of those who passed the Law, is additionally worrying if the following provisions (Art. 63-65) governing the procedure of determining and registering established state property are being observed in the context of the "due process of law". The procedural meaning of this remedy is a guarantee that no one can be deprived of property, among other things, except on the basis of law and in an impartial and fair procedure (Đurđić, 2008, p. 73). However, the allotted procedure in the provisions above guarantees quite the opposite. Because the principles of rule of law are seriously endangered by prescribing special and *ad hoc* administrative proceeding instead of regular litigation[13], ignoring the rules on the burden of proof and violations of the right to a fair trial and equal access to court. The doubt in the impartiality of the administrative body that will conduct the proceedings supported is heightened even more by illegal examples in the past.[14] Also, it was noted that the requirement of congruence was seriously brought into question both in terms of interpreting the intention of the law and in terms of the lack of due process of law.

[13] In that sense, the planned subsidiary application of the 2004 Civil Procedure Law after the 2017 Administrative Procedure Law does not fundamentally change anything and represents no more than a cosmetic change that should serve as proof that one of the sharpest criticisms in the Venice Commission Opinion from June 2019 on the text of Bill was implemented.

[14] The Orlandić case is illustrative not only because it shows how porous impartiality and trust in the administrative bodies of Montenegro are, but also because it reveals how unfounded is the procedure prescribed in these provisions of the Law. Namely, acting at the request of the Montenegrin Orthodox Church, the local real estate administration headed by Mr Orlandić unilaterally removed the Metropolitanate of the SOC as the titular of several religious buildings in Cetinje, arguing that the entries were illegal, which was a kind of avant-garde for the writers of the Law that was adopted more than a decade after this case. Then, acting on the appeal of the SOC, the Ministry of Finance, as the second instance body responsible for administrative control of the Real Estate Administration, annulled this unilateral decision of the Real Estate Administration and confirmed the ownership of the SOC, fully accepting the SOC argumentation. It is especially interesting that the Minister of Finance of the time stated that the issue of ownership could not be resolved in an administrative procedure, but only through a regular litigation, before a competent court (PCNEN, 2008). Today, the most important arguments of the SOC, which are critical of the disputed provisions of the Law, are based on the identical position, and this position was also confirmed by the Supreme Court of Montenegro in the verdict regarding the determination of property rights, no. 244/18 from 10 May 2018, in which, after emphasizing the importance of the rebuttable and presumption of accuracy of entry in the real estate cadastre, Court emphasized that the administrative body is not authorized to determine property rights, since that is in the jurisdiction of the court. The unequivocal position of administrative and judicial practice in these matters, which we have just presented, only further confirms what devastating consequences for the legal security and logic of the legal system of Montenegro are produced by the disputed solutions of the Law on Freedom of Religion.

*3.5. Prohibition of abuse of retroactive legislation*

Fuller believes that the most obvious and at the same time the most difficult problem of the legality and morality of law and its realization is the requirement that the rule adopted today should govern what happens tomorrow and not what happened yesterday (Fuler, 2011, p. 59). The requirement of prospectivity is so important for legal certainty, that according to some theorists, the retroactive force of law is "assassination of the law and the devastating force of the social contract [...] and that retroactivity is the force that deprives the law of its character" (cited according to Đurđić, 2008, p. 65) Fuller, however, while remaining an advocate of prospectiveness as an important segment of legality, is not so exclusive in his critique of retroactive legislation. Namely, he believes that retroactive regulation can be used as a "curative" law that is appropriately designed to correct shortcomings in the exercise of power (according to Fuler, 2011, p. 69). Thus, retroactivity can be a suitable mean of correcting possible antinomies among other demands of inner morality. Therefore, it was more appropriate to name the section dealing with this inner morality requirement - "prohibition of the abuse of retroactivity" instead of the prohibition of retroactivity of the law in general. In that sense, whether the undisputed retroactive character of this Law, based on everything presented so far, was adopted as a curative measure or as an abuse of retroactivity.

The provisions in articles 62-65 of Law are *par excellence* retroactive as they prescribe proceedings regarding legal acts and facts, some of which occurred more than 100 years ago and other more than 20 years ago. Retroactive regulation of these issues ignored the valid provisions of other laws that regulate institutes and deadlines after which the subjects of the Serbian Orthodox Church unequivocally became the owners of the facilities targeted by the analysed provisions. Only some of the institutes that have been skipped in this way are the institutes of acquisitive prescription (Art. 53, par. 2 and Art. 54, par. 2 of 2009 Property Law) and the action for cancellation of title (Art. 124a of the 2007 Cadastre Law), and their negligence further undermined legal certainty and confirmed the absence of a curative character in the retroactivity of these provisions. Furthermore, the implicit mandatory request of registration of SOC subjects under Art. 25 of the Law retroactively seeks to diminish their rights acquired by using the non-registration option granted by the previous law from 1977, which hereby has implicitly recognized the continuity of legal subjectivity for SOC subjects.

The lack of curativeness of this retroactive provision is also reflected in the fact that it ignores the suggestion from the joint guidelines of the Venice Commission and the OSCE-ODIHR (Venice Commission, OSCE/ODIHR, 2014) that underline that restrictions must not be retroactive or arbitrary towards a particular group or individuals (par. 7) and that, when it comes to the registration, the transition to the new legal solutions must be adequate, i.e. it must not diminish or abolish rights acquired under the previous law (par. 36). Finally, the Constitution of Montenegro in Art. 147, par. 1 prohibits the retroactive effect of laws and other regulations, except in the case of certain provisions of the law if it is required by the public interest which has been established in the procedure of

enactment of the law (par. 2). Therefore, neither of the above-mentioned paragraphs of the constitutional norm can justify the retroactive character of certain provisions of the Law. Quite the opposite, because it is difficult to say that the public interest was established when the entire legislative process was burdened by non-transparency, lack of dialogue and confusion about the real intention of the law, as described in the previous section. In addition, if the real intention of the Law was to restore the position of Church like it was before 1918, the question of the legitimacy of such an intention as a public interest can also be raised. Why would such a retroactive intervention in the period of more than a century ago be in the public interest, especially when today, more than century after 1918, many things are not the same: it is not the same character of Montenegrin statehood (see Raković, 2019), and neither is the constitutional position of churches and religious communities in Montenegro, which is even more important for this issue.[15] From the above stated it is clear that the provisions of the Law with retroactive effect have neither constitutional reinforcement nor justification in the field of curative action and improving impact on other requirements of the inner morality of law.

*3.6. Contradictions in laws*

The enactment of contradictory and mutually inconsistent laws is considered very detrimental to the legality and efficiency of the legal system *in toto* (Đurđić, 2008, p. 70). If contradictions, however occur, what can be even more detrimental than the existence of legal contradictions is their inadequate treatment, which can be achieved, for example, by favouring a technical approach instead of comprehensive consideration of contradictory provisions from not only legal, but also from economic, political and sociological point of view (Fuler, 2011, p. 82). Fuller distinguishes two types of contradictions in laws. The first refers to the case of "self-contradictory law" and the second refers to the contradiction between two or more valid legal regulations (external contradiction) (Fuler, 2011, pp. 80-81). Unfortunately, in the case of the analysed Law, both types of contradictions are present.

Examples of external contradiction are numerous and each of them seriously undermines the constitutional provision on the unity of the legal order from Art. 145 of the Constitution of Montenegro which, according to the interpretation of the Constitutional Court (Decision of CC, U-I no. 15/15, par. 7.3), implies "[...] the principle impossibility that a law governing one area changes certain legal solutions already contained in a systemic law governing that or another area". Thus, first of all, from the aspect of the previously processed request of internal morality of law, the disputed *ratio legis* of nationalization of facilities and land of SOC as a cultural heritage of Montenegro also encounters serious difficulties within this request. Namely, the provision of Law according to which religious buildings are property of the state because they are part of the cultural heritage is unsustainable if it is brought in connection with Art. 2, par. 2 of the 2010 Law on Cultural Heritage, which prescribes that a cultural good may be in state

[15] Before 1918, Orthodoxy was the state religion in Montenegro, while today Montenegrin Constitution prescribes a model of separation, strict separation to be more precise.

or private ownership. Thus, the regime of ownership obviously has no influence on the perception of an object as a cultural good. Additional confirmation of this interpretation can be found in Art. 3, par. 1 of the 2010 Law on Cultural Heritage, which stipulates that cultural goods are protected regardless of their ownership, or whether their character is secular or religious. Finally, in Art. 5, entitled "the right on cultural heritage" (a term used in Art. 62 of the Law as well), speaking first of the availability and use (and not possession) of cultural goods, the legislator in par. 2 especially apostrophizes religious communities when emphasizing their duty to respect the cultural goods of others as much as *their own***.** The interpretation of the used possessive pronoun that can be offered is that it was used precisely to denote the ownership and not the cultural affiliation of the goods to one subject because they are available (for use) to everyone (Pravni savjet i grupa autora, 2019, pp. 158-159). That this interpretation is really well-founded can be seen from the fact that the whole Art. 5 is aimed at guaranteeing the general right of usage of cultural heritage but also from the fact that in addition to religious communities the obligation to respect the cultural goods of others remains imposed on all other subjects and legal entities. These arguments unequivocally point to the conclusion that the legislator here really has in mind ownership of cultural goods.

Furthermore, the procedure of entry of state property rights on religious facilities and land is envisaged by Art. 63 as a specific administrative procedure. This in itself would not be disputable if Art. 63, par. 2 of the Law complied with 2017 Administrative Procedure Law (hereinafter: LAP) which stipulates in Art. 4, par. 2 that the provisions of special laws adopted due to the specific nature of administrative matters in certain areas must not contradict or diminish the principles and objectives of the LAP nor reduce the level of protection of the rights and interests of the parties prescribed by the LAP. Unfortunately, the procedure provided for in Art. 63 violates the principle of the LAP contained in Art. 14 which refers to the protection of the legal interests of the parties and which stipulates that the party has the right to participate in the procedure to determine the circumstances relevant for administrative acts and has the right to state its position on the results of the examination procedure. Art. 63 stipulates the obligation of the state body to determine, list and submit a request for entry of state property rights in the real estate cadastre, and the real estate cadastre body is obliged to register the submitted request and inform the relevant religious community about it. Therefore, no obligations on the notification that the procedure is being conducted, including the possibilities for the participation of religious communities in the capacity of a party in the sense of Art. 51 of the LAP, are foreseen, but quit the opposite (Pravni savjet i grupa autora, 2019, p. 168). Among the major systematic inconsistencies, i.e. the examples of external contradictions, it is worth mentioning the absurd transfer of the burden of proof from the state as a subject that makes a request to churches and religious communities as legal holders, contrary to Art. 112 of the 2009 Property Law, then the contradiction with Art. 86, par. 2 of the 2007 Cadastre Law which stipulates that the entry of real estate rights must be done on a clear and unambiguous legal ground, which in case of application of such provisions of the Law would not be the case because

there is obvious dispute about the legal ground, on which the administrative body is not authorized to make decisions[16], etc.

We have example of internal antinomy in both groups of provisions that are analysed in the article (property issues provisions regarding registration). Both of these groups of provisions are contrary to Art. 14, par. 1 of the Law which prohibits any discrimination on the grounds of religion or belief. Thus, transitional provisions dealing with property issues are directly discriminatory in relation to religious communities because only for them as subjects, it is envisaged the transfer of ownership to the state through legislation and a special procedure for that purpose, characterized by a lower scope of legal protection than those which other subjects and legal entities have at their disposal. Moreover, bearing in mind that the *differentia specifica* of religious communities in comparison to other subjects in legal life is precisely the fact that their identity is based on religion and religious beliefs, it would mean that their differentiation and unequal position was made on basis that is strictly prohibited (Pravni savjet i grupa autora, 2019, p. 179). On the other hand, this and the previously elaborated provision from Art. 25, par. 3 of the Law even have the effect of indirect discrimination, because they target only the SOC and its subjects. The mentioned example of internal antinomy can, in certain sense, be considered as a meeting place of internal and external contradictions, because the above mentioned provisions are for the same reasons also contrary to Art. 2 of the Law on Prohibition of Discrimination and a constitutional provision from Art. 8 of the Constitution of Montenegro.

*3.7. Laws that are capable of being obeyed*

It is reasonable to expect that enacted laws put enforceable requests in front their addressees. Otherwise, not only would the balance of reciprocity in the contractual relationship between the Government and the citizen, on which Fuller relies on so much, be greatly disturbed, but the absurdity would reach a level at which one might wonder how a reasonable legislator, even if he was the most notorious dictator , would be able to pass such a law? (Fuler, 2011, p. 83). In order not to fall into the trap of easily characterizing a law request as impossible to obey, Fuller advises distinguishing it from a request that is obviously extremely difficult to fulfil, but apart from a slight hint that for this purpose we use assumptions about the nature of man and the universe, which, to make matters

[16] In the context of the mentioned provisions on the entry of state property rights on religious facilities and land for which there is no evidence of property rights, it would be very interesting to see how this provision of the Law would be interpreted in relation to Art. 10, par. 3 of the Agreement between the Islamic Community and Montenegro according to which the existing property of the Islamic Community which is not entried in the real estate cadastre will be entried at the request of the Islamic Community, but it is also stated that the property which is at the same time a cultural good (hence, only if such status is expressly prescribed and not presumed for all objects as can be interpreted from the Law) cannot be alienated or taken out of the country without the consent of the Government of Montenegro (par. 3) which is in fact, a reasonably justified and standardized restriction that actually confirms the existence of property rights of the Islamic community. Linking these provisions of the Law and the Agreement is multiply challenging, both in terms of the procedure of entry and interpretation of evidence of property rights, and in a broader and insufficiently processed theoretical context, in terms of understanding the hierarchy of legal acts and the place that such an act of contractual state-church law has within it.

more difficult, are subject to change (Đurđić, 2008, p. 71), Fuller does not give any closer parameters for distinction and even has named that interspace as "indeterminate". Although our task is the most complex due to what has been stated here, we will try to point out two examples by which the Law violates the prohibition of demanding the impossible.

One part of Art. 62 which has already been cited several times, can hardly withstand the test of elementary logic and common sense from another aspect. Namely, when prescribing that cultural heritage is state property, the legislator used the phrase religious facilities and *land*. That part of the provision, as adopted, is grotesque and approaches level of absurdity from Fuller's rhetorical question because it makes Montenegro the only country in the world where land is considered as cultural heritage *eo ipso* (*sic*!) (Pravni savjet i grupa autora, 2019, p. 159). Another impossible situation that the analysed Law tries to induce is also related to the land mentioned in Article 62. Namely, the intention of that article is to transfer to state ownership the land owned by churches and religious communities (or only use them, from the legislator's point of view) because at one historical moment that land was a property of the state. Assuming that the land was indeed property of the state,[17] the essential intention of this article is then to actually nullify the effect of conversion that occurred by the moment of adoption of 2009 Property Law. Article 419 of this law stipulates that the right to use or permanently manage land in state ownership becomes the right of ownership of the previous holder of *ius utendi* (in this case, that holder are churches and religious communities) by the moment of entry into force of the 2009 Property Law, unless otherwise is prescribed by a special law. The Law pleads to be that special law, with a small problem of ten-year delay, because the only valid interpretation of the said provision leads to the conclusion that only this special law has the ability to prevent the effect of conversion - the constitution of property rights in full (*plena in re potestas*) over the land which was until then in property of the state, must have existed at the time of the entry into force of the 2009 Property Law. Therefore, such an attempt of acrobatics through the Law remains legally impossible (Pravni savjet i grupa autora, 2019, p. 159) because the opposite interpretation could even be understood as another example of inadmissible retroactive effect of this Law.

### *3.8. Stability over time*

The permanence of law through time which is necessary in order that the addressees would be properly acquainted with their rights and obligations arising from the legal act so that they can behave accordingly, Fuller has brought in, viewing it as another requirement of the internal morality of law, in direct correlation with a ban on retroactive legislation. More precisely, he subsumed the damage caused by retroactive and frequently changed regulations under the same source which he named legislative instability (Fuler, 2011, p. 92)

In section 3.5. some of the harmful effects that occurred due to non-compliance with the requirement of the prohibition of retroactive legislation were analysed. As for the

[17] And there are serious arguments to the contrary regarding religious facilities and land, see Pravni savjet i grupa autora, pp. 131-147.

requirement for stability over time, unlike the previous existing Law in this area, which lasted a full 43 years and for which can be said that has taken too seriously the requirement of stability over time, it seems that at a moment when all the bylaws have not yet been adopted and when less than a year has passed since the entry into force of the analysed Law, it is too early to take a position/stance on the fulfilment of this requirement. However, having in mind all the shortcomings presented in the previous sections, the question can be rightfully asked whether a future, already announced revision of the disputed solutions and thus disrespect of the requirement of stability over time, will in fact, paradoxically, be the most important contribution to the rule of law in this case?

## 4. Conclusion

This article has aimed to test and prove two hypotheses. The first referred to the retrograde character of the material sources of law that motivated and stood behind the Montenegrin Law on Freedom of Religion. This character has been confirmed by linking these sources with the basic postulates of regulating these issues in modern Europe, such as the principle of freedom of religion, neutrality and respect and recognition of self-determination of religious communities. It was confirmed that none of these principles were respected, and also it was pointed out that political and ideological motives that were strongly present during the entire legislative process and later can hardly find their place on the conceptual map of modern European achievements and values. The Law itself, as an act that is a formal source of law, is subjected to the test or requirements of the morality that makes law possible, starting from the belief that these requirements of internal morality are not a decor or some finesse that optionally adorns the power of law, but essential condition of that power itself (Fuler, 2011, p. 160). They were particularly adequate because they express, in the context of reciprocity which Fuller speaks of as an important balance that sustains the social contract, a true picture of the special relationship between the legislator and those whom the legislative undertaking relates to (Rundle, 2016, p. 504). Bearing in mind the significance of this argument, we performed a kind of "test" and with the offered explanations, determined that the analysed Law and its provisions did not fully or largely meet almost any of Fuller's requirements for the rule of law or internal morality of law. The true extent of the reasons for concern due to such conclusion can be seen if it is known that the scope of rule of law in a society depends on the realization of these principles of legality. To put it differently, the rule of law must not be equated with the validity of any but only of good (or moral) law, where the character of good or moral is manifested as gradation - through guarantee and realization of the minimum which requires that every law guarantees equality and adequate protection (Leposavić, 2019, p. 876). Thus, on such a scale of contribution to the existence of the rule of law, the analysed Law stays inadmissibly low.

However, one thing leaves space for moderate optimism, if we continue to look at the situation from the perspective of Fuller's jusnaturalism of the procedural type, and that is that such an unenviable place on the rule of law can be easily improved: by using

precisely predicted forms and procedures in order to correct the errors embedded in each of the tested segments, one by one. And if the strengthening of the quality of legality through the fulfilment of each of the 8 requirements of the internal morality of law is upgraded by a transparent, inclusive and honest dialogue between legislators and addressees, then it can be witnessed the phenomenon of how something that was not or could hardly be considered as law acquired the character of law and how the idea of reciprocity, that very heart of the internal morality of law (Rundle, 2016, p. 500) gets its full reaffirmation. Achieving such scope of legal, but not only legal, progress in the field of religious freedom in Montenegro, about which Prof. Tanasković wrote with so much hope and optimism, depends so exclusively and solely on the standpoint to be taken towards the Law analysed in this paper. Presented position on this issue is in a complete accordance with what was written by the author whose work has been taken as the outline of this paper, both in methodological and content terms. Fuller wrote in his book that opposing laws that tend to impose religious or political beliefs are based on the understanding that such laws represent an unjustified interference with individual freedom (Fuler, 2011, p. 91). It has been confirmed that the struggle against such laws, which was relevant almost 60 years ago when the book *Morality of Law* was written, is still relevant today in Montenegro, as well as were confirmed words of reposed in the Lord Metropolitan of SOC in Montenegro, Amfilohije, who has rightfully denied legal character of this Law, naming it as "lawless law" (Vojinović, 2020).

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## PREDSEKULARNI KARAKTER CRNOGORSKOG ZAKONA O SLOBODI VEROISPOVESTI U KONTEKSTU FULEROVIH ZAHTEVA ZA UNUTRAŠNJOM MORALNOŠĆU PRAVA

Sažetak

Autori analiziraju novi crnogorski Zakon o slobodi veroispovesti ili uvjerenja i pravnom statusu vjerskih zajednica sa dva aspekta: aspekta društveno-političkog konteksta njegovog usvajanja (materijalni izvori prava) i formalnih aspekata odredbi samog Zakona (formalni izvor prava) kako bi se ukazalo na ozbiljne nedostatke tog zakona. Što se tiče prvog aspekta, analizira se širi društveni kontekst u Crnoj Gori u poređenju sa evropskim regulatornim principima u oblasti vjerskih sloboda. Što se tiče odredbi samog zakona, one se razmatraju u kontekstu Fulerove teorije o unutrašnjoj moralnosti prava i njenih 8 zahteva koji čine pravo mogućim kako bi se podrobno ispitalo da li i koliko Zakon o slobodi vjeroispovesti ispunjava princip zakonitosti kao osnovno načelo za ostvarenje vladavine prava.

**Ključne reči:** L. L Fuler, moralnost prava, Crna Gora, Zakon o slobodi veroispovesti, postsekularnost.

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# AUTONOMOUS CONCEPTS AND *STATUS QUO* METHOD: QUEST FOR COHERENT PROTECTION OF HUMAN RIGHTS BEFORE EUROPEAN SUPRANATIONAL COURTS[***]

***Abstract***

*The accession of the European Union to the European Convention on Human Rights is currently being renegotiated, but this remains a rocky and time-consuming process. Mostly relying on doctrinal method, the authors examine various methods advocated in legal theory as a means to ensure a coherent protection of human rights in Europe in the absence of an institutional agreement. The authors focus their attention on the further development of autonomous concepts in the case law of two the European supranational courts as a prerequisite for successful application of the status quo method. The principle of ne bis in idem is selected as a case in point. Finally, authors formulate proposals for approaches regarding autonomous concepts to be utilized by the Court of Justice and the European Court of Human Rights.*

***Keywords:*** *European Union, European Convention on Human Rights, supranational courts, autonomous concepts, ne bis in idem.*

## 1. Introduction

In the wake of the 70th anniversary of the European Convention on Human Rights (hereinafter: ECHR), the issue of the accession of the European Union (hereinafter: EU) to the ECHR gained new momentum and renegotiation of the agreement is back on the table (European Parliament, 2020, p. 1). Namely, in September 2020, the Council of Europe (hereinafter: CoE) and the European Commission issued a joint statement pertaining to the resumption of negotiations. The statement points out that the accession of the EU to the ECHR "will be an important milestone in the protection of human rights and fundamental freedoms across Europe", as well as that accession will *inter alia* help to guarantee "coherence and consistency" between EU law and the system of the ECHR (European Commission, 2020, p. 1).

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The statement itself should not be read as a political, but as a policy one, as the EU has been preparing for the launch of the process for some time. More than a year ago, the European Commission prepared a 'Staff Working Document' - a comprehensive outline of the proposed EU position for the re-negotiation of the draft accession agreement of the EU in line with the findings of Opinion 2/13 of 2014 of the Court of Justice of the European Union (hereinafter: CJEU) (Council of the European Union, 2019, p. 3).[1] In a similar vein, after having received a written contribution from the European Commission, in October 2019, the Council reaffirmed its commitment to the accession and agreed to supplementary negotiating directives as to enable a resumption of negotiations with the CoE (European Parliament, 2020, p. 1).

Once the Secretary General of the CoE was informed that the EU is ready and willing to proceed with the negotiations on its accession to the ECHR, she pointed that she would make proposals on the format in which these negotiations could be conducted. The critical point in time was approval of the Ministers' Deputies of the continuation of the work of the Steering Committee for Human Rights (hereinafter: CDDH) in co-operation with the representatives of the EU, through the CDDH *ad hoc* negotiation group (hereinafter: 47+1 Group) on the basis of the work already conducted on the accession, in January 2020 (also see: Steering Committee for Human Rights (CDDH), 2010). Subsequent to that, two formal meetings and one informal meeting of the 47+1 Group were held on the accession of the EU to the ECHR, while the next one is scheduled for February 2021. The frequency of the meetings of the 47+1 Group shows the level of the renegotiation endeavours.

However, it has been rightly argued for a long time in the legal theory that regardless of all the invested efforts, the road to accession remains "rocky" (Murphy, 2013, p. 1) and "long and winding" (Buyse, 2013, p. 1). Namely, the future negotiated draft agreement will have to be ratified by all EU Member States "in accordance with their respective constitutional requirements" (Article 218 (8) of the Treaty on the Functioning of the EU (hereinafter: TFEU) as well as by all State Parties to the ECHR. In addition, European Parliament's consent to the accession agreement is required under Article 218(6) of the TFEU (European Parliament, 2020, p. 1).

This unambiguously shows that the accession of the EU to the ECHR is going to be a time-consuming process. Therefore, short-term solutions should be applied as to reduce the adverse effects of a prolonged non-accession of the EU to the ECHR. While most legal scholars advocate for the establishment of an institutional link between the judicial system of the ECHR and the EU legal order through the accession agreement, as the optimal method for providing the coherent and effective human rights protection before supranational courts in Europe, it is desirable to consider the applicability of other available solutions, which can contribute to enhanced coherence of the fundamental rights protection in Europe. Therefore, the next section of this paper will examine other methods advocated in legal theory for ensuring the coherent and effective protection of human

[1] On 18 December 2014, the CJEU delivered its Opinion 2/13 on the compatibility with EU law of the draft agreement for EU accession to the ECHR concluding that the drafted accession agreement is not compatible with EU law. See Douglas-Scott, 2014, and Matić Bošković, 2020, p. 31.

rights before the CJEU and the European Court of Human Rights (hereinafter: ECtHR), while not requiring the creation of an institutionalized arrangement between the CJEU and the ECtHR. The analysis is aimed to determine whether those methods are capable to enhance coherence and effectiveness of the human rights protection in Europe. In the subsequent section, the doctrine of autonomous concepts will be explored as to determine whether and how it should be upgraded as to be more beneficial for the development of coherent and effective protection of human rights before the supranational courts in Europe. In that context, the paper will particularly examine only one of the numerous autonomous concepts, which have been developed by the two courts: the principle of *ne bis idem*. The autonomous concepts of *ne bis in idem* was selected as case in point, as the most recent case law of both European supranational courts provides some relevant insights and development in the arena of their harmonizing effects. The concluding section of the paper attempts to come up with the proposals for improvement of the approaches of the ECtHR and CJEU in developing autonomous concepts in order to enhance the coherence and efficiency of human rights protection in Europe even before the accession takes place.

## 2. Methods for the establishment of a coherent and effective human protection before supranational courts in Europe advocated in legal doctrine

The various proposed (and to an extent, utilized) solutions for the creation of coherent and effective system of human rights protection before supranational courts in Europe can be systematized in five categories. These are, *inter alia*: the method of adoption of a separate EU catalogue of fundamental rights, the method of amending the ECHR, the method of establishing an institutional link between two courts, the method of *de facto* accession of the EU to the ECHR and the method of continuation of the *status quo* (Ćorić Erić, 2013, p. 9). Most of these methods were already tested in practice and their effects were comprehensively examined in legal doctrine. As it was explained earlier, the accession process is expected to be time-consuming and "winding" and therefore it is too early to assess its effects on the coherence and effectiveness of human rights protection in Europe.

The Charter of Fundamental Rights of the EU (hereinafter: EU Charter), which is considered as outcome of the application of the aforementioned method pertaining to the adoption of a separate EU catalogue of fundamental rights did not yield expected results in terms of ensuring coherence of the protection of human rights in Europe.[2] The EU Charter was initially praised by some scholars as a tool which is ensuring coherence between the case law of two supranational courts as it includes two norms (Articles 52(3) and 53 of the EU Charter) that provide interpretative guidance with regards to the interaction between the EU Charter and the ECHR (Lenaerts, 2018, p. 4). According to those provisions, the EU Charter's rights that correspond to ECHR's rights should be interpreted in the same way as those ECHR rights. In addition, once the correspondence between two rights is established, the CJEU will strive to ensure that the EU Charter is interpreted so as to provide, at the very least, a level of protection that corresponds to that of the ECHR, as interpreted by the ECHR

[2] More on the history of the EU Charter see, *inter alia*, Ćeranić, 2009, pp. 16-17.

(Craig, 2013, pp. 1145-1146). Despite those provisions, the EU Charter differs from the ECHR, as certain rights are worded differently than the corresponding rights in the ECHR, while it contains certain rights and freedoms that are not covered by the ECHR. Those differences, coupled with the fact that in the course of the last decade the CJEU has become more focused on the EU Charter as its own "human rights catalogue", in the literature referred to as the "EU Charter-centrism", have negatively affected the coherence between case-law of the two courts (Glas & Krommendijk, 2017, p. 574; Kuijer, 2020, p. 1001).[3]

Similar to that, the method of amending the ECHR has not given any harmonizing effect through its application in practice. The Protocol 16 seems promising in that regard. One of its key novelties, which is beneficial for the strengthening coherence of human rights protection in Europe, relates to the establishment of a new procedure under which domestic courts or tribunals will be able to request an advisory opinion from the ECtHR on the fundamental issues pertaining to the interpretation and application of the rights and freedoms contained in the ECHR or its additional protocols. However, it can come into play with regards to the EU only if the EU ratifies it once it accedes to the ECHR.[4]

The application of the method of *de facto* accession of the EU to the ECHR, advocated by some scholars, also gave very limited results in practice. Through the progressive role of both courts the area of overlapping jurisdictions of the two supranational courts has been extended over the time. That additionally increased the risk of a potential normative conflicts. Kuijer (2020) rightly argued that the ECtHR mostly followed the approach of "professional courtesy" introduced in its *Bosphorus* ruling (*Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* referred by Kuijer, 2018, p. 8). By doing so, it exercised a sort of judicial restraint towards the adjudication of the CJEU. That "professional courtesy" approach has undermined the application of the method of *de facto* accession, as it disabled the ECtHR from reviewing the cases which are strongly linked to the EU legal order. Therefore, the method of *de facto* accession did not find its full application in practice and therefore its potential effects on the coherence of human rights protection in Europe remained uncertain. Certain opponents of the method of *de facto* accession rightly argued that the proposed idea, which is based on the court activism, was not beneficial for achieving sufficient level of coherence due to the lack of guarantees that the courts will not rapidly nor radically change their case-law (Van den Berghe, 2010, p. 154; Kuijer, 2020, pp. 1004-1005).

Finally, a group of authors was in favour of maintaining the jurisdictionally complex *status quo* (Douglas-Scott, 2006, p. 665; Toth, 1997, p. 492). In that context, Weiler and Alston (1999) referred to the method of the maintaining of *status quo* as to "normative supranationalism". According to them, once the political processes stall, the courts can proceed with integration (Weiler & Alston, 1999, p. 53). This method was perceived by its supporters as capable to contribute to mutual dialogue and cooperation between judges

[3] Witte (2018) underlines that the ECHR and the case law of the Strasbourg Court are still present in the case law of the CJEU, but they are used more sparingly and selectively than they were before the entry of force of the Treaty of Lisbon. In addition, according to O' Leary (2018, p. 4) it is estimated that one out of every ten cases before the CJEU now reference the Charter, and many of its most significant judgments in recent years have had an important fundamental rights dimension.

[4] Thus far only 15 countries ratified it.

of the two courts leading to more integrated and harmonized human rights' approach in Europe (Defeis, 2001, p. 303). In addition, it was praised for its flexibility, while criticized for the limited effects it had on the consistency of case-law of the two courts. Its inability to reduce the given inconsistencies was explained by the lack of an explicit hierarchal relationship between the courts (Kuijer, 2020, p. 1002).

However, it seems that even in the absence of the institutionalized hierarchical link, there is room for improvement of the performance of both supranational courts as to achieve more harmonized human rights approach to Europe through the stronger recourse to the doctrine of autonomous concepts while applying the method of continuation of *status quo*. The following section will examine the potential of this doctrine to improve the performance of both courts in achieving coherent human rights protection in Europe.

## 3. Role of autonomous concepts in the creation of coherent and effective system of human rights protection in Europe

The doctrine of autonomous concepts was initially developed by the ECtHR in early 1970s, while ten years later the European Court of Justice, as the CJEU was officially called at the time, also started to refer to the notion of autonomous concepts in its jurisprudence (Lenaerts & Gutiérrez-Fons, 2013, p. 7; Ćeranić, 2017, pp. 89-102).

In a nutshell, this doctrine implies that autonomous concepts of the ECHR's and the EU law shall be interpreted independently from the meaning which equivalent concepts have in domestic law. This doctrine was developed by the ECtHR so as to prevent contracting states from violating the guarantees of the ECHR, by giving its own, narrow interpretation of the terms contained in the ECHR. It is noteworthy that the doctrine of autonomous concepts is not specific only of European supranational courts. Instead, it is in line with the broader approach followed in international law, according to which any state cannot rely on its own law as an excuse for failure to comply with its international obligations (Bjorge, 2015, pp. 201-203).

In legal theory, different rationales behind the doctrine of autonomous concepts were raised. For instance, Mahoney claimed that the development of the autonomous concepts in the case law of the ECtHR is attributable to "the open textured language and the structure of the convention" which leaves the court significant opportunities for different interpretations (Mahoney, 1998, p. 2). In addition, it was argued that, through the development of autonomous concepts, integration among the EU member states was fostered (Milčiuvienė, 2019**,** p. 101). In that context, Mitsilegas points that the autonomous concepts "achieve effectiveness by managing legal diversity to create a level playing field" (Mitsilegas, 2016, p. 127). Furthermore**,** it was claimed that it would not be possible to avoid the development of autonomous concepts, since different member states do not share common criteria which provide for the uniform interpretation and application of the ECHR law (Milčiuvienė, 2019, p. 101). In that light, Lenaerts & Gutiérrez-Fons, specify an extensive body of case-law where the CJEU recourse to the autonomous concepts is based on the need for a uniform application of EU law and the principle of equality (Lenaerts & Gutiérrez-Fons, 2013, p. 13).

All those explanations of the doctrine of autonomous concepts are sound and well grounded. However, it seems that, in formulating the autonomous concepts, both courts failed to take into account the need for a more coherent approach to the protection of human rights between the ECtHR and CJEU. By doing so, both courts are distracted from achieving the desired effectiveness of the autonomous concepts. It appears that both courts have been focused on preserving the aim and objective of the single instrument at stake: for the ECtHR that was the ECHR, while for the CJEU that was the specific instrument of the EU law. Therefore, it seems the CJEU should give more attention to the need to preserve the aim and objective of the ECHR in formulating its own autonomous concepts. Although both the ECtHR and CJEU, through their case law, have developed a broad spectrum of autonomous concepts, this paper will focus only on the examination of one of them: the principle of *ne bis idem*. That principle was selected because the most recent case law of both European supranational courts provides some interesting insights in terms of harmonizing effects of autonomous concepts.

## 4. *Ne bis in idem* and cross-fertilization of autonomous concepts in the light of the most recent case-law

The recent case-law of the CJEU and the ECtHR with regards to the *ne bis in idem* principle is a case in point with regards to the need for further convergence in the jurisprudence of the two courts and a more harmonious interpretation of the two seminal human rights' instruments – namely the ECHR and the EU Charter within the two supranational systems.[5]

Until recently, the jurisprudence of the two mentioned courts with regards to the *ne bis in idem* principle aligned towards a higher level of protection of human rights, as pointed out by Lasagni & Mirandola (2019). This happened despite the fact that the wordings of the legal instruments guaranteeing the *ne bis in idem* principle are different, and that the principle had a wider scope of application within the EU due to being enshrined not only in the EU Charter, but also in the Convention on Implementation of Schengen Agreement, whereby it applies also to transnational setting (Lasagni & Mirandola, 2018; Matić Bošković & Kostić, 2020, p. 70). While differing in scope and wording, both the ECHR and the EU Charter require the following to be in place in order for the *ne bis in idem* principle to apply: two sets of procedures of criminal nature, concerning the same facts, initiated against the same offender, where a final decision has been passed in one of the said proceedings.[6]

[5] In this context, the principle of harmonious interpretation is understood as the need for the EU law to be consistently interpreted and applied in harmony with international law so as to achieve more coherence, as proposed by Ziegler (2016).

[6] While Lasagni & Mirandola classify these requirements into four elements: 1) two sets of proceedings of criminal nature (bis), 2) concerning the same facts (idem), 3) against the same offender, and 4) a final decision, Seernels (2019, p. 229) underlines only three elements, as did the ECtHR in paragraph 49 of the judgment in *Mihalache v. Romania*: the two sets of proceedings must be "criminal" in nature (1); they must concern the same facts (2); and there must be duplication of the proceedings (3).

As Serneels (2019, p. 232) points out, an important example of such alignment can be found in the three rulings the CJEU adopted in 2018, namely in the *Menci*, *Garlsson* and *Di Puma* cases, where the CJEU applied the line of reasoning with regards to one of the key elements of the *ne bis in idem* principle – the dual proceedings – that was previously applied by the ECtHR in the *A and B v Norway* case. However, this alignment was an important instance of a reduced scope of human rights protection and the outset of a downward competition in the area of human rights protection.

Namely, in *A and B v Norway*, the ECtHR redefined the notion of *bis* and sustained that, in certain cases, a combination of criminal and administrative procedures does not constitute a duplication of proceedings as prescribed by Art. 4 of Protocol No. 7 ECHR (Lasagni & Mirandola, 2019).[7] The ECtHR took the position that dual or accumulated punitive administrative and criminal proceedings can be presumed to constitute one integrated whole, provided that there is a "sufficiently close connection in time and substance" between these two proceedings (Serneels 2019, p. 232). This decision was received with severe criticism, spearheaded by the dissenting opinion of judge Pinto de Albuquerque, who claimed that the judgment "opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect".

Nonplussed by this argumentation, in the above-mentioned three cases, the CJEU took the position that parallel punitive administrative-criminal proceedings and penalties with regard to the same person and for identical offences in the area of VAT and market abuse can constitute a justified interference with the *ne bis in idem* right under Article 50 of the EU Charter (Serneels, 2019, p. 232; Matić Bošković & Kostić 2020, p. 73).

Subsequently to this, the CJEU went on to resort to a different interpretation of the *ne bis in idem* principle, which this time affected the notion of the „final decision". Namely, in the *Kossowski* case the CJEU found that the *ne bis in idem* principle is not to be applied to the final decision of the authorities in the member states if the criminal investigation of the case was not detailed (Lach, 2017, p. 6). In addition, the CJEU framed its reasoning clearly in the EU context, as an autonomous concept, emphasising in paragraph 47 of the ruling that "the interpretation of the final nature [...] of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice."

This reasoning of the CJEU, surprisingly, has been adopted by the ECtHR in the *Mihalache v Romania* case. Namely, in this case, the Grand Chamber of the ECtHR had to determine whether a decision of the public prosecutor to discontinue criminal proceedings constituted the notion of "final acquittal or conviction" that would trigger the application of the *ne bis in idem* principle as enshrined in Article 4, Protocol 7 of the ECHR.[8] In doing so, the ECtHR firstly explicitly referred to the relevant sources of EU law and the Luxembourg jurisprudence, invoking in detail the reasoning in *Kossowski* (see paras. 42

[7] For an account of the previous ECtHR jurisprudence related to *ne bis in idem* see: Ilić (2017).

[8] A useful summary is provided at (Lyaskova, 2019).

and 43 of the *Michalache* judgment). As noted by Serneels (2019, p. 237), the ECtHR then went on to adopt the CJEU interpretation whereby the *ne bis in idem* applies to decisions that preclude further criminal prosecution, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision".[9] Serneels (2019, p. 239) furthers the argumentation previously put forward by Lock (2016), that such instances of ECtHR's acceptance of the CJEU reasoning constitute legal transplants, which may entail a risk of EU law concepts being transplanted without fully taking into account their wider constitutional context. This position is certainly inspired by the concurring opinion of Judge Pinto de Albuquerque to the judgment in the *Mihalache* case, where he referred to the wider framework of the area of freedom, security and justice in the EU (including the need to ensure the principles of mutual trust and prevent impunity) as the "intrinsic logic" behind CJEU's reasoning in its case law, as being contrary to the classical *pro persona* philosophy previously pursued by the ECtHR.[10] Judge Pinto de Albuquerque went on to state that the ECtHR decision to pursue this approach is an "acritical and precipitate absorption of the Luxembourg case-law on Article 54 CISA, especially *Kossowski*."[11]

It seems evident that the case-law shows the need for a more coherent, and more focused approach to cross-fertilization of autonomous concepts between the two supranational courts. It is worthwhile recalling the arguments put forward by Lock (2016) with regards to the instances in which ECtHR makes references to EU law sources, including the CJEU jurisprudence. Namely, Lock analysed the challenges that may come into play when the ECtHR bases its findings on EU law in cases against non-EU Member States, some of which have willingly abstained from becoming EU member states. His call upon the ECtHR to adopt a more consistent approach, avoiding copying uncritically EU law approaches therefore seems justified (Lock, 2016) and supportive with the idea of avoiding the downward competition noted in the *ne bis in idem* case law described above.

Having this in mind, it seems prudent to also call the CJEU to examine more closely whether its case law related to the human rights protection is in line with Article 52, paragraph 3 of the EU Charter, namely to consider whether the protection awarded by the CJEU amounts to the meaning and scope of the rights protected being the same as those laid down by the ECHR. And while the EU Charter allows the EU law to provide more extensive protection of such rights, it can be reasonably argued that it does not call for a convergent lowering of the previously awarded level of protection of human rights by the two supranational courts in favour of efficiency of proceedings and of preventing impunity.

Therefore, a desirable approach in utilising autonomous concepts by the two courts would be twofold: first, it would imply careful consideration of the context of the EU law principles in the jurisprudence of the ECtHR, and second, it would require the CJEU to maintain, at all times, the minimal level of protection of human rights that is enshrined in the ECHR.

[9] See paragraph 39 of the *Kossowski* case and paragraph 95 of the *Mihalache* judgment.

[10] Paragraphs 33 and 34 of the Concurring opinion of Judge Pinto de Albuquerque

[11] Paragraph 54 of the Concurring opinion of Judge Pinto de Albuquerque.

## 5. Conclusion

The on-going renegotiations of the accession of the EU to the ECHR point to the relevance of achieving coherence and consistency between the EU law and the ECHR system of protection of human rights. In parallel to that, they show that the accession process will continue to be time-consuming and "windy".

The examination of the other available methods which were advocated as capable to enhance the coherence and effectiveness of the European system of human rights protection gave some relevant results. Primarily, it shows that the potential success of the method of continuation of the *status quo* strongly depends on the approach taken by both supranational courts in developing their autonomous concepts. Thus far, both courts, when formulating the autonomous concepts, failed to sufficiently take into account the need for a more coherent approach to the protection of human rights between the ECtHR and CJEU. Instead, they were mostly focused on preserving the aim and the objective of the legal instrument belonging to their own legal order, while neglecting the other.

The recent case law on *ne bis in idem*, however, showed that instances of acritical reception of autonomous concepts can have detrimental effects and may result in downward competition, instead providing more effective protection of human rights in Europe. This serves as case in point with regards to the need for further convergence between the autonomous concepts and case-law of the two courts. It reveals that the achieved "harmonizing effect" of their case-laws cannot be necessarily considered as cardinal virtue *per se* as long as it does not provide the most effective and comprehensive protection of human rights to individuals in Europe. Therefore, the cases of so called "negative cross-fertilization", such as the *Mihalache v Romania* case, do not provide an example of successful application of the method of maintenance of the *status quo.*

Some guidance can, however, be provided as to the desirable approach in utilising autonomous concepts by the two courts. Firstly, what is required is a careful consideration of the context of the EU law principles in the jurisprudence of the ECtHR, in order to avoid acritical reception and negative cross-fertilization. Secondly, it would require from both courts, particularly the CJEU to maintain, at all times, the minimal level of protection of human rights that is enshrined in the ECHR. That approach derives from the EU Charter, and is fully in line with the commitment of the EU to accede to the ECHR.

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## AUTONOMNI KONCEPTI I *STATUS QUO* METOD: U POTRAZI ZA DOSLEDNOM ZAŠTITOM LJUDSKIH PRAVA PRED EVROPSKIM NADNACIONALNIM SUDOVIMA

Sažetak

Proces pristupanja Evropske unije Evropskoj konvenciji o ljudskim pravima nedavno je ponovo pokrenut. Ipak, u pravnoj nauci se pravilno ukazuje da se radi o komplikovanom i dugotrajnom procesu, dok, sa druge strane, praksa nadnacionalnih evropskih sudova nije međusobno usklađena i u nekim slučajevima za posledicu ima smanjenje obima zaštite ljudskih prava u Evropi. Otuda se javlja potreba da se već sada ispitanju druga rešenja koja mogu doprineti smanjenju neželjenih posledica dugotrajnog pristupanja Evropske unije pomenutoj Konvenciji i doprineti doslednoj i delotvornoj zaštiti ljudskih prava u Evropi. Koristeći se uglavnom dogmatskim metodom, autorke ispituju različite metode predložene u pravnoj teoriji (i primenjene u praksi) sa stanovišta njihovog potencijala da doprinesu delotvornoj zaštiti ljudskih prava, u odsustvu institucionalnih veza između Suda pravde Evropske unije i Evropskog suda za ljudska prava. Autorke potom ukazuju na potrebu da, u primeni metoda zadržavanja statusa *quo*, koji se trenutno čini najcelishodnijim, dva evropska nadnacionalna suda pribegnu unapređenoj primeni koncepta autonomnih pojmova. One tu potrebu zatim i ilustruju kroz prikaz novije sudske prakse dva navedena suda u odnosu na princip *ne bis in idem*. U zaključnom delu rada autorke formulišu predloge

za unapređenje pristupa Suda pravde Evropske unije i Evropskog suda za ljudska prava u razvijanju i formulisanju autonomnih pojmova, u cilju postizanja delotvorne zaštite ljudskih prava u Evropi i pre nego što Evropska unija pristupi Evropskoj konvenciji o ljudskim pravima.

**Ključne reči:** Evropska unija, Evropska konvencija o ljudskim pravima, nadnacionalni sudovi, autonomni koncepti, *ne bis in idem*.

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# ROLE OF INTERNATIONAL LAW INSTRUMENTS IN INSTITUTIONALISING REGIONAL COOPERATION IN SOUTH EAST EUROPE

***Abstract***

*This article explores the role of international law instruments in the process of institutionalisation of regional cooperation in South East Europe. The institutionalisation has been defined as the process of creation of regional organisations composed by the states and other subjects involved in regional cooperation. The article examines how primary and secondary international legal acts are used to enable creation of these organisations and their functioning. The article concludes that the founders of the said regional organisations have relied on the international law instruments typically used in the process of establishment of international organisations and that the bodies of the regional organisations have produced various legal acts enabling internal management and conduct of operations of these organisations.*

***Keywords:*** *regional organisations, South East Europe, regional cooperation, international treaties, resolutions.*

## 1. Introduction

Since the late 1990s, another wave of regional cooperation has been promoted throughout the region of South East Europe (SEE) and the Balkans.[1] This wave of regional cooperation, principally motivated by the European Union,[2] has covered a number of areas of governmental activities and steered to the creation of structured institutional frameworks. These processes require political commitment of the involved governments, on the one hand, but they also necessitate to be institutionally shaped and legally grounded,

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[1] It has always been interesting to define limits of the region of South East Europe or that of the Balkans. Delević (2007, p. 11) uses the following description: "The Balkans is the historic and geographic name used to denote the territory in southeast Europe south of the rivers Sava and Danube. It is often referred to as the 'Balkan Peninsula,' as it is surrounded by water on three sides – the Black Sea to the East and branches of the Mediterranean to the South and West."

[2] One of the key documents with the above-mentioned aim is one establishing the Stabilisation and Association Process, which, *inter alia*, entails the active contribution to regional cooperation by the concerned countries. Refer to: Commission des Communautés Européennes, 1999.

on the other hand. Some inherent advantages of international organisation that provide for a predefined form and a permanent institutional structure, render this manner of institutionalisation more efficient to conduct any cooperative process within the framework of an organisation (Diez de Velasco Vallejo, 2002, p. 10). For the purpose of this article, the institutionalisation of regional cooperation should be understood as creation of intergovernmental organisations composed of the international legal subjects involved in regional cooperation. Given its importance for international conduct of state's affairs, such institutionalisation requires the use of international law instruments at different stages of establishment and operations of the regional organisations.

Therefore, this article will focus on two major roles of international law in the process of institutionalisation of regional cooperation in South East Europe: firstly, international law instruments enable creation of institutional frameworks for concrete forms of regional cooperation through the establishment and prescribing the responsibilities of regional intergovernmental organisations, and, secondly, these instruments, as adopted by the organisation's decision-making bodies, define conditions and procedures for the functioning and operations of these organisations in the form of secondary rules (compare: Diez de Velasco Vallejo, 2002, p. 107; Daillier, Forteau & Pellet, 2009, p. 641).

## 2. Creation of regional international organisations: from political reasons to the conclusion of constituent instruments

The following paragraphs will examine both theoretical and practical reasons which justify embodying regional cooperation in the form of intergovernmental organisations, on the one hand, and the importance and various forms of the constituent instruments, as founding documents of these organisations, on the other hand.

### *2.1. Raison d'être of the regional organisations in South East Europe*

As the examined regional organisations fall within the category of international public organisations, a number of theoretically defined and practically verified features of the latter are also pertaining to the former. The following lines will briefly examine these features. When discussing *raison d'être* of creation of the international organisations, one often refers to the widely accepted understanding of their relevance for the functioning of intergovernmental cooperation in an institutionalised manner. Amerasinghe (2005, p. 10) has outlined the political and legal steps for the creation of intergovernmental organisations:

> "(I) establishment by some kind of international agreement among states; (II) possession of what may be called a constitution; (III) possession of organs separate from its members; (IV) establishment under international law; and (V) generally, but not always, an exclusive membership of states or governments, but at any rate predominant membership of states and governments".

The status of an international organisation, which is defined as an association of states, possessing a distinct legal personality from the one of its members, and which is assigned to achieve lawful goals, disposing of its organs, and vested with legal powers (Bronwlie, 2001, p. 679), offers the most convenient way of institutionalisation. Actually, despite some arguments that the international organisations tend to be overly bureaucratic in their functioning, expensive in monetary terms and sometimes excessively autonomous in their actions, they still remain the best fora for intergovernmental interaction and they are facilitators of international bargaining processes, implementation of international commitments, management of interstate projects, and other related efforts (Abbot & Sindal, 1998, p. 5).

In favour of establishing international organisations, two main features of these bodies are often highlighted – their centralisation and independence. Namely, centralisation enables concentrated interstate actions in a formalised and neutral framework/structure. It further constitutes a legally framed decision-making process among the participating states and introduces some leverages among the governments disposing of different power at the international stage.[3] Even though the international organisations are subject to influences by the members' governments, they, however, enjoy certain level of substantive independence which is guaranteed by their constituent instruments. This independence may be perceived in managing the operations falling within the assigned responsibilities of an organisation, on the one hand, and by securing their neutrality, on the other hand. The operations are usually managed according to the rules of the organisation, whilst their neutrality may be exercised in different forms, including, but not limited to, information provision to the member states and third parties, dispute settlements, allocation of resources and managing funds. It is noteworthy that neutrality helps displaying impartial image of the international organisation's actions, but it requires the organisation's bodies to be protected from any sort of interference that may be exerted by the member governments (Abbot & Sindal, 1998, pp. 9-23). In this respect, structured and durable regional cooperation requires the institutionalisation of processes and interaction between the involved actors through establishing regional organisations (Glodić, 2017, p. 271).

From a substantive aspect, regional cooperation in the Balkans has covered many areas of State activity: political framework of cooperation, security cooperation, economic and trade relations and administrative cooperation (Glodić, 2017, p. 270). These cooperative efforts were institutionalised through a number of regional organisations, among which the most notable are: the Regional Cooperation Council, the Energy Community, the Transport Community, the Regional School of Public Administration, the Western Balkan Fund, the Regional Youth Cooperation Office, the Security Centre – RACVIAC, and the Centre of Excellence in Finance.[4] Given its size, this article will analyse the most typical

[3] The manner in which Archer described the purpose and functions of international organisations is worth citing: "The role of international organisations is that of their being arenas or forums within which actions take place. In this case, the organisations provide meeting places for members to come together to discuss, argue, co-operate or disagree. Arenas in themselves are neutral; they can be used for a play, a circus or a fight" (Archer, 2001, p. 73).

[4] It should be noted that the European Union is a party to the Treaty Establishing the Energy Community and the Treaty Establishing the Transport Community.

international law instruments related to these organisations and representative of their practices without comprehensive approach.

*2.2. Constituent instruments and the establishment of regional organisations*

Although each international (universal or regional) organisation has its own specificities and is based on a distinct international legal document, there are, however, some traits common to the majority of the organisations. Many issues related to the establishment and functioning of international organisations are comparable and there is a significant level of 'cross-influencing' among them (Amerasinghe, 2005, pp. 16-17).

The dominant international practice proves that the constituent instruments are usually made in the form of treaties, which are a formal and legally binding expression of concurring will of international law subjects (Bederman, 2002, p. 40; Cassese, 2005, p. 170). In addition to establishing a new legal subject on the international plane, the constituent instruments stipulate their powers and responsibilities, mandate, institutional structure and relevant decision-making procedures (Shaw, 2003, p. 1193; Rosenne, 2004, p. 253). In the same vein, the International Court of Justice highlighted that "the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals" (ICJ, 1996, p. 75).

The constituent instruments almost regularly contain such names and titles which unambiguously demonstrate their purpose and subject. The international practice has shaped some usual denominations, such as: constitutions, statutes, pacts, agreements establishing an organisation, etc. Although, due to imminent advantages of concluding the constituent instruments in the form of a legally binding international act, a limited number of cases prove that the States also use political documents for creating international organisations, which do not produce the same legally binding effect as the treaties. The notorious examples of such practice are the documents by which the relevant governments established the Organisation for Security and Cooperation in Europe and the Nordic Council (Diez de Velasco Vallejo, 2002, pp. 11-12).

While considering the development of a constituent instrument, which constitutes primary rules of an organisation, it should be noted that such an instrument was a subject of negotiations between the founding members of the organisation and it represents the initial and basic legal document whose entry into force enables the legal existence of an international organisation (Diez de Velasco Vallejo, 2002, p. 11). The primary rules precede the establishment of the organisation (Daillier, Forteau & Pellet, 2009, p. 641).

Regarding implementation and interpretation of the constituent instruments, the International Court of Justice has established that "from a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply" (ICJ, 1996, p. 74) and "moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (ICJ, 1971, p. 19). Thus,

they will be subject to the defined international legal principles of treaty interpretation and other relevant prevailing rules.

The practice related to the establishment of the regional intergovernmental organisations explored by this article demonstrates the use of the both types of documents: treaties and political declarations. For the sake of example, the Transport Community was established by a multilateral treaty (see: Treaty Establishing the Transport Community),[5] whilst the Regional Cooperation Council (RCC) was established by a joint declaration adopted by the ministers representing the participants of this body (see: Joint Declaration on the Establishment of the RCC). This Joint Declaration lays down the RCC Statute as its Annex II, thus no formal treaty was signed, but the parties recognise the existence of the RCC since its establishment.[6] A more traditional approach was in place in the case of establishment of the Regional School of Public Administration (ReSPA) which was founded by an international agreement (Agreement Establishing the Regional School of Public Administration, hereinafter: ReSPA Agreement).[7] Similar instruments were used for establishing the Centre of Excellence in Finance (see: Agreement on Establishing the Centre of Excellence in Finance) and the RACVIAC (Agreement on RACVIAC – Centre for Security Cooperation ).[8]

Another example of the use of constituent instruments is in the case of the Regional Youth Cooperation Council (RYCO), which is established by the Agreement on the Establishment of RYCO (hereinafter: RYCO Agreement), whilst its functioning is in more details regulated by the Statute of RYCO (RYCO Statute) constituting, pursuant to Article 3(1) of the said Agreement an annex thereto.[9] Article 12 of the RYCO Agreement has stipulated that the Agreement and its annexes constitute a legally binding instrument between the parties. This provision has highlighted the character of the document. Since there is no any provision in the Agreement which would lead to interpretation that the Statute does not produce the same legal effect as the Agreement, it remains unclear what

[5] Article 1(1) of the Treaty Establishing the Transport Community define its aim as follows: "The aim of this Treaty is the creation of a Transport Community in the field of road, rail, inland waterway and maritime transport as well as the development of the transport network between the European Union and the South East European Parties, hereinafter referred to as 'the Transport Community'".

[6] Point 7 of the RCC Statute stipulates: "The RCC, through RCC Secretary General and the RCC Secretariat, provides political guidance, supports and monitors and, where necessary, facilitates the work of relevant regional taskforces, initiatives and organizations active in specific thematic areas of regional cooperation in SEE. In particular, the RCC assists the taskforces/initiatives in gaining access to regional and international political, technical and financial support required to fulfil their objectives. The RCC establishes appropriate relationships with individual taskforces/initiatives and organizations in order to reinforce their efforts and avoid unnecessary overlapping. The RCC, in close coordination with the SEECP, streamlines regional taskforces and initiatives with the aim of achieving enhanced effectiveness, synergy and coherence."

[7] Article 1 of the ReSPA Agreement stipulates: "ReSPA is established as an international organisation." Article 4 defines the objectives and Article 5 lays down activities of the organisation.

[8] Article 1.1) of this Agreement stipulates the establishment of the organisation, whilst Article 1.3) defines it as "an international, independent, non – profit regionally owned, academic organisation."

[9] Article 3(1) of the RYCO Agreement reads: "The Statute of RYCO is hereby adopted and constitutes an annex thereto." The identical procedure for amendments is envisaged for the RYCO Agreement and the RYCO Statute, as stipulated by Article 8 of the RYCO Agreement.

reasons inspired the parties to opt for such a drafting technique. In addition, the same legal technique was applied in relation to the establishment of the Western Balkans Fund (Agreement Concerning the Establishment of the Western Balkans Fund and Statute of the WBF, hereinafter: WBF Agreement, *respective* WBF Statute).

The treaty-making practice between the members of some of these organisations and related to the policy objectives of regional cooperation may go beyond the conclusion of the constituent instrument. The best illustration is the Agreement on the Price Reduction of the Roaming Services in Public Mobile Communication Networks in the Western Balkans Region of 4 April 2019 under the auspices of the RCC.

## 3. International law instruments enabling functioning and operations of the regional organisations

The entry into force of the constituent instrument enables the organisation to start with its own *life* through exercise of its legal prerogatives and, hence, executing the conferred responsibilities. These functions are usually performed by its institutional structures composed of the governing (decision-making bodies) and its executive machinery – a permanent secretariat composed of the organisation's officials (Glodić, 2019, pp. 130-132). In order to enable implementation of the founding instrument, the organisation produces its own legal acts – secondary rules and concludes an international agreement which regulates its status within the country where its headquarters are located.

### *3.1. Headquarters Arrangements defining the position within the Host State of the organisation*

An international organisation should be independent from any type of interference of its members in the conduct of its operations and discharge of the conferred functions. This independence should be particularly maintained *vis-à-vis* the country in which the organisation's headquarters are situated, so called the Host State. This type of a particular international relation between an international organisation and its Host State is regulated by the headquarters arrangements (Brownlie, 2001, pp. 682-683). The most important provisions of the headquarters arrangements are those which stipulate the privileges and immunities of the organisation within the host country, freedom of operations and the status of its administrative head and its officials (Amerasinghe, 2005, pp. 315-317). On a theoretical level, legal justification for according immunities to an international organisation is explained by the functional necessity of the organisations, *i.e.* the international organisations should enjoy those immunities that appear indispensable for the exercise of their functions (Klabbers, 2009, p. 132). At the practical level, by concluding such an agreement with the Host State, the international organisation in question manifests *ius tractationins* as a component of its international legal personality.

The examined regional organisations have mainly followed the practice of other international organisations to conclude such agreements with the Host State. For the sake of example, we will mention some of them. ReSPA concluded the headquarters arrangement with the Government of Montenegro (Agreement between the Government of Montenegro

and ReSPA on the Seat and Functioning of ReSPA in the Host Country of 22 June 2011)[10], RYCO has signed an agreement with the Albanian Government (Host Country Agreement between the RYCO and the Republic of Albania of 28 August 2018)[11].

In the case of the RCC, there is a different situation. The headquarters arrangements were concluded between the Council of Ministers of Bosnia and Herzegovina, representing the host country, on the one hand, and the countries participants of the South East Europe Cooperation Process (Agreement between the Council of Ministers of Bosnia and Herzegovina and the Governments of the Other SEECP Participating States, the United Nations Interim Administration Mission in Kosovo on behalf of Kosovo in accordance with the UNSCR 1244 on the Host Country Arrangements for the Secretariat of the Regional Cooperation Council of 14 September 2007). This practice is somewhat unusual since such agreements are typically concluded between the Host State and administrative head of an international organisation. The practice in the case of the RCC may demonstrate a different approach given the manner of constituting the RCC itself on the basis of a declaration and not a treaty. Since the RCC has established a liaison office in Brussels (Point 18 of the RCC Statute), its Secretariat has concluded the headquarters arrangements with Belgium (Headquarters Agreement between the Kingdom of Belgium and the Regional Cooperation Council Secretariat of 29 August 2008). Article 2.2. of the above referred Agreement on the Host Country Arrangements for the RCC Secretariat has stipulated the legal capacity of the latter to conclude the headquarters arrangement with the Belgian authorities.

### *3.2. Acts adopted by the regional organisations' bodies*

In addition to the primary rules, the international organisation's operations are managed and conducted according to the secondary rules enacted by its organs pursuant to the constituent instrument and, to a lesser extent, by its institutional practice (Amerasinghe, 2005, pp. 20-21). Thus, the creation of an international organisation as a separate legal entity makes sense only if such an organisation is vested with law-making powers pursuant to its constituent instrument (Klabbers, 2009, p. 178).

The acts adopted by the organs of an international organisation produce binding effect on the organisation, its organs and, sometimes, on its members. Such biding effect is enshrined by the provisions of the constituent instrument of an organisation and they govern administrative rules of the organisation, rules of procedures of different organs, establishment of advisory and subsidiary bodies, employment relations within the organisation, financial procedures, procurement rules, etc. (Amerasinghe, 2005, pp. 164-165; Diez de Velasco Vallejo, 2002, pp. 113-116). These acts enable running of the organisation and are translating the responsibilities conferred by the organisation's members into more tangible deliverables through the organisation's institutional mechanism (Glodić, 2019,

[10] Concluded pursuant to Article 3(2) of the Agreement Establishing ReSPA: "A Headquarters Agreement shall be concluded between ReSPA and Montenegro." These arrangements define, inter alia: seat, legal status, freedom to work, inviolability, immunities, communications, exemptions from taxes and duties, privileges and immunities of the director and the staff.

[11] Concluded pursuant to Article 3.2. of the Agreement on RYCO.

p. 77). The form, content and scope of these acts are predetermined by the constituent instrument and while exercising their law-making powers, the organs of the organisation should observe the constituent instrument's relevant provisions and should not undermine intention of the members of the organisation (Amerasinghe, 2005, p. 163).

A common denomination for the secondary acts adopted within an international organisation is the term "resolution", although various other names may be used. However, its generic character implies that its effects, scope of application and meaning within the legal system of an international organisation will rely heavily on the terms of the constituent instrument of such an organisation, as well as on interpretation and subsequent practice of the parties to this constituent instrument (Jennings & Watts, 1992, p. 48).

The regional organisations in South East Europe widely follow this international practice and their constituent instruments confer powers upon the governing bodies (composed of the members' representatives) to adopt secondary rules. For the sake of illustration, few examples will be presented. Point 15b) of the RCC Statute has envisaged that the Board of this organisation, inter alia, *adopts decisions pertinent to the activities of the Secretariat of the RCC*. Article 11(2) of the ReSPA Agreement lays down that *the Governing Board shall adopt Resolutions for all matters pertaining to its responsibilities* […] *including Rules of Procedure, Financial Regulations, Staff Regulations and accession of new members*. Article 18.1 of The RYCO Statute stipulates that its Governing Board shall *adopt the Rules of Procedure and other secondary regulation required for the functioning of RYCO*. Article 30 of the Treaty Establishing the Transport Community envisages that the Regional Steering Committee *shall lay down rules of the Permanent Secretariat, in particular for the recruitment, working conditions and geographical equilibrium of the Secretariat's staff.* Article 14 of the RACVIAC Agreement defines the power of the Multinational Advisory Group to adopt the Staff Regulations of this organisation. On a more descriptive side, Article 35(3) of the WBF Statute provides for the minimum content of the Staff Regulations containing *rules, principles and procedures governing the selection of staff, their recruitment, classification of posts, and the efficient operation of the WBF's Secretariat in attainment of the objectives of this Statute*. The foregoing examples lead to the conclusion that the constituent instruments use different wordings to establish the power of the intergovernmental governing bodies for adopting the secondary rules of the organisations. There a number of instances demonstrating that, pursuant to the powers conferred upon them by the constituent instruments, the governing bodies enacted different pieces of secondary rules – staff regulations (see: Transport Community Staff Regulations; ReSPA Staff Regulations), financial regulations, rules of procedure (see e.g. Rules of Procedure of the ReSPA Governing Board; Rules of Procedure of the Regional Steering Committee of the Transport Community; Terms of Reference of the RACVIAC Multinational Advisory Group),[12] recruitment rules (Rules of the recruitment of the Transport Community), etc.

Besides adoption of legally binding acts, the regional organisations may also enact a number of legally non-binding documents containing policy recommendations and falling within the category of *soft law*. Due to its nature, *soft law* can be more easily used in order

[12] Also, different rules of procedure for the bodies of the WBF available at on the WBF website.

to define some relationships and processes on the international plane for which there is no readiness to create a legally binding document (Abbot & Sindal, 2000, p. 423; Amerasinghe, 2005, p. 175). Although the *soft law* instruments do not produce biding effect, there is, however, certain reaction to be expected from the addressees of these instruments. Namely, they are expected to consider the provided recommendations or other relevant documents when they shape the policies concerned by these instruments (Amerasinghe, 2005, p. 177). Besides the expected consideration of policy recommendations, the states participating in an international organisation have committed to cooperate with the organisation and other members of the former. Therefore, one may highlight their duty to cooperate on implementing what was recognised as the objectives of cooperation (Amerasinghe, 2005, pp. 178-179). The regional organisations and the intergovernmental conferences operating within their framework issued a number of recommendations pertaining to relevant policy areas (compare: RCC, 2011; RCC-ReSPA, 2017).

The above examples prove that, in the exercise of the conferred powers, the regional organisations in South East Europe are powered to use different secondary law instruments, and even some acts falling within the category of *soft law*. The secondary international law instruments are an unavoidable tool for enabling functioning and operations of the regional organisation.

## 4. Concluding remarks

International organisations are both products of international law instruments and creators of these instruments. International law offers necessary instruments that enable establishment of an international organisation and that provide the legal framework for its operations. Following the established theoretical framework on the creation and functioning of international organisations, this article has demonstrated how both primary and secondary rules of international organisations have been used with the aim of institutionalising the processes of regional cooperation in South East Europe. The institutionalisation was defined as the process of the creation of regional intergovernmental organisations. The constituent instruments in the form of treaties, headquarters arrangements, as well as different types of internal legal acts (secondary law) are present in the practice of these organisations. The author presented and analysed a number of relevant examples that are used in the practice and assessed their role in the process of institutionalisation of regional cooperation.

The article has concluded that the founding parties of the organisations and the organisations' bodies relied on the international law instruments, which are regularly used for the above purposes. In addition to the legal acts, the organisations have also enacted some documents defining policy and political commitments of the members of the regional organisations which may be qualified as *soft law* instruments. It is obvious that the examined regional organisations have developed a rich rules-making practice. Hence, the participants of the process of regional cooperation in South East Europe and the bodies of the established regional organisations did not diverge from the accepted international

practice to use already known and widely spread legal and political instruments with aim of institutionalising regional cooperation in a number of policy areas.

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## ULOGA MEĐUNARODNOPRAVNIH INSTRUMENATA U INSTITUCIONALIZOVANJU REGIONALNE SARADNJE U JUGOISTOČNOJ EVROPI

Sažetak

Ovaj članak ispituje ulogu i upotrebu međunarodnopravnih instrumenata u procesu institucionalizacije regionalne saradnje u jugoistočnoj Evropi. Proces institucionalizacije

je određen kao proces stvaranja regionalnih međuvladinih organizacija koje čine države i drugi subjekti uključeni u proces regionalne saradnje u ovom regionu. Polazeći od teorijskih i praktičnih prednosti uspostavljanja međunarodnih regionalnih organizacija, članak ispituje način na koji su primarni i sekundarni međunarodnopravni akti upotrebljeni da bi se omogućilo uspostavljanje ovih organizacija i funkcionisanje njihovih institucionalnih okvira. Zaključeno je da su se osnivači posmatranih regionalnih organizacija oslonili na one instrumente međunarodnog prava koji se uobičajeno koriste u procesu osnivanja međunarodnih organizacija te da su tela ovih organizacija, polazeći od osnivačkih instrumenata, stvarala različite sekundarne međunarodnopravne akte koji im omogućavaju funkcionisanje i obavljanje njihovih poslova. U suštini, opšteprihvaćeni instrumenti međunarodnog prava su bili neizbežni u procesu institucionalizacije regionalne saradnje u jugoistočnoj Evropi i države iz regije su koristile one instrumenti koji su već od ranije ustaljeni u međunarodnoj pravnoj i političkoj praksi.

**Ključne reči:** regionalne organizacije, jugoistočna Evropa, regionalna saradnja, međunarodni ugovori, rezolucije.

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# ADEQUATE REPRESENTATION OF PERSONS BELONGING TO NATIONAL MINORITIES IN PUBLIC SECTOR: THE NATURE, CONTENT AND SCOPE OF OBLIGATIONS IN THE COMMENTS OF THE ADVISORY COMMITTEE FOR THE FRAMEWORK CONVENTION**

***Abstract***

*Adequate representation of persons of minority origin in public sector bodies is one of the conditions for their effective participation in public affairs, as prescribed in Article 15 of the Framework Convention for the Protection of National Minorities. To establish whether a State Party fulfils this requirement, the Advisory Committee for the Framework Convention has developed the standard of adequate representation. The aspect of the standard which concerns the adequate representation of persons of minority origin in non-elected public sector bodies is still vague and insufficiently developed. That is a source of uncertainty as to the obligations of the State Parties and the appropriate methods for their realisation. The paper investigates the nature, content and scope of obligations ensuing from this particular aspect of the standard of adequate representation with the aim to contribute to its further normative articulation. The investigation is carried out by analysing the thematic commentaries and country-specific opinions of the Advisory Committee.*

***Keywords:*** *Article 15 of the Framework Convention for the Protection of National Minorities, standard of adequate representation, non-elected public sector bodies, legal obligations, Advisory Committee.*

## 1. Introduction

Presence of persons of minority background in the workforce of public sector bodies is one of the conditions for their effective participation in public affairs, as laid

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** The paper is based on the comprehensive research of best practices for adequate representation of persons belonging to national minorities in public sector, conducted by the author for the needs of the EU-funded Project "Support of affirmative measures related to employment of national minorities in public sector", which was implemented in the Republic of Serbia between December 2018 and October 2020 by the GFA Consulting Group.

down in Article 15 of the Framework Convention for the Protection of National Minorities (Framework Convention, ETS 157). Whether the level of their presence is sufficient for the achievement of this goal is evaluated against the standard of adequate representation. The standard of adequate representation of persons belonging to national minorities in public sector bodies is a legal standard which specifies requirements that are either necessary or sufficient for meeting the related legal obligations ensuing from Article 15. As such, it should guide activities of the State Parties to the Framework Convention and serve as the point of reference for their evaluation in the monitoring procedure.[1]

For several reasons, which have been tackled elsewhere, the application of the standard of adequate representation is characterised by a lot of vagueness and the resulting uncertainty (Matijević, 2019a, pp. 22-23). That is, in particular, true for its aspect that concerns adequate representation of persons of minority origin in *non-elected public bodies*, which is the subject of this paper. A closer look at the interpretations of Article 15 given by the Advisory Committee for the Framework Convention[2] shows that the answer to the question of what does it take to meet the standard of adequate representation when it comes to the non-elected public sector bodies is still sought in a confusing blend of references to the broad human rights ideals, such as social cohesion, inclusive governance, fairness, and examples of best practices.

To contribute to the further normative development of this particular aspect of the standard of adequate representation, in my previous work on the subject I tried to identify its main objectives (Matijević, 2019a). In this paper, I will undertake an initial investigation into the nature, content and scope of obligations arising under the standard of adequate representation of persons of minority origin in non-elected public sector bodies. While the purpose of the earlier analysis was to provide an elaborate answer to the question of why should the State Parties make sure that persons of minority origin are adequately represented in their public sector bodies, the purpose of this one is to provide a clearer view on how to realise this duty. The broader goal of the paper remains to contribute to the further normative articulation of this, so far, underdeveloped subtype of the standard of adequate representation.

The term "non-elected public bodies" is in the paper used as an opposite to "elected public bodies" in order to delineate the specific aspect of the standard of adequate representation that is its subject matter.[3] Given that the term has been rarely used and even more rarely defined in the literature, at least a brief explanation should be given of what is

[1] The Framework Convention for the Protection of National Minorities provides for a system of monitoring of its implementation by the States Parties. The monitoring procedure has two phases. In the first phase, the Advisory Committee carries an evaluation of minority legislation and practice in a State Party and adopts a country-specific opinion. Following the adoption of an opinion by the Advisory Committee, the Committee of Ministers adopts a resolution which contains conclusions on the implementation of minority rights recognised in the Framework Convention in the state under review and recommendations on how to improve it.

[2] Further: "the Advisory Committee".

[3] The distinction between the elected and non-elected public bodies is also present in the Advisory Committee's comments on Article 15. However, instead of using the term "non-elected public bodies", the Advisory Committee in its comments refers to the executive bodies and public services. See, for instance, Opinion on Georgia (2009, p. 51, paras. 203 and 204).

here meant under the notion of "non-elected public bodies". First of all, they should not be confused with what is in the literature referred to as "quangos" or "non-departmental public bodies", that is the bodies which are financed from public resources and fulfil a public function, but with some degree of independence *vis-à-vis* elected government (Smith & Flinders, 1999, p. 17).[4] In fact, the term "non-elected public bodies" in the paper refers to the entities which belong to the concept of "public administration" in the most traditional meaning of it as the entities governed by public law and established for the execution of public law (Wilson, 1887, p. 212).[5] Differently from the elected public bodies, the non-elected public bodies are here taken to signify those bodies whose main activities are performed by persons who act from the position of employees and not as representatives of interest of societal groups. In other words, our analysis concerns public bodies which fulfil their public function through persons who occupy a position within their organisational structure, not based on their political party affiliations or associations to some segment of the population, but based on their specific skills and expertise. Naturally, their workforce is for the major part composed of civil servants or of the broader category of public servants, but it can also be made of employees who do not have the status of public servants, such is the case with the staff of public companies. Here employed notion of "non-elected public bodies", as such, includes the public administration bodies at all territorial levels, educational, health care and other public institutions, as well as the state-owned companies providing public goods.[6]

The investigation into the nature, content and scope of obligations ensuing from the standard of adequate representation is done primarily through the analysis of the Advisory Committee's interpretations of the duty to establish conditions for effective participation of persons belonging to national minorities in public affairs. The investigation departed from the interpretations of Article 15 and the related provisions of the Framework Convention found in its thematic commentaries. Then it was broadened to include the views expressed by the Advisory Committee in its country-specific opinions delivered in the course of the monitoring procedure.

The paper is structured in the following way. The nature and content of the obligations arising under the standard of adequate representation are analysed in the first part of the paper. In the second part of the paper, I explore the scope of these obligations with regards to the territorial level for which the public sector body was established. The scope of the obligations with regards to the competences of the public bodies is investigated in the third part of the paper. In conclusion, I briefly discuss the importance of further normative development of the standard of adequate representation.

[4] See, also, Knox (1998, pp. 159-160, fn. 13).

[5] For an elaborate presentation of the public administration approach to the public sector, see Lane (2000, pp. 2-13).

[6] The "boundary problems *within* the public sector", as Lienert (2009, p. 27) calls ambiguities in determining the scope of the notion of public sector, are as well and unavoidable limitation of the here defined notion of "non-elected public bodies". Being only an element of the notion of public sector, the notion of "non-elected public bodies" suffers from the same problems in setting the boundaries between market and non-market activities which trouble those who attempt to define "public sector". On the lack of a universal definition of public sector, see Eechoud (2006, p. 280).

## 2. Nature of obligations

Due to the great differences in the position, needs and characteristics of different European minorities, the drafters of the Framework Convention could go only thus far as to lay down the most important principles for their protection (Stekette, 2001, p. 4). That is reflected in the legal character of its provisions, which are not directly applicable but programme-type provisions setting out the objectives to be pursued by the State Parties for an effective legal and institutional protection of national minorities.[7] Chiefly for this reason, the State Parties have a very broad margin of discretion in the choice of measures for the implementation of the Framework Convention (Explanatory Report to the Framework Convention for the Protection of National Minorities, p. 12, para. 11).

This general feature of the Framework Convention is even more pronounced when it comes to Article 15. The text of Article 15 is phrased in a language vaguer than the rest of the Convention, thus leaving to the State Parties an even broader discretion when it comes to the means for the realisation of duties there established (Verstichel, 2004, p. 194). Different minority groups have not only different needs and interests but also different capacities to participate in the public affairs of the country. For that reason, "a measure that leads to effective participation in one State Party", as the Advisory Committee observes, "does not necessarily have the same impact in another context" (Commentary No. 2, p. 36, para. 148).

However, the wide margin of discretion does not mean that the State Parties can meet their Article 15 obligations by merely trying to achieve the objectives laid down in its text (Estébanez, 2005, p. 278). The obligations of the State Parties arising from Article 15 and the standard of adequate representation are not obligations of conduct but obligations of result (Malloy *at al.*, 2009, p. 96). Differently from the obligations of conduct, the obligations of result are binding as to the results to be achieved, and they are breached when the result required by them do not occur (Economides, 2010, p. 377).[8] This means that the State Parties' duty is not to give their best to secure conditions for adequate representation of persons of minority origin in their public sector bodies, but to achieve the adequate representation.

Having said that, on the more detailed reading of the comments of the Advisory Committee, one can also notice that the distinction between the obligations of result and the obligations of conduct often tends to be blurred because of the long-term perspective inbuilt in the provisions of the Framework Convention (Commentary No. 2, p. 36, para. 149).[9] When it comes to the goal of adequate representation implicit in the goal of effective

[7] Their programme-type character could also be ascribed to the lack of consensus over the very basic normative issues, such as "the issues of right-holders and the legal nature of specific rights" (Jovanović, 2005, p. 628), characterising since the very beginning the normative multiculturalism, the raise of which led to the adoption of the Framework Convention. The price of it was a limited possibility for a solid articulation of the legal obligations of the State Parties to the Framework Convention.

[8] On the distinction between the obligations of conduct and obligations of result under international law, see also Wolfrum (2011).

[9] See, for instance, Commentary No. 2 (p. 69, para. 149).

participation in public affairs, we can observe that Article 15 does not require from the State Parties achievement of some directly measurable targets such as, for instance, that their public sector workforce numerically mirrors the ethnic composition of their population.[10] Instead, the State Parties are expected to create an environment in which adequate representation of persons of minority origin in public sector will become a lasting result of a consistent recognition of the special needs of minority communities by their legal and institutional systems. These special needs and position of minority communities are clearly reflected in the objectives behind the standard of adequate representation, which could be summarised as elimination of prejudice, equal access to public services and accommodation of identity-related needs of national minorities.

Naturally, what will be the most appropriate measures to achieve these objectives depends on the specific circumstances of the country under consideration. Firstly, it depends on the features and needs of a minority group whose adequate representation is to be secured. As observed by the Advisory Committee in its interpretation of the relationship between the concept of full and effective equality and the linguistic rights guaranteed in the Convention that also sheds light on the standard of adequate representation:

> "[…] the principle of equality does not presuppose identical treatment of and approaches to all languages and situations. On the contrary, measures to promote equality must be targeted to meet the specific needs of the speakers of various minority languages. Separate provisions may be necessary for the speakers of languages of numerically smaller minorities to ensure the revitalisation of their language in public life, while other, more widely spoken minority languages, may require other methods of promotion" (Commentary No. 3, p. 10, para. 27).

The objectives behind the standard of adequate representation point to the strong interrelatedness between the concrete legal obligations ensuing from the standard of adequate representation and the features of a minority group. Large minority groups concentrated in some parts of a country usually demand that their linguistic rights are secured on a par with the state language in the public bodies operating in the territories they settle and show interest to participate in public affairs of a country as a whole. On the other hand, the agenda of smaller and dispersed minorities is usually more concerned with their adequate representation in the public bodies which have a particular say on the matters that are affecting them the most. These could be the public bodies in charge of providing services in the access to which they face particular obstacles, or specialised bodies for the preservation of their language and culture, etc. Given the diverse needs of different European minority groups, in its recommendations on how to meet the standard of adequate representation, the Advisory Committee only occasionally delivers recommendations of a

[10] On the contrary, according to the Committee, "[m]easures which aim to reach a rigid, mathematical equality in the representation of various groups, […] should be avoided "[because] [t]hey risk undermining the effective functioning of the State structure and can lead to the creation of separate structures in the society". (Commentary No. 2, p. 59, para. 123).

general character. Instead, its recommendations are for their major part made of references to the best practices of the State Parties identified in the process of monitoring.

When it comes to the differences between the countries related to the financial and other resources needed for the realisation of the standard of adequate representation, they are not among the factors which could limit the scope of obligations established under the standard. At best, given the long-term perspective inbuilt in the provisions of Article 15, lower financial, institutional and other resources could to some extent and for some time soften the negative comments of the Committee.[11] The underrepresentation of persons of minority origin in the workforce of the public sector bodies is in most cases consequence of structural discrimination, and the remedial action often demands complex institutional changes requiring significant financial and administrative resources. Moreover, implementation of other minority rights which is a prior condition for the realisation of the standard of adequate representation, presents in itself a resource-intensive task. When the Advisory Committee finds that a State Party faces significant economic difficulties, this could to some extent lower its expectations *vis-à-vis* the pace with which the standard of adequate representation is to be realised. However, the lack of financial, administrative and other resources cannot absolve the State Party from its duty to ensure adequate representation of persons belonging to minority communities in the non-elected public sector bodies. Nor it could ever become justification for a lasting underperformance and negative status quo in the realisation of obligations ensuing from the standard of adequate representation.

The Advisory Committee's awareness of various difficulties which could follow the realisation of the standard of adequate representation encompasses as well those arising from the competing economic and other objectives pursued simultaneously by the State Parties such as, for instance, cut-backs in the number of public servants through the fiscal austerity measures. The Committee is also mindful of the fact that employment-related measures aimed at greater representation of national minorities in public bodies could cause tension and resentment in the countries with high unemployment rates and where a significant portion of the population works in the grey sector (Opinion on Macedonia, p. 23, para. 97).[12] However, as said, this would not affect the content and scope of obligations arising under the standard, but could for a while render the tone of the Committee's negative opinion less harsh.

### 3. The scope of obligations with regards to the territorial level of public sector body

The general rule found in the Advisory Committee's comments on the standard of adequate representation is that all public sector bodies are subject to obligations ensuing from the standard, but to a different degree and in a different way. The public sector of the

[11] See, for instance, Opinion on Georgia (p. 8, para. 18).

[12] The reports of the civil sector organisations in other countries in the region also point that the use of some of the recruitment-related measures, such as the affirmative action measures, despite their noble aims could have negative ramifications on the relationship between the majority and minority communities. See, for instance, Đorđević *et al.* (2018, pp. 98-99).

modern European states is organised as a complex network of bodies established at the central, local and regional level. The method of its territorial organisation and the degree of its decentralisation have an important place in the Advisory Committee's doctrine of the standard of adequate representation. Its analysis shows that the answer to the question of the territorial level of the public sector that should be the primary target of measures aimed at adequate representation is to be guided by the three basic rules:

I. The degree of decentralisation dictates which territorial level of public sector should be the primary target of measures aimed at achieving adequate representation.

This first rule shows that when a state is highly decentralised and its regional and municipal public sector bodies have very broad competences, the Advisory Committee will primarily look into the level of representation in these bodies. The Advisory Committee in its comments underlines the importance of the constitutional organisation of a state and notes that "subnational forms of government and minority autonomous self-governments can be valuable tools to foster effective participation of persons belonging to national minorities in many areas of life." (Commentary No. 2, p. 8). But to what extent the emphasis would be on the regional and municipal public bodies in its evaluation also depends on whether these are actually in a position to fully realise such broad competences.[13] In other words, it would depend on whether they were given the necessary means, including the financial ones, to exercise their powers effectively (Opinion on Montenegro, p. 32, para. 104).

II. The measures aimed at adequate representation should target in particular public bodies situated in areas inhabited by national minorities traditionally or in substantial numbers.

Adequate representation in subnational segments of public sector, including the local level public bodies, is especially important in the parts of the country where persons belonging to national minorities live compactly (Commentary No. 2, p. 32, para. 129). The exclusive use of the state language in these public bodies may seriously hamper the participation of national minorities in public affairs (Commentary No. 3, p. 29, para. 93). Under Article 10, para. 2, the State Parties are expected to "ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities". One of the main methods to create conditions for the use of minority languages before public bodies situated in areas inhabited

[13] A good illustration of this are findings of an analysis of the official use of minority languages in Serbia, according to which almost all public bodies which were providing administrative services in minority languages faced financial difficulties due to the fact that the expenses incurred in this way were not budgeted for in the process of allocation of financial means for the realisation of mandate of these bodies. The author notes that the existing system of financing did not make any difference between the bodies situated in the municipalities where none of the minority languages were in the official use and those where several minority languages had the status of languages in the official use. See Pavlović (2019, p. 55).

by national minorities is to undertake proactive measures for the recruitment of persons of minority origin or in other ways ensure their adequate representation in these bodies.[14]

III. The central level public bodies are also subject to the obligations arising under the standard of adequate representation.

No matter to what degree public sector of a State Party is decentralised, "the decentralisation process must not relieve the central authorities of their overall responsibility regarding the participation of persons belonging to minorities" (Opinion on Macedonia, p. 24, para. 101). The obligations arising under the standard of adequate representation which concern the central level public bodies ensue in the first place from the relationship between Article 15 and Article 10, para. 2. The second article, which provides the link between the language-related needs of national minorities and the standard of adequate representation, as noted, requires from the State Parties to ensure conditions for the use of minority languages before administrative authorities in the areas inhabited by national minorities. For the state-level public bodies located in these territories, adequate representation of persons of minority origin in their workforce presents a way to fulfil that duty.[15]

When it comes to the public bodies situated outside areas traditionally inhabited by national minorities, the Advisory Committee says that they "should remain committed to their general responsibility resulting from their international obligations and the national legal framework regarding participation of persons belonging to national minorities in various spheres" (Commentary No. 2, p. 33, para. 132).[16] Adequate representation of persons belonging to national minorities in the central level public bodies is a precondition for their effective participation in the regulatory processes which concerns matters of special interest for national minorities. Participation in public affairs through the adequate representation of national minorities in the central level public bodies can as well serve as a channel through which "the particular concerns of persons belonging to national minorities are taken into account, but also to make it possible for them to influence the general direction of development in society" (Commentary No. 2, p. 12, para. 17). For that reason, in its country-specific opinions, the Advisory Committee standardly insists on adequate participation of persons belonging to national minorities in the executive bodies.

Apart from these general reasons, adequate representation in the central level public bodies is also essential to ensure that matters of concern of numerically smaller minorities and of the so-called "dispersed" minorities are adequately addressed. In relation to this, the Advisory Committee primarily refers to the needs of persons belonging to Roma community often dispersed in the different regions of the country (Commentary No. 2, p. 8, p. 31, para. 124).

[14] See, for instance, Opinion on Bulgaria (p. 28, para. 107).

[15] See on this Vacca (2016, p. 2).

[16] For an overview of legal regulation of the official use of minority languages before the public administration bodies in several European countries see Đurić (2019, pp. 56-63).

## 4. The scope of obligations with regards to the competences of public sector bodies

On a number of occasions, the Advisory Committee has reiterated that the duty to ensure adequate representation of persons belonging to national minorities applies to public bodies active in all main segments of public life (Opinion on Macedonia, p. 23, para. 98). As observed by the Committee, "[d]ifficulties in the various sectors are often connected and mutually reinforcing and they can lead to a spiral of exclusion from socio-economic participation" (Commentary No. 2, p. 18, para. 47). For that reason, employment-related or other measures that could increase their level of representation should be used within the diverse public bodies (Opinion on Latvia, p. 39, para. 162).

Apart from this general rule, the Committee also points to the segments of public sector which are essential for the realisation of the objectives behind the standard of adequate representation.[17] The list of sectors in which it is especially important to ensure adequate representation to a great extent follows the list of public services which are in the Framework Convention identified as vital for the realisation of the rights of national minorities. These are, as it ensues from the provisions contained in Articles 6 to 14 of the Convention, media services[18], administrative services[19], education[20] and health care[21].

In its observations on the areas of public life in which adequate representation is of greater importance for minorities, the Committee is particularly guided by the needs of the most vulnerable minority groups, or the most vulnerable sections within minority groups. For that reason, the regulation and delivery of health services is an especially prominent topic in its considerations of the public services where adequate representation of national minorities might be crucial for the realisation of their Article 15 participatory rights. As a consequence of different factors, such as the presence of overt discrimination, low socio-economic status, geographical isolation, language obstacles and cultural distinctiveness, persons belonging to certain national minorities face more obstacles in access to health care (Commentary No. 2, p. 20, para. 61). From this general observation, the Committee concludes that it is essential to ensure that public bodies in charge of providing health care have the capacity to cater to the specific needs of persons of minority origin. Among the different measures that could be used to this aim, safeguarding adequate representation of persons belonging to national minorities in the workforce of the health sector has special importance. These measures should not be directed only at the health care centres, hospitals and other bodies which provide health care, but also at bodies in charge of planning, organisation and guaranteeing quality of the health care provision:

[17] In doing this, the Advisory Committee departs from the very text of Article 15, which requires from the State Parties to ensure effective participation of persons of minority origin in those segments of public affairs which are vital for the rights of national minorities (Commentary No. 2, p. 12, para. 16).

[18] See Commentary No. 2 (p. 34, para. 141).

[19] See Commentary No. 2 (p. 40, para. 160).

[20] See Commentary No. 2 (pp. 40-41, para. 161-165).

[21] See Commentary No. 2 (p. 21, para. 62).

> "State Parties should ensure the effective involvement of persons belonging to the minorities concerned in the design, implementation, monitoring and evaluation of measures taken to address problems affecting their health care. […] Medical and administrative staff employed in health services should receive training on the cultural and linguistic background of national minorities, so that they can adequately respond to the specific needs of persons belonging to national minorities. The employment of health mediators or assistants belonging to national minorities can contribute to improved communication and more appropriate approaches" (Commentary No. 2, p. 21, paras. 62-63).[22]

Importance of adequate representation of national minorities among medical and administrative staff engaged in the provision of health services is especially emphasised when it comes to the regions settled in substantial numbers by persons of minority origin. According to the Committee, to be able to respond to their needs adequately, the staff engaged in the delivery of health care in these regions should be able to provide health services in minority languages and to respond to the needs ensuing from the cultural and linguistic specificities of national minorities (Commentary No. 3, p. 28, para. 88).

Another observation to be made on the scope of obligations *vis-à-vis* the competences of public bodies is that the Advisory Committee also pays attention to the representativeness of the staff of bodies entrusted with the matters of special importance for minority groups. The Advisory Committee in principle welcomes the establishment of such specialised bodies at the national, regional or local level, but it also stresses the importance of the recruitment and retention of staff with the minority language skills for a successful realisation of their responsibilities (Commentary No. 2, p. 28, para 104).[23]

## 5. Conclusion

The objective of this paper was to contribute to the further normative articulation of the aspect of the standard of adequate representation which concerns non-elected public sector bodies. Without a clearer view on what does it take to have an adequate representation of persons belonging to national minorities in non-elected public sector bodies, this segment of the Article 15 obligations will be bound to remain a source of misunderstanding both with regards to the duties of the state authorities and the claims that minority groups could reasonably raise. The lack of certainty that characterises the standard often leads to quick-fix solutions. These are especially employed when the negative findings of the Advisory Committee threaten the achievement of another valuable goal. The role of the Advisory Committee's findings in the evaluation of the progress of

[22] Footnote omitted.

[23] However, the Advisory Committee cautions that minority-related issues "should not remain exclusively in the domain of specialised governmental bodies", and that "the minority perspective needs to be mainstreamed in general policies at all levels and procedural steps by the actors involved in policy-making" (Commentary no. 2, p. 23, para. 73). Similarly, at p. 28, para. 105.

candidates and potential candidates for the EU membership has increased the importance of the process of monitoring of the implementation of the Framework Convention. That, however, led to the situations where the State Parties adopted laws and policies which in the long run haven not had positive effects on the level of representation of minority groups, but have fulfilled the goal of earning for the State Party a favourable opinion of the Advisory Committee in the period that was decisive for the success of the EU accession process. On some occasions, these solutions were in effect almost as bad as the problem they were trying to resolve. Some of them were potentially damaging for the relationship between the majority and minorities because of the tensions they could have caused in the societies where a great number of jobs belong to the grey economy. Some involved the danger of the creation of parallel structures in society. Others have resulted in only cosmetic changes which have silenced the discussion about the level of representation of minorities in public sector. Eventually, they all led to the futile use of resources that are always scarce when it comes to such elusive aim as the one of full and effective equality between persons belonging to a national minority and those belonging to the majority.[24] All these problems are additional reasons for the further normative elaboration of the here examined aspect of the standard of adequate representation, both in theory and in practice.

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[24] The illustrations of some or all of the mentioned problems, which in the first place reflect the lack of understanding of what are the objectives, obligations and methods for the realisation of the standard of adequate representation, as well as the urge to fulfil the standard as soon as possible because of the EU accession process, can be found in the Advisory Committee's findings on Serbia, Croatia, North Macedonia and Montenegro. For an analysis of the Serbian experience with the problem of inadequate representation and its attempts to resolve it, see Matijević (2019b).

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## ADEKVATNA ZASTUPLJENOST PRIPADNIKA NACIONALNIH MANJINA U JAVNOM SEKTORU: PRIRODA, SADRŽINA I OBIM OBAVEZA U KOMENTARIMA SAVETODAVNOG KOMITETA ZA OKVIRNU KONVENCIJU

Sažetak

Adekvatna zastupljenost osoba manjinskog porekla u telima javnog sektora je jedan od uslova za njihovo efikasno učešće u vođenju javnih poslova propisano čl. 15. Okvirne

konvencije za zaštitu nacionalnih manjina. Stepen ispunjenosti ovog uslova utvrđuje se primenom standarda adekvatne zastupljenosti. Jedan od posebnih aspekata standarda tiče se zastupljenosti pripadnika nacionalnih manjina u tzv. neizabranim telima javnog sektora, odnosno telima koja poslove iz svoje nadležnosti ne sprovode preko izabranih lica, već preko lica koja imaju status državnih ili javnih službenika, nameštenika i drugih zaposlenih. On je do sada ostao nedovoljno razvijen i prilično neodređenog normativnog sadržaja što, kako kod država članica Okvirne Konvencije, tako i kod samih pripadnika nacionalnih manjina, dovodi do ozbiljnih nedoumica u pogledu sadržaja obaveza koje iz njega proističu kao i najpodesnijih metoda za njihovo realizovanje. Autorka se u članku bavi ispitivanjem pravne prirode, sadržaja i obima obaveza koje proizilaze iz ovog posebnog segmenta standarda adekvatne zastupljenosti s ciljem da doprinese njegovom daljem normativnom artikulisanju. Zaključci se zasnivaju na analizi tumačenja čl. 15. i drugih relevantnih odredbi Okvirne Konvencije koja su sadržana u tematskim komentarima i pojedinačnim mišljenjima Savetodavnog komiteta za Okvirnu konvenciju.

**Ključne reči**: čl. 15. Okvirne konvencije za zaštitu nacionalnih manjina, standard adekvatne zastupljenosti, neizabrana tela javnog sektora, pravne obaveze, Savetodavni komitet za Okvirnu konvenciju.

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# NULLITY AND INEFFECTIVENESS OF CONTRACTS AS A CONSEQUENCE OF VIOLATION OF EU COMPETITION AND PUBLIC PROCUREMENT RULES**

***Abstract***

*The presented paper will focus on the extent of requirements of EU law for nullity or ineffectiveness of contracts in specific areas linked to functioning internal market: competition law, including agreements restricting competition, abuse of dominant position, merger control and state aid, and rules of public procurement. The scope of EU-law-based nullity is quite limited and only Art. 101(2) TFEU provides expressed nullity of agreements restricting competition. In the case of abuse of dominance, nullity of contract constituting abuse of dominant position can be drawn from the principle of effectiveness of EU law. Validity or nullity of contracts violating suspension clause in merger control regime are assessed in two periods – before decision on merger and after decision of the Commission. State aid regime cannot rely on EU-law-based nullity of contracts that violate EU state aid rules. Finally, public procurement rules appear the most complex in this context since they operate with the "right" of the contracting authority to terminate contract and power of revision authority to declare "ineffectiveness" of illegally awarded contract, and therefore revision of directives is suggested.*

***Keywords:*** *EU Law, competition law, public procurement, nullity, ineffectiveness.*

## 1. Introduction

Establishing internal market of the European Union (EU) relies on plenty rules embedded in primary law as well as secondary law. Moreover, rules aimed at establishing the EU's internal market are split to exclusive competence of the EU under Art. 3 of the Treaty on the Functioning of the European Union (TFEU) and shared competence under Art. 4 TFEU. While, in particular, "competition rules necessary for the functioning of the internal market" is exclusive competence of the EU [Art. 3(1)(b) TFEU], the majority of rules of internal market fall into shared competence of the EU and the Member States [Art.

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4(1)(a) TFEU]. Distinguishing between exclusive competence and shared competence is crucial for application of the principle of subsidiarity, while the principle of proportionality is applicable equally. Law-making of the EU shall also respect "national identity" of the Member States [Art. 3(2) of the Treaty on European Union (hereinafter "TEU")]. This principle does not, however, undermine the principle of the primacy of EU law itself and constitutes limited exemption from general primacy of EU law restricted merely to the cases when European acts which do not respect fundamental values of the Member States (Besselink, 2010, pp. 47–48). Hence, the Member States cannot refer to national identity as an excuse from Art. 4(3) TEU, i.e. principles of sincere cooperation and loyalty, and together with the principles of proportionality and subsidiarity, limit the scope and extent of actions of the EU. There is long-time respected principle of procedural autonomy of the Member States in achieving aims of the EU that is gradually shaped by (1) general requirements of the principles of effectiveness of EU law and equivalence of application of EU law (e.g. Delicostopoulos, 2003; Zingales, 2010) as well as by (2) harmonization directives dealing with particular question of administrative law, civil and criminal procedure. There is no general competence of the EU to harmonize private law (Schmid, 2002), nonetheless EU law significantly encroaches on several areas of substantive private law of the Member States, in particular company law (e.g. Mock, 2002 and literature cited therein) and consumer law (Weatherill, 2012).

From the times of Roman law, nullity (including nullity of contracts) has been deemed as an extreme measure and consequence of errors linked to legal act (Scalise, 2014). Therefore, serious interests of public policy must be established in order to nullify or cause ineffectiveness of the private arrangements relying on contractual freedom. Generally, in the EU, validity, nullity and effectiveness of private arrangements and contract is a domain of private law regimes of the Member States. Hence there is no general competence of the EU to harmonize private law, requiring certain rules regarding nullity or ineffectiveness of private contracts must be stipulated directly or indirectly in EU law in irregular occurrences due to principles of proportionality and subsidiarity.

The presented paper will focus on the extent of requirements of EU law for nullity or ineffectiveness of contracts in specific areas linked to functioning internal market: competition law, including agreements restricting competition, abuse of dominant position, merger control and state aid, and rules of public procurement. This sphere of rules of internal market was selected because these rules do not deal with particular contracts between individuals protecting specific individual (e.g. consumer protection) but they protect functioning of the system of EU internal market as a whole.

## 2. Agreements restricting competition

Regarding nullity of contracts, Art. 101(2) TFEU is the most straightforward provision of EU law invalidating private contracts contrary to EU law directly via the primary law: "Any agreements or decisions prohibited pursuant to this Article shall be automatically void". Hence nullity itself is directly laid down by primary law and does not

require any further national regulations, there is still a margin for assessment of the scope of the prohibition (i.e. to what extent are arrangements between undertakings void) and time framework of the prohibition.

Well-established case law of the Court of Justice of the European Union (hereinafter CJEU) noted that it is necessary to distinguish between contract between undertakings under national private law and prohibited agreement. *In Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* (1966) the CJEU explained that "This provision, which is intended to ensure compliance with the Treaty, can only be interpreted with reference to its purpose in community law, and it must be limited to this context. The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the treaty, fall outside community law." Therefore it is necessary to identify only those parts of the agreement that are contrary to Art. 101(1) TFEU, since provision in Art. 101(2) TFEU that agreements prohibited pursuant 101(1) TFEU "shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself" (*Consten/ Grundig*, 1966). This approach of the court is, in fact, demonstration of a limited competence of the EU and the principle of conferral. The CJEU requires interference into private law of the Member States to be as minimal as possible and nullity of the contract as a whole is considered extreme and ultimate consequence that can be applied only if effect of Art. 101(2) TFEU cannot be achieved otherwise, e.g. confirmed in *CEPSA* (2008, par. 80): "[...] automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law".

Such a limited scope of nullity stemming from EU law can have serious consequences regarding arrangement of relations between undertakings that are parties to the agreement caught by Art. 101(1) TFEU. In particular, vertical agreements establish transactions regarding goods, services, payments, etc. and restrictive provisions form merely a part of such agreements. The CJEU confirmed e.g. in *Société de vente de ciments v Kerpen & Kerpen* (1983) that there is no consequence of nullity for other parts of the agreement that are not contrary to Art. 101(1) TFEU as well as "any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for community law. Such consequences are to be determined by the national court according to its own law." Similarly, it is within the ambit of national regulation to provide guidance to the parties to an agreement regarding duty to adjust the agreement in order not to be contrary to Art. 101(1) TFEU, e.g. explained by the CJEU in *VAG France* (1986, par. 15): "It is on the basis of national law that it is necessary in particular to determine whether such incompatibility may have the effect of obliging the contracting parties to amend the content of their agreement in order to prevent it from being void."

Art. 101(2) TFEU stresses "automatic" nullity of agreements and decisions violating Art. 101(1) TFEU. The direct effect of Art. 101 TFEU is also underlined by Art. 1(1) EU Regulation 2003: "Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required." Hence agreement and decision violating Art. 101(1) TFEU is void on a basis of EU law notwithstanding private-law rules regarding nullity of contracts of particular state. Moreover, in the case of demonstrated infringement of Art. 101(1) TFEU, courts of the Member States cannot assess whether the agreement or decision is null under national law and it is merely empowered to declare or confirm its *ex lege* nullity. Another consequence of the "automatic" nullity of agreement is its *erga omnes* character, as it was described in *Béguelin* (1971, par. 29): "Since the nullity referred to in article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties."

Under the judgment in *Haecht II*, the time framework of the nullity of agreement or decision appears to be simple: "(26) Such nullity is therefore capable of having a bearing on all the effects, either past or future, of the agreement or decision. (27) Consequently, the nullity provided for in article 85(2) is of retroactive effect" (*Haecht II*, 1973, par. 26 and 27). This simple point of view is applicable in the case of cartels and other hard-core restrictions. Prohibition of agreements that do not have as their object to restrict competition depends on real effects of an agreement and also on market situation. Due to dynamics of market conditions the agreement can be caught by prohibition of Art. 101(1) TFEU and later fall from the prohibition as well as fulfil conditions under 101(3) TFEU and lose benefits of that legal exemption during the "life" of the agreement. Application of Art. 3 of the EU Regulation 2010 is an apparent example for such consideration, since the application of the block exception for vertical restriction depends on the threshold of 30 % market share. Indeed, if the agreement restricting does not fulfil criteria under the EU Regulation 2010 is not automatically prohibited and still benefit from Art. 101(3) TFEU, the market share can dynamically influence assessment effect of the agreement on competition and trade on internal market. Therefore, it is much more appropriate not to consider an agreement null and void *ab initio*, i.e. from the moment when it was concluded, but null back from the moment when it violates Art. 101(1) TFEU or falls from the exemption laid down by Art. 101(3) TFEU. Similarly, Art. 101(2) TFEU cannot stipulate nullity of an agreement for the periods in the future when it does not infringe Art. 101(1) TFEU, either by non-existence of restrictive effects or by benefitting from the exemption under Art. 101(3) TFEU. Moreover, this point of view brings different understanding of nullity under Art. 101(2) TFEU, i.e. an autonomous EU-law nullity independent from nullity of the contracts under national private law. Indeed, national private law can stipulate nullity of contracts violating law, however it is within the ambit of national regulation to decide whether it is possible to "renew" effect of previously null agreement when it ceases to infringe law or not. Notwithstanding nullity of the agreement under substantive national private law, the courts of the Member States cannot provide grant protection and effects to the agreements null pursuant to Art. 101(2) TFEU.

### 3. Abuse of dominant position

Comparing to agreements restricting competition, there is no corresponding provision in regulation covering prohibition of abuse of dominant position enshrined in primary law in Art. 102 TFEU. While in Art. 101 TFEU the contractual element in the case of agreements restricting competition is always present, in unilateral practices covered 102 TFEU, conclusion of contract and performance thereof it is not always present, e.g. abuse of dominant position can be constituted by refusal to conclude an agreement. Due to absence of explicit EU law regulation, the CJEU was more cautious in asserting nullity of contract constituting abuse of dominant position and in *BRT/SABAM* (1974, par. 14) it left to the national judge to decide on validity of contracts: "If abusive practices are exposed, it is also for the court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions." The necessity of nullity or at least ineffectiveness of contractual arrangements constituting abuse of dominant position under Art. 102 was more apparent in *Ahmed Saeed Flugreisen* (1989, par. 45): "[…] the competent national administrative or judicial authorities must draw the inferences from the applicability of the prohibition and, where appropriate, rule that the agreement in question is void on the basis, in the absence of relevant Community rules, of their national legislation." Hence the wording in *Ahmed Saeed Flugreisen* is an expression of the instruction for loyal fulfilment of duties of the Member State required by EU law enshrined in Art. 4(3) TEU, i.e. to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union." Summing up, even in the case of absence of an explicit obligation included in Art. 102 TFEU and notwithstanding national rules of private law on nullity of contracts, EU law requires the Member States not to provide legal protection and effect to contracts that constitute abuse of dominant position. Therefore, from the point of view of EU law, legal ineffectiveness can be more appropriate in connection with Art. 102 TFEU, however, in fact, the effects are equivalent to those of nullity of contract.

Because of absence of detailed and comprehensive case law regarding "nullity" under Art. 102 TFEU, commentators suggest employing rules established regarding 101(2) TFEU (e.g. O'Donoghue & Padilla, 2020, p. 1208 and literature cited therein), in particular, absolute character, (in)separability of clauses, limited scope of effects of EU law on contracts, nullity *ex tunc.* Equally to agreements restricting competition, the concept of absolute effects of prohibition of abuse of dominant position relies on automatic effect of the prohibition that is enforceable under Art. 1(3) EU Regulation 2003 without prior declaratory decision on infringement itself: "The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required".

## 4. Concentrations

Comparing to agreements restricting competition and abuse of dominant position, mergers are not subject to prohibition but subject to control by competition authorities. The EU adopted *ex ante* mandatory regime of merger control (for types of merger regimes see, e.g. OECD, 2019) coupling notification duty and suspension clause [Art. 7(1) EU Regulation 2004]. Apparently, prior to decision of the European Commission on merger, there is no reason for doubt regarding validity of contractual arrangements that constitute merger itself existence of valid private contract (or other private-law act) is essential for the existence of merger.

However, validity of all transactions contravening suspension rules shall be dependent on decision on the merger itself [Art. 7(4) EU Regulation 2004]. Violation of suspension, i.e. implementation of transaction constituting merger prior its approval, is not connected with automatic nullity and transactions constituting or implementing concentration are null only if the concentration is declared incompatible with the internal market. The situation is much more complex when the concentration is approved only together with conditions. The broad wording of Art. 7(4) EU Regulation 2004 enables to invalidate not only transactions in the case of prohibition of concentration but also transactions contrary to conditions of approval of the concentration. On the other hand, transactions are valid even if they violate suspension clause if they do not contravene final decision on the concentration (*Éditions Odile Jacob v Commission*, 2012, par. 38-40).

Hence, validity and enforceability of transaction can be split into two phases. The first phase covers transactions prior to clearance of the concentration by the European Commission. Except cases exempted by Art. 7(2) and Art. 7(3) EU Regulation 2004, every activity of parties of the concentration aimed to implement concentration contravenes suspension duty under Art. 7(1) EU Regulation 2004. These "gun jumping" activities of undertakings are subject to sanctions under Art. 14(2)(b) EU Regulation 2004 (fines not exceeding 10% of undertakings' turnover). However, there is not explicit provision of EU law dealing with nullity or validity of transactions contravening suspension duty prior the decision of the Commission. Rationale of application approach similar to effect of abuse of dominant position is apparent and approach similar to that stipulated in *Ahmed Saeed Flugreisen* shall be employed. Even in the absence of EU rules or national rules, the courts of the Member States cannot provide legal protection to such transactions. Therefore, in terms of explicit rules, even EU remains mute regarding private-law effects of "gun jumping", there is implied requirement of legal ineffectiveness of these transactions. Agreements violating suspension duty are rather "suspended" than "null" because after final clearance of the concentration they are deemed valid under Art. 7(4) EU Regulation, even though they were illegal in the moment of its occurrence. Nonetheless, such agreements can be also caught by prohibition of Art. 101 TFEU and to follow this antitrust regime, certainly, including "ancillary restraints" principles (Cf. Nazzini, 2006).

The situation is completely different in the second phase, i.e. after decision on the concentration. If the concentration is declared incompatible with internal market, all

"gun-jumping" transactions follow the legal fate of the concentration, hence they are not valid *ab initio*. This nullity of transaction stems directly from EU law independently from national legal orders.

The scope of application of Art. 7(1) EU Regulation 2004 was defined by the CJEU in *Ernst* & *Young* (2018, par. 49) case and the suspension clause does not catch"[...] transactions, despite having been carried out in the context of a concentration, are not necessary to achieve a change of control of an undertaking concerned by that concentration" even though these transactions "may be ancillary or preparatory to the concentration[...]". Hence only transaction related to concentration that "[...] present a direct functional link with its implementation[...]" and their implementation is therefore "likely to undermine the efficiency of the control of concentrations" is caught by Art. 7(1) EU Regulation 2004 with effects to Art. 7(4) thereof (*a contrario, Ernst* & *Young,* 2018, par. 49).

## 5. State aid

The aim of the prohibition of aid granted by states (for more details regarding definitions and concepts of state aid see e.g. Cortese, 2020; Kubera, 2020; Pärn-Lee, 2020) is clearly stipulated in provision of Art. 107(1) TFEU: avoid any act of public authority that "distorts or threatens to distort competition […], in so far as it affects trade between Member States." Although it employs similar notions and concepts to those used in competition rules for undertakings (Art. 101 and 102 TFEU) (e.g. distortion of competition), the concept is completely different from philosophical and economic point of view and Art. 107 TFEU is linked back to Art. 28 et seq. TFEU and Art. 110 TFEU, i.e. rules barring the Member States to segment internal market by their actions, particularly of protectionist or discriminatory nature. Therefore, compared to Art. 101 and 102 TFEU as well as merger control, it is hard to identify direct effect of Art. 107(1) TFEU itself. EU Regulation 2015 that introduces procedural rules regarding state aid is oriented mainly to prevent granting aid contrary to EU law and in the case granting unlawful aid to recover it. There is no explicit provision of nullity of contracts by which the aid was awarded. Moreover, the public body is not obliged (in fact it is not allowed) to recover unlawful state aid if it is contrary to general principles of EU law [Art. 16(1) EU Regulation 2015], particularly when legitimate expectations on legality of aid were created (for details regarding test of legitimate expectations see Pinto, 2016; Ritzenhoff, 2014, p. 733).

Contrary to substantive provision regarding state aid based on Art. 107 TFEU, provision of Art. 108 (3) in fine TFEU has direct effect and may be invoked for private enforcement: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision." The CJEU confirmed powers of the courts of the Member State to enforce Art. 108(3) TFEU not only in cases of recovery decision of the European Commission, but also in "stand alone" cases: "The last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. That purpose is achieved first, provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's

final decision, which, if negative, precludes for the future the implementation of the notified aid plan. The intention of the prohibition thus effected is therefore that compatible aid may alone be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision." (*CELF I*, 2008, par. 9). Although Member States are addressees of Art. 108(3) TFEU, providers of aid can directly face claims arising from violation of said provision. On the other hand, application of Art. 108(3) TFEU by national courts is limited by procedural rules of respective Member States (Goyder & Dons, 2017; Gyárfaš, 2017; Honoré & Jensen, 2017; Jouve, 2017; Köhler, 2017; Martin-Ehlers, 2017; Ordóñez-Solís, 2017; Pastor-Merchante, 2016; Stehlík, 2018). Request from the EU law to impose nullity on contract or provision on nullity of such contracts was not even identified by the European Commission since it identified following private law remedies: (a) preventing the payment of unlawful aid; (b) recovery of unlawful aid (regardless of compatibility); (c) recovery of illegality interest; (d) damages for competitors and other third parties; and (e) interim measures against unlawful aid (EU Notice 2009, par. 26). Moreover, nullity of contracts on state aid was also rejected by some national courts, e.g. in Austrian *Bank Burgenland,* and *Landesforstrevier L* case (Gyárfaš, 2017, p. 458) or Slovak *Trnava v City Aréna* case.

## 6. Public procurement

Nullity or ineffectiveness of contracts concluded as an outcome of violated rules of public procurement was nor originally included in Remedies Directive of 1989 (EU Directive 1989) and the Member States used to rely on sacrosanctity of *pacta sunt servanda* principle, thus the contract can be declared null on the basis of national private law only. This argument was struck by the CJEU in *Commission v Germany*, rejecting objections of Germany, inter alia, "even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law". "The particular features of the system of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services" and "a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law…" (2007, par. 36-38).

The sanction of "ineffectiveness" of contracts concluded contrary to stipulated public procurement rules was introduced by the substantial revision of EU Directive 1989 by EU Directive 2007 (together also "Remedies Directive").

The Remedies Directive in Art. 2d thereof does call neither for absolute nullity of contracts, nor for unconditional ineffectiveness. First of all, the Remedies directive requires "ineffectiveness" of the contracts and private-law consequences, including termination of

contracts refers to national legislation [Art. 2d(2) thereof]. Comparing to this power of reviewing authority to declare ineffectiveness of the contract, the contracting authorities shall have power to terminate contract under Art. 73 EU Directive 2014 on specific occasions that, in fact, constitute the most serious violations of public procurement rules.[1] On the other hand, the contracting authority has "right" to terminate the contract, while reviewing authority has "duty" to declare ineffectiveness of the contract.

The reviewing authorities shall have significant margin of appreciation, since they shall have power not to declare ineffectiveness of a contract concluded within the illegal public procurement, if "overriding reasons relating to a general interest require that the effects of the contract should be maintained." [Art. 2d(3) Remedies Directive].

Thus, there is no explicit rule of nullity of illegally awarded contracts as well as no express duty of contracting authorities to do so. Also the CJEU was reluctant to provide such a directive. In *MedEval* (2015, par. 40) the Court stressed the necessity of legal certainty and protection of successful tenderer from financial losses: "Rendering a contract concluded following a public procurement procedure ineffective puts an end to the existence and possibly the performance of that contract, which constitutes a significant intervention by the administrative or judicial authority in the contractual relations between individuals and State bodies. Such a decision can thus cause considerable upset and financial losses not only to the successful tenderer for the public contract in question, but also to the awarding authority and, consequently, to the public, the end beneficiary of the supply of work or services under the public contract in question. As is apparent from recitals 25 and 27 in the preamble to Directive 2007/66, the EU legislature placed greater importance on the requirement for legal certainty as regards actions for a declaration that a contract is ineffective than as regards actions for damages". In *Rudigier*, the CJEU did not find in EU law any general rule on ineffectiveness or nullity due to the violation of public procurement apart from ineffectiveness in specific cases defined in Art. 2d Remedies Directive: "On the other hand, EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence." (2017, par. 57).

However, on a basis of *Commission v Germany*, Halonen (2017) suggests that there is an obligation to terminate contract based on illegal public procurement since the Member States cannot maintain arrangement contrary to the EU law. This duty to terminate contract can be implicitly given by the duty of the Member States to safeguard functioning of internal market against obstacles to free movement of goods and services. Therefore, the duty to terminate contract based on EU law covers, at least, the most serious

[1] (a) The contract has been subject to a substantial modification, which would have required a new procurement procedure pursuant to Article 72;
(b) the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) and should therefore have been excluded from the procurement procedure;
(c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been declared by the Court of Justice of the European Union in a procedure pursuant to Article 258 TFEU.

infringement of public procurement rules that have significant impact on the freedoms of internal market, since EU public procurement regime is only expression of one of the tools aimed to remove obstacles to free movement of goods and services via harmonization pursuant to Art. 114 TFEU.

## 7. Conclusions

From the times of Roman law, question of nullity of contracts contravening public law appears to be simple – contract stemming from illegal acts shall be null and void. Contracts involved in agreements restricting competition, abuse of dominant position, mergers, state aid and public procurement have specific nature – their existence or non-existence may influence functioning of market mechanism within the internal market of the EU. Bearing in mind this importance, one can assume that EU law is clear and straightforward regarding these contracts based on illicit or illegal behaviour. It appeared that we must draw a line between EU-law-based nullity and nullity based on national law. The scope of EU-law-based nullity is quite limited and only Art. 101(2) TFEU provides expressed nullity of agreements restricting competition. In the case of abuse of dominance nullity of contract constituting abuse of dominant position can be drawn from the principle of effectiveness of EU law. Validity or nullity of contracts violating suspension clause in merger control regime are assessed in two periods – before decision on merger (ineffectiveness due to principle of effectiveness of EU Law) and after decision of the Commission (follow legal destiny of the merger as a whole). Comparing to antitrust and merger control, state aid regime cannot rely on EU-law-based nullity of contracts that violate EU state aid rules. This question is completely left to the ambit of national law and there is no case law confirming at least implied duty to deem such contracts null and void.

Finally, public procurement rules appear the most complex in this context since they operate with the "right" of the contracting authority to terminate contract and power of revision authority to declare "ineffectiveness" of illegally awarded contract. The CJEU was definitely reluctant to provide exact guidance regarding nullity of illegally awarded contract, particularly out of the scope of "ineffectiveness", and left the assessment to the Member States. Although this self-restraint of the EU and its institutions can be welcomed from the point of view of proportionality, it does not contribute to clarity of the regime itself. It must be noted, that in the course of enlargement process when the European Commission critically reviewed progress of the countries of Western Balkan in the area of public procurement rules (2020a, 2020b, 2020c, 2020d, 2020e, 2020f[2]) clear and precise rules on the side of the EU shall be prerequisite of existence and development of coherent and effective regulatory area. Therefore, it seems to be inevitable that requirement of nullity of illegally awarded contracts shall be established within the revision of public procurement directive for the cases of the most serious infringement of public procurement rules.

[2] Regarding the using name of Kosovo the European Commission in the report stated, that this designation „is without prejudice to positions on status, and is in line with UNSCR 1244(1999) and the ICJ Opinion on the Kosovo declaration of independence." (2020f, p. 1).

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## NIŠTAVOST I NEPUNOVAŽNOST UGOVORA KAO POSLEDICA KRŠENJA PRAVA KONKURENCIJE EU I PRAVILA O JAVNIM NABAVKAMA

Sažetak

Rad će se fokusirati na zahteve koje postavlja pravo EU u pogledu ništavosti i nepunovažnosti ugovora u određenim oblastima koje su povezane sa funkcionisanjem unutrašnjeg tržišta: pravo konkurencije, uključujući restriktivne sporazume, zloupotrebu dominantnog položaja, kontrolu koncentracija i državnu pomoć i pravila o javnim nabavkama. Domen primene pravila o ništavosti koja su zasnovana na pravu EU je ograničen i samo je u čl. 101 (2) Ugovora o funkcionisanju Evropske unije izričito predviđena ništavost restriktivnih sporazuma. U slučaju zloupotrebe dominantnog položaja, ništavost ugovora može da proistekne iz principa efikasnosti prava EU. Punovažnost ili ništavost ugovora koji krše klauzulu suspenzije u režimu kontrole koncentracija se procenjuje u dva trenutka – pre odluke o spajanju i nakon odluke Evropske komisije. Režim državne pomoći ne može da se oslanja na ništavost ugovora kojima se krše pravila EU o državnoj pomoći na osnovu prava EU. Konačno, pravila o javnim nabavkama su, čini se, najsloženija u tom smislu, jer funkcionišu u smislu „prava" ugovorne strane da raskine ugovor i ovlašćenja tela koje vrši reviziju da proglasi „nepunovažnim" ugovor koji je nelegalno dodeljen. Stoga se predlaže revizija direktiva.

**Ključne reči:** pravo Evropske unije, pravo konkurencije, javne nabavke, ništavost, nepunovažnost.

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# EMPLOYEE'S RIGHT TO PRIVACY: WHERE IS THE BOUND OF THE EMPLOYER`S RIGHT TO MONITOR EMPLOYEES` COMMUNICATIONS**

***Abstract***

*Starting from the assumption that employees enjoy the protection of private life in relation to their employers, this paper seeks to answer the question how the right to privacy as a civil right can be incorporated into labour law without, concurrently, undermining the nature of the employment relationship, and considering the subordination as its primary feature. Accordingly, the nature of this right is analysed and the conditions under which it can be restricted in the workplace. Taking into account that the breaches of privacy and even more subtle ways of breach have increased in frequency in the workplace, the author deals with the issue of monitoring the employee's communication, pointing to the high sensitivity of this topic, since at the same time numerous legitimate interests of the worker should be fulfilled, as well as of the employer. The aim of the paper is to point out that in this case, the consistent application of the principles of legitimacy, proportionality and transparency is crucial for balancing the conflicting interests of workers and employers.*

***Keywords**: right to privacy, principles of legitimacy, proportionality and transparency, monitoring at work, monitoring employees' communications.*

## 1. Background of the study

*The right to privacy* belongs to the group of basic, fundamental (civil) human rights that aim to protect moral and mental integrity (Paunović, 2013, p. 179). It is simply defined as the primal right of man to be left alone (Guerin, 2011, p. 252). Each individual has the right to carefully guard his or her privacy (intimacy) from the eyes of the public (of others), thus protecting his or her personal dignity. Protecting the private sphere of the individual, his/her intimacy and his/her family is one of the basic goals of modern legal systems. Although a strict negative approach is usually associated with the right to privacy,

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which entails the obligation to refrain from interfering with or excessive interference in the private sphere of the individual, in addition to these primarily negative obligations, there might be specific (positive) obligations contained in genuine respect for private and family life.[1]

According to its content, the right to privacy is a complex right encompassing a number of freedoms and rights. This is because *privacy/private life* is a broad concept incapable of exhaustive definition.[2] It is not absolute, however, but its boundaries are always determined according to the circumstances in which it is observed (Danilović, 2017, p. 163). The boundary between the public and the private varies case by case (Ditertr, 2006, p. 229). To determine the extent of the private sphere, a person's reasonable expectation of privacy may be a significant, though not necessarily decisive factor (Rid, 2007, p. 514). In seeking to make the notion of private life operational in law, that is, to determine how well the presence of others in the private domain can and must be tolerated, the literature and case law have constructed a plurality of public, non-private spheres.[3] In each of these spheres, an individual enjoys a degree of protection of privacy. However, difficulties in delimiting particular spheres of private life were the reason for abandoning this theory and taking a stand on the *unique notion of private life*, acknowledging that some of its parts, such as intimacy, are particularly sensitive (Kovačević, 2013, p. 498).

The right to privacy, in the first place, protects the physical and moral integrity of the person, including his or her sex life. Any interference with a person's physical integrity must be prescribed by law and that person's consent is required (Gomien, 2007, p. 133), because sex life/sexual orientation is an important aspect of one's private life (Ditertr, 2006, p. 231). Of particular importance is that the right to privacy protects the right to the free unfolding of personality, as well as the right to establish and develop relationships with other human beings and the outside world (*Botta v. Italy*, par. 32). The right to privacy also protects all other parts of the person's intimacy, such as his or her name or voice, which makes it difficult to determine its contents in advance, as evidenced by the fact that European Court for Human Rights (ECtHR) extends the scope of application of Article 8 of the European Convention on Human Rights (hereinafter ECHR or Convention) on a case-by-case basis. Moreover, the right to privacy also applies to professional or

[1] With regard to the protection of Article 8 of the European Convention on Human Rights (ECHR), the European Court for Human Rights (ECtHR) has repeatedly considered whether the positive responsibility of the state held in harmony with genuine respect for family life can be discussed (*Airey v. Ireland, Rees v. The United Kingdom*). In determining whether there is a positive obligation, it must be taken into consideration the equitable balance which must be struck between the general interest of community and the interests of an individual, the balance which is an integral part of the entire Convention (Ditertr, 2006, pp. 227-228).

[2] For this reason, ECtHR determines in each particular case whether there has been a violation of Article 8 of the Convention, having in mind the circumstances of each individual case, which provides it with a degree of flexibility and thus the ability to adequately respond to any social changes that are primarily conditioned by technological development (Krstić, 2006, p. 15).

[3] Thus, according to one theory, the most hidden and furthest from the public, is the most *secret (intimate) sphere*, while the *private sphere* is what the individual can share with other (close) persons, but which should not be available to the public. In contrast, the *private-public sphere* involves what takes place in generally accessible places, and thus the public gains the right to be informed of all that is relevant in the specific case (Vodinelić, 1978, p. 918).

commercial activities, while the office and other premises fall within the scope of Article 8 of the Convention (*Niemietz v. Germany*, par. 31).

An important segment of the right to privacy is the protection of personal data, which primarily means protection against any unauthorised and excessive personal data processing. This is in line with the concept of distinguishing three types of privacy - physical privacy, data privacy, i.e. information privacy and privacy decision-making (Stojković-Zlatanović & Lazarević, 2017, p. 706). Although only information privacy directly refers to personal data, in fact all three can be compromised through the collection of personal data, i.e. by monitoring the work process or other aspects related to the work process (Reljanović, 2020, p. 75).

In the field of labour relations, the processing of personal data is present to a large extent, whereby employers and employees do not often realize that many of the activities which they do routinely and on a daily basis include the processing of personal data indeed. The processing of personal data is, in most cases, carried out when it is required for concluding an employment contract or for fulfilling legal obligations.[4] However, for the processing of certain data, the employee must give his/her consent, which he/she will sometimes do explicitly and sometimes by conclusive action - passive behavior is considered debatable as a clear expression of will and can be disputed (Reljanović, 2020, pp. 67-68). Data privacy is also related to the right to confidentiality of personal data, which implies the right of a person to prevent the re-disclosure of personal information to a third party (Stojković-Zlatanović & Lazarević, 2017, p. 706).

The right to privacy is the most affected human right by the development of technology on a global scale. It has become almost impossible to preserve an individual's privacy in a context where smartphones equipped with cameras, eavesdroppers, microphones, and monitoring devices are accessible to every individual, and where one piece of information can, thanks to the Internet, go round the world in record time. All this has caused a steady rise in the number of citizens seeking protection of their privacy before the court.

## 2. The right to privacy in the workplace

Although the right to privacy is a basic human right that belongs to every individual, its growing importance in the field of labour relations has been noticeable in the last few decades. In the context of the workplace, the right to privacy refers to the right of an employee to be free from the excessive intrusiveness of an employer who wishes to have insight into his or her activities, beliefs and private communication (Guerin, 2011, p. 252). There are a number of reasons that have brought workplace privacy issues into the focus of interest (Blanpain, 1995, pp. 1-2). The process of globalisation, that is, the global economic market, has led to fierce competition among employers, who now, in order to survive and be successful in such a market, rely heavily on the potential of their workers.

[4] This is considered a lawful reason for the processing of personal data in accordance with Regulation (EU) 2016/679 (General Data Protection Regulation).

In order to achieve the best possible business result, the employer wants to obtain as much information on employees and candidates for employment as possible, including information on their private life. On the other hand, the development of information technology has enabled the employer to supervise the work of an employee in new, innovative ways, but also to obtain all the information about the employee's psychological health, genetic or other conditions/predispositions thanks to the development of science. Also, as the employer's responsibility for workplace safety grew, so did his need to obtain certain personal information and information about employees' habits. All of this made an employee's right to privacy extremely vulnerable.

Historically, the right to privacy was first guaranteed to the individual in relation to the state, while the privacy of an employee in the workplace depended on how the employer exercised his/her managerial powers. The employer used to perceive an employee as the parent perceives his/her child, so in that relationship the employee had no more privacy than the child has in relation to his/her parent (Ray & Rojot, 1995, p. 61). Today, however, the situation is vastly different, as there is growing awareness that the enjoyment of the right to privacy, to some extent, needs to be extended to the area of employment. This understanding is the result of the idea of the horizontal effect of human rights, which enjoy not only protection in relation to the state, but also in relation to third parties.[5] However, it is not easy to determine the extent to which privacy is guaranteed to an employee in the workplace, since the employees voluntarily submit themselves to the employer's authority by signing an employment contract. *Legal subordination, personal performance of work, voluntariness and remuneration* as essential features of employment represent additional risk generators for an employee's private life and make it difficult to apply basic principles regarding limitations of the right to privacy. It should not be forgotten, however, that one of the essential features of employment includes a special *employment-law regime of employment,* which, as professor Lubarda states "evolved from the concept of subordinate work to the concept of decent work of an employee-citizen" (Lubarda, 2012, p. 15). Accordingly, there is general agreement that an employee enjoys the protection of the right to privacy with respect to the employer during his or her employment and that he/she does not waive his/her rights when coming to work (Vigneau, 2002b, p. 507).

### 3. Conditions (principles) of limitation of an employee's right to privacy

In democratic societies, the possibility of limiting basic human rights is minimised. Human rights, in principle, can only be restricted under pre-determined conditions. Like other rights, the right to privacy is relative and must be balanced with other rights, so,

[5] In Germany, the right to privacy and its protection have been of particular importance since the World War II because of the experience with the Nazi regime during which individuals and their rights were completely unprotected in relation to the state. For this reason, human rights were considered as rights which were enjoyed exclusively in relation to the state. In this context, human rights had an effect only between the state and the individual (citizen). However, German doctrine has largely changed to adapt to the reality, so that the exercise of the right to privacy has expanded, and today it has a horizontal effect (Weiss & Geck, 1995, pp. 75-76).

therefore, the general limitation of this right arises from the existence of other subjective rights and legally recognized interests (Vodinelić, 1978, p. 925). Privacy, therefore, is recognized as a *prima facie* value that can be pushed aside in favour of a higher value (Palm, 2009, p. 212).

A general rule for the limitation of human rights, transposed into the field of labour law, could be interpreted as an opportunity for the employer to, to *a certain extent*, restrict an employee's right to privacy when necessary to achieve a *legitimate aim* and with respect for the principle of *transparency*. However, unlike the right to privacy of an individual (citizen) which is regulated in detail by international and local legal acts, an employee's right to privacy still requires many answers. What essentially differentiates the *state-individual* relationship from the *employer-employee* relationship is the fact that an employee, by entering into employment (by signing an employment contract), agreed to be under his/her employer's authority and, among other things, comply with his/her business interests. In this regard, in practice, the legitimate interest of an employer is more broadly interpreted than the legitimate interest of the state. However, regardless of the specificity of employment, the principles of legitimacy (relevance), proportionality and transparency are applied as necessary conditions to limit an employee's right to privacy, wherever possible (Vigneau, 2002a, pp. 511-514). These principles are legal techniques that should be used primarily by courts to find, in each individual case, the right measure to meet the interests of employer and employee.

According to the principle of *legitimacy*, employee's right to privacy can be restricted if there is an important and justified *interest* of the employer for such limitation, or if such limitation is generally justified. It is a very flexible tool that allows courts to consider all the circumstances of the case and to decide on whether a limitation on the right to privacy is justified or not (Vigneau, 2002a, p. 510).

The employer's ability to limit employee's privacy is usually associated with two kinds of reasons, namely *business-related* and *liability-related reasons*. In the first case, it is about the need of the work process, i.e. the situation when the limitation of an employee's privacy is considered necessary for the smooth running of the business process. In the second case, it is the responsibility of the employer, as the owner of the facilities, with regard to safety (persons and property) in the workplaces. In general, *liability-related reasons* are the least *controversial*, since security of property and persons always arises as a higher interest justifying a limitation on human rights. *Business-related reasons*, however, should be interpreted narrowly, since the breach of an employee's privacy can only be considered justified if it is proven that it is indeed necessary for the work process or indispensable in the implementation of the employment contract.

Among *business-related reasons*, the most controversy is caused by the reasons related to the employer's interest in controlling intended use of the facilities, quality of work performance, but also maximum productivity and profitability. This is because in many cases the employer can satisfy these interests by applying other methods that do not necessarily imply an infringement of an employee's privacy (e.g. restricting the Internet traffic or setting goals at work to be achieved on a daily, weekly or other basis).

*The principle of proportionality* is considered to be an essential legal remedy for the understanding and application of human rights.[6] Because of the way it establishes a fair relationship between conflicting interests and rights, this principle has been a recognizable element of the justice system since Aristotle (Vigneau, 2002a, p. 510). It was first used in Labour law to establish certain restrictions on the right to strike and the right to lock-out[7], and today it is used as a mechanism to prevent abuse of power by the employer, since all power holders are expected to use it proportionally and to avoid any unnecessary restriction on the rights (Davidov, 2012, p. 63). It is not so demanding to determine the employer's interest in restricting an employee's right to privacy, as it is demanding to assess whether that restriction has been properly and appropriately enforced, and whether it is justified under the given circumstances. The principle of proportionality applies not only to the *extent* of the restriction, but also to the *way* in which that restriction is exercised. Accordingly, the employer's interest should be satisfied in a manner and by the means that will least violate an employee's privacy, or in the least intrusive way. It also applies to the *duration* of the restriction that should exist only as long as there are reasons to justify it.

*The principle of transparency* means that the employer should be clear and open about all his/her activities, and its application can crucially influence the decision on whether, in this particular case, interference with an employee's privacy by the employer is permitted. As a rule, it is a constituent element of a justified restriction on an employee's privacy, and only exceptionally its application can be ruled out. Generally speaking, this principle means that an employee must be familiar in advance with the employer's intention to limit his/her privacy in any way. The principle of transparency is sometimes directly linked to an employee's duty of loyalty to an employer (Ray & Royot, 1995, p. 71), and it can also be derived from the general rule of obligation law on the performance of contractual obligations in good faith (*bona fide*).

When it comes to protecting the right to privacy in the workplace, the principle of transparency should, among other things, make up the deficit of the *principle of legality*. The principle of legality is a condition for the restriction of the right to privacy of an individual (citizen) by the state, since such restrictions should be prescribed by law.[8] Since it is not possible in labour law to anticipate all the reasons in advance that may justify a

[6] The principle of proportionality usually involves three types of test: first, the relationship between the goal and the means by which a legitimate goal can be attained is examined; then the choice of the least restrictive means is made; and eventually a comparison is sought between what is to be achieved and the 'price' to be paid concerning the restriction of a right (Davidov, 2012, pp. 63-64).

[7] Unlike collective labour law, where the application of the principle of proportionality is required by both parties, in the context of individual labour law, due to the different power of workers and the employer, the application of the principle of proportionality refers to the employer. For more on the principle of proportionality in Labour law, see: Davidov, 2012, p. 67.

[8] Article 8 of the European Convention on Human Rights: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

restriction on an employee's private life, the principle of transparency should ensure that the employee is notified in advance of the possibility of such restriction.

## 4. Employee monitoring

*Employee monitoring* is a very broad term that in practice can refer to different methods of monitoring and surveying. The term 'monitoring' includes, but is not limited to, the use of devices such as computers, cameras, video equipment, sound devices, telephones and other communication equipment, various methods of establishing identity and location, or any other method of surveillance (International Labour Organisation, 1997, p. 1). It, therefore, implies different types of surveillance through which information is collected on the subjects of surveillance.

The most commonly used methods of employee monitoring are video surveillance, *communications monitoring* and GPRS monitoring. The surveillance system can still be divided into electronic (computer) monitoring system and telephone monitoring system.[9] In addition to these, there are other, less prevalent, types of surveillance such as: electronic cards for monitoring arrival and departure from work; magnetic cards; portable computers for keeping track of workplace, ways and time spent on breaks; pagers, eavesdroppers, recording devices, etc. (International Labour Organisation, 1993, p. 13). All these forms of surveillance have in common the fact that they are carried out by modern technologies, they can violate employee's privacy and, in practice, lead to similar dilemmas that are sought to be addressed using the same principles.

### *4.1. Monitoring employee communication*

Monitoring communication is one of the most complex issues related to an employee's privacy in the workplace. This is because the interests (of the employer) that justify the supervision of this form of communication are more broadly set, but also because it is more difficult to determine the proportion and circumstances in which such supervision is permitted. The complexity of this issue is certainly associated with the fact that the development of labour law did not accompany the development of technology, its use in the workplace, and the consequences that such use carries with it. The complexity of the issues that arise in practice is particularly related to the monitoring exercised over an employee through *computer-based performance monitoring*, since some clear attitudes have emerged in theory and practice regarding video surveillance and telephone communication monitoring. Employee computer-based monitoring in the first place involves monitoring communications via email and Internet applications.

[9] Electronic (computer) monitoring system involves employee data collected directly through the use of computers and other means of communication. This system automatically records information about employee's work such as the number of characters typed, the number of transactions completed, the time spent for each transaction completed, and the idle computer time. In contrast, telephone monitoring system records all information about the date, time, duration, call destination, the number called and its cost. Thus, for example, all calls by taxi dispatchers are recorded, their duration and efficiency, while the speed, distance travelled, holds and breaks which taxi drivers make are measured (International Labour Organisation, 1993, p. 13).

*Electronic mail*, as the most prevalent form of communication in the workplace, raises many contentious issues regarding its private use and monitoring. The nature of e-mail is such that an employee often perceives it as his or her own, even when it is a business one, because the e-mail address is usually made up of the employee's first and last name and only the employee has access to this address. On the other hand, life in modern society cannot be imagined without internet access. The Internet is where a modern man (employee) finds all the information. Therefore, it is not advisable to introduce a complete ban on private internet use at work. Since e-mail and internet communication represent an integral part of the notion of privacy, it is necessary to establish legitimate reasons for their monitoring, and in order to be able to do so, it is important to differentiate *external and internal (content) monitoring*. The first type involves monitoring the number of calls, their duration, the number of e-mails, their size, internet traffic, and unlike the second type of monitoring, it does not involve monitoring the content of telephone, electronic or internet communication. In the leading workplace privacy case in France, *Nikon* case of 2001, the Court of Cassation (*Cour de cassation*) stated that workers have a right to respect for private life in the workplace and during working hours, what specifically implies the secrecy of his/her communication, i.e. the employer cannot monitor the content of personal messages either sent or received by the employee through a computer assigned to him/her as a tool for work without violating his/her fundamental rights and freedoms. This principle should be applied even when the use of computers for non-business purposes was prohibited (Vigneau, 2002b, p. 355).

An additional problem is that the issue of monitoring communication also contains a sub-question that complicates it and which could be considered *per se*, regardless of the issue of monitoring. It is a question of the *intended use of the means (of communication) for the sake of*, or the use of company facilities for private (personal) purposes. There are different views as to whether an employee has a *right to private access* to company facilities. By itself, an employment contract does not allow an employee to use his or her employer's resources for private purposes (Reinhard, 2002, p. 385). *The employer, as the owner of the property and facilities who manages and controls the work process, has the right to restrict or prohibit the use of company facilities for private purposes, since their purpose is to have work performed.*

In practice, however, employers very often allow (tolerate) the use of telephones, emails and the Internet for private purposes on a limited (insignificant) scale. Limited or modest use of company facilities for private purposes refers to the use that does not prevent an employee from performing all his/her work tasks on a daily basis, as well as that which does not cause significant expenses on his or her *employer's* behalf. For example, in French law the occasional use of company facilities does not constitute *grounds for justifiable termination* of an employment contract, and *vice versa*, the apparent misuse and regular use of company facilities for private purposes will constitute a justifiable termination.[10]

[10] Disciplinary sanction must be proportionate to the extent of the use of company facilities for private purposes. For example, online gambling in the workplace is *a justified reason* to *terminate* an employment. For more on the use of company facilities for private puposes as a job termination reason, see: (Vigneau, 2002b, pp. 358-359).

Permission for the use of company facilities for private purposes may result from policies and procedures adopted by the employer, and may be the result of deeply rooted practices (habits) known by the employer which are considered as a permission *per facta conculdentia* (Hendrickx, 2002, p. 101). In cases where the employer tolerates the private use of the telephone in the workplace, the assumption is that there is also a tolerance in relation to the use of the Internet and e-mail (Reinhard, 2002, p. 385). However, an employee may never use the means of communication for commercial purposes, or the content of the conversation may be threatening, racist, sexual or pornographic oriented.[11]

*4.2. Is the employer allowed to monitor an employee`s communication?*

A good starting point for considering this issue is the view that the notion of private life includes the privacy of communication, which includes communication by mail, telephone, e-mail, as well as other forms of communication, but also includes information privacy, which primarily involves the use of the Internet (Council of Europe, 2015, p. 6). Also, a significant achievement in the field of an employee's privacy (and communication) is the view that activities of a professional or business nature are not excluded from the notion of privacy (*Niemietz v. Germany*, par. 29.), and that telephone calls from business premises are *prima facie* covered by the notions of private life and correspondence as defined in Article 8 of the ECHR, which can be analogously applied to e-mail sent from work, as well as to the information obtained through monitoring of the Internet use for private purposes in the workplace (*Copland v. The United Kingdom*, par. 41).

In general, it is possible to identify two different approaches to monitoring employee's communication: the first, *the more restrictive*, and the second, slightly *more flexible* with regard to this employer's possibility. While the first approach is to protect *employee's privacy*, the second focuses more on an *employer's authority* in the workplace. According to the first approach, employer may monitor employee's communication if he or she fulfills several requirements: a) *employer must* have *a legitimate (justifiable) reason for monitoring* employee's communication; b) employee must *be notified in advance* of possible monitoring and its scope; c) employer cannot monitor the *content* of an employee's private communication, regardless of whether it is permitted in the specific case or not; d) monitoring should not be *continuous* and *constant*; and e) communication monitoring should be *indispensable*, in the sense that the same objective cannot be achieved in any other, less intrusive way. Under this (restrictive) approach, controlling the proper use of company facilities and assessing an employee's abilities and performance (performance evaluation) are not reasons that *automatically* justify monitoring an employee's communication. Communication monitoring with reference to these reasons could only be considered permissible when there is no

[11] In the Netherlands, in 1999, the largest trade union (FNV Bondgenoten) adopted the Agenda for privacy in the use of internet and e-mail. It provides that employees are authorized to use the e-mail system for non-commercial transactions in order to send and receive personal e-mail messages provided that this does not interfere with their day-to-day work commitments. It is not permitted to send threatening, sexual or racist oriented messages or to visit pornography websites. The employer is not allowed to check the number of e-mails, e-mail addresses, their content or to register the sites that are visited (Hendrickx, 2002, p. 102).

other way to monitor the conduct of employee or to evaluate the quality of his/her work.

According to the second approach, monitoring employee's communication may not be *indispensable* in order to be considered permissible. It is sufficient for monitoring by the employer to be *useful* or *desirable*, i.e. to favor his/her business interests. In other words, the employer has the right to monitor employee's communication and to control whether the employee uses company facilities for business purposes, i.e. whether the employee uses working hours for private communication, or for the purpose of evaluating the employee's work. However, in order to interpret the reasons for the implementation of monitoring an employee's communication in such a flexible way, it is necessary for the employer to respect the principle of transparency in a broad sense.

The complexity of the issue of monitoring an employee's communication as well as different approaches to answering this question were highlighted in *Bărbulescu v. Romania*, since in this case the Chamber (2016) and the Grand Chamber (2017) in their judgments were guided by different arguments and presented two completely different approaches in balancing an employee's right to respect for private life on the one side and the employer's right to monitor employees' communication and, accordingly to use his/her disciplinary power, on the other side. In this very case, the applicant (the employee) considered that his communication monitored by the employer was of a private nature, and that such monitoring violated his right to respect for private life as guaranteed by Article 8 of the Convention.[12] On the contrary, in its judgment of 12 January 2016, the Chamber took the view that it is perfectly reasonable for an employer to monitor whether an employee performs his/her job obligations and duties fully and in that sense there is no violation of an employee's right to respect for private life. This view is largely based on the fact that the employee could not expect privacy with regard to his communication in the workplace, since there was *a general ban* on the use of computers and other company facilities for private purposes.

While it is true that the employer, as the owner of company facilities, has a strong interest in monitoring an employee's activities, the impression is that the Chamber did not pay sufficient attention to the employee's right to privacy. This is because the employee was not informed in advance about the possible monitoring of communication and was misled about the nature of such communication, since he himself created his access code to the application through which he communicated, and especially because the employer made transcripts of his communication and made it available to his colleagues who discussed it publicly. It is also noted that no clear distinction has been made between the undisputed *right of an employer to monitor the work process* and *to sanction*[13] *inappropriate behavior*

[12] The messages sent by the applicant related to his sexual health problems and relationship with his fiancèe, which is covered by the notion of private life and which requires the highest level of protection under Article 8 of the Convention. Also, the employer had clear indications that a part of the communication entitled '*Andre loves you'* had nothing to do with his job. (Partly Dissenting Opinion of Judge Pinto De Albuquerque, *Bărbulescu v. Romania*, no.61496/08, Judgment of ECHR, 12 January 2016, par. 19).

[13] Sanctioning for illegal or inappropriate use of the Internet should start with a verbal warning first and then be gradually tightened by giving reprimand, imposing a fine, degrading, and eventally for the most severe forms of repeated transgression, to pronounce a measure for termination of employment. Partly Dissenting Opinion of Judge Pinto De Albuquerque, *Bărbulescu v. Romania*, no.61496/08, Judgment of ECHR, 12 January, 2016, par. 3.

*of an employee* on one side, and *the way he/she exercises his/her right*, which may be such as to offend an employee's right to privacy on the other side. In this sense, it is possible that the employer legitimately exercises his/her right to monitor, but still violates his/her employee's privacy.

Taking the above into account, it is not surprising that in a judgment of 5 September 2017 the Grand Chamber found a violation of the right to respect for privacy. The Chamber seized the opportunity once again to strongly emphasise that the state has a positive obligation to protect the employee's privacy, regardless of the fact that in this specific case it is violated by the employer, and that the employee enjoys the protection of privacy and communication in the workplace even when their restriction is, for some reason, necessary. Several facts decisively influenced this outcome in the case *Bărbulescu* and these are: the employee/applicant did not receive prior notice of the nature and extent of the activities undertaken by the employer to monitor employees' communications, nor that such monitoring could include the content of his communications; the applicant himself created a messenger account and was the only person who knew the password; during the monitoring procedure, the employer recorded and stored both the flow and the content of his employee's communications; the domestic courts did not determine a specific (legitimate) reason to justify such strict monitoring, given that such reasons as *the risk of damage to the information technology system* or *the prevention of unlawful activities and business secrecy* are too theoretical and do not constitute evidence that the employee really exposed his employer to these risks through his activities; the domestic courts also did not determine whether the employer could satisfy his interests in another way that would be less intrusive and would not imply the insight into the content of communications (*Bărbulescu v. Romania,* pars.108-141).

It is therefore concluded that it is too dangerous to take the stance that employer is unconditionally authorised to violate employee's privacy (to access the content of the employee's communications) whenever he/she has previously informed his/her employees about the *prohibition of the use of company facilities for private purposes*, and that the *principle of transparency* is not exhausted by informing employees about the prohibition of the use of company facilities for private purposes, but should include a prior warning to an employee about the possible monitoring, its nature, duration and scope.

## 5. Conclusion

The right to privacy is one of the basic human rights that protects mental and physical integrity and dignity of man. Although this right was first granted to an individual in relation to the state, a positive trend in the development of human rights has contributed to a strong affirmation of human rights in the workplace, and thus to the belief that once an employee enters the workplace he/she does not relinquish his/her privacy, and in that sense he/she enjoys the protection of private life in relation to the employer, which is generally interpreted as his/her right to be free from excessively intrusive monitoring by employers. However, the right to privacy may, like any other right, under certain conditions, be limited, provided that the fulfillment of these conditions is appreciated on a case-by-

case basis, and in particular considering subordination as an indispensable feature of the employment relationship and the balance of the interests of workers and employers as an important achievement of labour law.

Despite the many concerns that arise regarding determining the right measure of interest to be satisfied, it is concluded that the possibility of restricting this right in the workplace is limited by the principles of legitimacy, proportionality and transparency. The most challenging issue of restricting the right to privacy in the workplace concerns the application of the principle of proportionality, since its determining depends on the circumstances of the case and the importance of the employer's interest, but also to what extent the employee was notified in advance on the possibility of restricting the right to privacy, i.e. he/she could reasonably expect privacy in the workplace, which is why the principle of transparency (transparency of the employer) plays an increasingly important role in assessing the justification of an employee's right to private life.

The issue of the justification on the restriction on the right to privacy becomes particularly complex in circumstances when the employer seeks to monitor employee's behavior in the workplace in general, which includes monitoring his/her communication. Notwithstanding the diversity of cases that arise in practice and different views regarding the employer's ability to monitor employee's communication, it is concluded that compliance with the principles of legitimacy, proportionality and transparency is, in this case, a condition for restricting an employee's right to privacy. Of particular importance is the consistent application of the principle of transparency, which generally means the obligation of the employer to be clear and open about all his/her activities, and it also implies the obligation of the employer, in each concrete case, to warn his/her employee in advance of the monitoring being carried out, its nature, duration and scope.

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## PRAVO ZAPOSLENOG NA PRIVATNOST: GDJE JE GRANICA POSLODAVČEVOG PRAVA DA NADZIRE KOMUNIKACIJU ZAPOSLENIH

Sažetak

Pravo na privatnost spada u red osnovnih ljudskih prava kojima se štiti psihički i fizički integritet i dostojanstvo čovjeka. Premda je ovo pravo najprije priznato pojedincu u odnosu na državu, pozitivan trend razvoja ljudskih prava doprinio je snažnoj afirmaciji ljudskih prava na radnom mjestu, a time i uvjerenju da se zaposleni dolaskom na posao ne odriče svoje privatnosti, te da u tom smislu uživa zaštitu privatnog života u odnosu na poslodavca. Međutim, pravo na privatnost kao i svako drugo pravo može se, pod određenim

uslovima ograničiti, s tim da se ispunjenost ovih uslova cijeni u svakom konkretnom slučaju.

U radu se zaključuje da je mogućnost ograničenja ovog prava na radnom mjestu omeđena principima legitimnosti, srazmjernosti i transparentnosti. Najizazovnije pitanje ograničenja prava privatnosti na radnom mjestu tiče se primjene principa srazmjernosti, budući da određivanje srazmjere zavisi od okolnosti slučaja i važnosti poslodavčevog interesa, ali i od toga u kojoj mjeri je mogućnost ograničenja prava na privatnost bila unaprijed poznata zaposlenom. Pitanje opravdanosti ograničenja prava na privatnost postaje naročito složeno u uslovima u kojima poslodavac nastoji da u cjelini kontroliše ponašanje zaposlenog na radnom mjestu, a što uključuje i nadozor nad komunikacijom zaposlenog.

Bez obzira na raznolikost slučajeva koji se javljaju u praksi i na različite stavove u pogledu mogućnosti poslodavca da nadzire komunikaciju zaposlenog, zaključuje se da poštovanje principa legitimnosti, srazmjernosti i transparentnosti, i u ovom slučaju, predstavlja uslov ograničenja prava na privatni život zaposlenog. Kao posebno važna javlja se dosljedna primjena principa transparentnosti koji, uopšteno govoreći, podrazumijeva obavezu poslodavca da u svakom konktretnom slučaju prethodno upozori zaposlenog o nadzoru koji se sprovodi, njegovoj prirodi, trajanju i obimu.

**Ključne riječi:** pravo na privatnost, principi legitimnosti, srazmjernosti i transparentnosti, nadzor nad zaposlenima, nadzor nad komunikacijom zaposlenih.

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# ARTICLE 8 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE RIGHT TO PRIVACY IN THE CONSTITUTION OF MONTENEGRO

*International protection of human rights can be discussed only once international jurisdiction manages to impose itself and fit in with the national jurisdictions and when the transition is made from guarantees within the state, prevalent at present stage, to guarantees against the state.*
(Bobio, 2008, p. 41)

***Abstract***

*The subject of this paper is a comparative analysis of the right to respect for private and family life in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the right to privacy in the Constitution of Montenegro. To this end, the paper presents relevant provisions in these documents along with a critical approach to their (in) compliance, both in the determination of specific rights and in cases of their restriction. The paper seeks to offer an answer to the question on whether this right is adequately implemented in the Constitution of Montenegro, as well as whether its different content, analyzed on the concrete example, requires direct application of international law. The author also seeks to provide information on whether insufficient harmonization of the provisions of international and national law in this area may affect more complete protection of this right. To this end, the paper analyzes one of the cases in which the European Court of Human Rights ruled on the violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in relation to Montenegro. Starting from the presented subject matter, at the end of the paper, appropriate conclusions are drawn about possible directions of improvement of existing solutions and practices in which they are realized. Author primarily used normative and comparative law method together with the case-law analysis.*

***Keywords:*** *right to respect for private life, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution of Montenegro, court practice.*

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## 1. Introduction

The process of internationalization of human rights raises a number of questions on the relationship between international and domestic law. This is significant to the extent that special legal disciplines, such as International human rights law have developed out of the study of this relationship, or traditional disciplines (constitutional law, criminal law) have been substantially upgraded with new dimensions of human rights. These developments are particularly significant in the European legal area which with its ramification of institutions of protection of human rights, their design and practice, represent the most effective mechanisms for their protection at the international level. At the same time, it has influenced the expansion of the area of legal dialogue, which is important for relations arising in the process of applying the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) and its impact on constitutional systems and case law of state signatories to the Convention. Consequently, it is important for the relationship between the European Court of Human Rights (hereinafter ECtHR) and national courts (constitutional and regular) on this issue, which are characterized by relations of approximation of the systems, their unification and homogenization, all in order to strengthen values and principles, which shape them (De Vergottini, 2015, p. 47).

Such legal, more precisely normative challenges, also apply to the consideration of the normative regulation of certain rights in the Convention and the constitutions of the signatory states, and the analysis of one of those rights (right to respect for private and family life, i.e. the right to privacy) are the focus of this paper. More specifically, the subject of analysis is a comparison of the manner in which the right to respect for private and family life is determined (Article 8 of the Convention) and content-wise identical right in the provisions under the respective section on right to privacy (Article 40 of the Constitution of Montenegro) and other essential elements that complement it (Art. 41 - inviolability of the apartment, Art. 42 - secrecy of letters and Art. 43 - personal data). Bearing in mind that the mentioned rights shape the right to privacy as a collective right, they are observed in the paper separately, to the extent that their content and systematics are presented.

In answering this question, normative and comparative law method is primarily used, together with the analysis of cases from court practice.

## 2. Right to privacy (term)

Theoretical considerations on the respect for human integrity and dignity, as primary social and legal values each, preceded the constitutionalization of the right to privacy and its establishment in international legal acts. To this end, "right to one's own world" has been materialized in different ways as it originates from medieval charters on the protection of individuals from the arbitrary actions of state officials. This form will be further shaped in the modern age through affirmation the idea of subjective rights,

and later by the first written constitution (USA, 1787), more precisely in Amendment 4 from 1791, which set forth: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". The interpretation of this provision in accordance with the changed social circumstances, and especially the technical development, has broadened the scope of this right and the procedures for its protection. Along with that, theoretical views on the nature of this right were developed, starting with the traditional theory of the right to privacy heralded in Waren and Brandeis' article *The Right to Privacy*, published in the *Harvard Law Review* in 1890s.

The development of industrial society, and subsequently information society would bring about increase in the number of modalities by which the right to privacy could be violated and extended beyond the originally protected violation of the right to home. In that direction, the advancement of information technologies would result in the creation of various databases about individuals, and in the possibility of their abuse. In addition, various dimensions of this right would emerge and acquire the character of a collective right that is broad enough to cover violations of human rights and freedoms that could not otherwise be subsumed under their traditional classification. This is because it consists of several individual rights (right to home, right to secrecy of correspondence and other means of communication, right to protection of personal data etc.) and their number increases in proportion to the efforts to protect the intimacy of individual as effectively as possible.

The framework of this right would get its final shape once it is embedded in the acts of international and domestic law, more specifically, once it is defined as a standard in: 1) international treaties; 2) constitutions and 3) human rights laws and (or) 4) special laws whose subject matter is the right to privacy, as well as numerous bylaws.

The stated features of this right also result in the complexity of its conceptual determination and definition. This generated differences in its content and systematics as found in the acts focused on the subject. This especially refers to the differences that exist between its definition in international treaties and in national law, which is why this paper focuses on the difference in its standardization in the Convention and the Constitution of Montenegro respectively. This relationship is not considered and analysed at scientific, professional or nomotechnical level only, but also in a broader range that determines the scope of protection of this right, and effectiveness of legal remedies used for this purpose.

### 3. Relevant provisions on the right to privacy in international law

Several international documents at universal and regional level contain the right to privacy, under such or similar names.

Article 12 of the Universal Declaration of Human Rights states that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks".

Article 17 of the International Covenant on Civil and Political Rights prescribes this right in a substantively identical manner, with a difference in legal effect, since the provisions of the Covenant, unlike the Universal Declaration, are binding.

This right is also the subject of the Charter of Fundamental Rights of the European Union in the way that Article 7 stipulates that: "Everyone has the right to respect for his/her private and family life, home and communications", while Article 8 of the Charter regulates the protection of personal data.

Resolution of the Parliamentary Assembly of the Council of Europe no. 1165 of 1998 broadens the scope of the right to privacy and states that it enables every person "not only to be protected from interference by the authorities, but also from interference by other individuals and institutions, including the media".

## 4. Right to respect for private and family life in the Convention and in the Constitution of Montenegro (comparative analysis)

The basic requirement for any "country in transition" in the implementation of the *acquis communautaire* is respect for legal values, standards and relevant provisions. However, this does not mean mere replication of legal regulations, but their adaptation to the social context of the member states of the Council of Europe. This is especially true in the field of human rights and as such it is contained in the recommendations for drafting domestic law, especially the Constitution as the highest legal act, and is the most often emphasized in the EU accession process.

Such commitments were declared in relation to Montenegro,[1] i.e. recommendation was that the human rights enshrined in the Constitution of Montenegro should correspond in content and systematics to those embedded in the Convention. On a quantitative level, this has been fulfilled given that human rights' provisions are stipulated in 63 articles out of 158 articles of the Constitution. However, the question remains if this was achieved in the qualitative (content) level,[2] and if the names of some human rights and their systematics are fully aligned with the provisions of the Convention.[3] Such a challenge also arises when analyzing the right to privacy and related rights in the Constitution of Montenegro and their compatibility with the relevant provisions of the Convention.

[1] Such a practice existed in the activities, opinions and recommendations of the Commission for Democracy through Law (Venice Commission) in the process of drafting and adopting the current Constitution of Montenegro, such as Opinion of the Venice Commission.

[2] The conceptual and substantive discrepancy between the provisions of the Constitution and the ECtHR has been pointed out by the scientific community and professionals in the process of its drafting and to that end the contributions of M. Šuković and N. Vučinić at the CANU scientific conference on the draft Constitution of Montenegro were published in the collection of papers from this conference from 2007. See: Šuković (ed.), 2007, pp. 28, 63, 64.

[3] There are several cases in which the names (not normative and essential meaning) of human rights and freedoms from the ECtHR and the Constitution of Montenegro do not match), such as the ECtHR (Article 2) establishes the right to life, while the Constitution of Montenegro prohibits the death penalty (Article 26), the ECtHR (Article 6) establishes the right to a fair trial, while the Constitution of Montenegro contained in several articles (Article 21 - the right to legal aid, Article 35 - presumption of innocence, etc.).

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, this right is enshrined in Article 8,[4] entitled "Right to respect for private and family life". The first paragraph states that "Everyone has the right to respect for his private and family life, his home and his correspondence", while paragraph 2 contains restrictions on this right under which: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

In the internal legal order of Montenegro, the right to privacy is primarily regulated by the Constitution of Montenegro, 2007, within the framework of personal rights and freedoms, in Article 40, under the rubric of the same name, and is defined by the provision that "Everybody shall have the right to respect for his/her private and family life". In this way, the rubric and the mentioned provision of the Convention do not correspond, since they are not synonyms, given that the term "privacy" has a narrower meaning than the term "private life" established in the Convention, and "refers to all types of intrusions into the private life of an individual" (Beširević *et al.*, 2017, p. 162).

The next three articles of the Constitution are regulated as special rights: inviolability of the apartment (Art. 41), confidentiality of correspondence (Art. 42) and personal data (Art. 43), and at the same time, they are, according to already mentioned opinion, integral parts of the right to private life. Within these three articles, the limitations of certain segments of the right to privacy have been determined, i.e. the conditions under which the guarantees of this right can be waived.

Relevant provisions of the Constitution of Montenegro related to the subject of this paper are the following:

- The provision of Article 9 governing the primacy of international law over domestic law, according to which: "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation".
- The provision of Article 16 according to which the law in accordance with the Constitution regulates "the manner of exercise of human rights and liberties, when this is necessary for their exercise".
- The provision of Article 24 which regulates the limitation of human rights and freedoms in such a way that they may be "limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society".
- The provision of Article 28 which determines the protection of the dignity and inviolability of the person, more precisely, the provision of paragraph 2 of this

[4] Art. 8 was analyzed in detail in Gutić, 2010.

Article which guarantees the "physical and mental integrity of a man, and privacy and personal rights".

The differences presented in relation to the Convention should not be seen as purely terminological and nomotechnical issues, but as a challenge to the full and effective protection of human rights. This is due to the fact that *prima facie* it can be noted that the Convention (Article 8) regulates the "right to respect for private and family life" and the Constitution of Montenegro (Article 40) prescribes the "right to privacy" which acquires an essential dimension only if viewed together with the next three articles of the Constitution which determine the inviolability of the apartment, the secrecy of letters and personal data. In this way, the right to privacy, metaphorically speaking, on the example of the Constitution of Montenegro, has the characteristics of a "constitutionally uncodified right".

Therefore, the subject of this paper is the relationship between the cited articles of the Convention and the Constitution of Montenegro and the analysis of their (non) complementarity, as well as of a case in which the ECtHR adjudicated on the open issues pertaining to the relationship thereof.

### *4.1. Relationship between Article 8 of the Convention and the segments of privacy rights contained in Articles 40, 41, 42 and 43 of the Constitution of Montenegro*

Art. 8, par. 1 of the Convention guarantees the right to respect for private and family life whose holder is "every citizen", and it consists of four elements, i.e. protected good, and they are: 1) private life, 2) family life, 3) home and 4) correspondence. According to the Convention, all of them have the characteristics of autonomous terms i.e. the ECtHR interprets them in its authentic way, different from what is established in the legal systems of the signatory states

The breadth of the approach in shaping this right stems from the fact that it can be violated in several ways, by endangering various goods, four of which are explicitly mentioned. However, this does not exhaust the list of goods and legal values whose violation means a violation of an individual's privacy, but in practice, their broader interpretation, protects everything that may violate these rights by arbitrary interference by the state and other entities. Theoretical views go in the same direction, according to which the elements of this right include the right to personal identity, i.e. all forms of personal autonomy and those contacts that are maintained in social ties (Popović, 2012, p. 293). This is confirmed in practice by the fact that the provision on private life from Article 8 of the Convention is given a residual character, i.e. it covers factual situations that cannot be supported by other articles of the Convention.

In that sense, the definition from the Convention is more appropriate and comprehensive than the one known in the Constitution of Montenegro, since it does not state two out of the four elements of this right contained in the Convention (respect for home and respect for correspondence) but the constitution creators, as we have already stated classify it as special articles of the Constitution under the titles "inviolability of apartment" (Art. 41) and "confidentiality of correspondence" (Art. 42).

The disadvantages of such constitutional engineering lie in the fact that the term "apartment" in Article 42 of the Constitution is etymologically narrower than the term "home"[5], just as the term "secrecy of letters" is narrower than the term "correspondence", to the extent that it sounds archaic in the age of modern IT achievements. This observation has not only a legal-technical but also a substantive dimension, because, in one case, it narrows the content of the type of object being protected ("apartment" instead of "home"), and in another, the type of communication by which rights may be violated (violation of secrecy of "letter" instead of secrecy of "correspondence"). This narrows the sphere of privacy that is protected, on both grounds.

The advantage of the wording from the Convention is reflected in the fact that its four constituent elements often overlap in practice, so e.g. violation of privacy subsumes violation of correspondence or violation of personal data. Since such examples of overlap may also apply to the three mentioned articles of the Constitution of Montenegro (Articles 41, 42 and 43) in deciding on the violation of the rights, national judges in each case must weigh "predominance" in the violation of these rights, i.e. certain parts of the same right, as regulated by the Convention. Therefore, in specific cases it is more difficult to determine the relevant law and apply the appropriate norm.

The right to respect for private and family life enshrined in the Convention is not an absolute right, but has precisely stated limitations in its second paragraph. The limitations thereof are set by the provision that public authorities shall not interfere in the exercise of this right unless "it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of others" (art. 8, par. 2).

The reason for such a normative approach is, on the one hand, the confirmation of the rule on narrow interpretation of exceptions, in order to more fully protect the elements of privacy from paragraph 1. On the other hand, it shows that it is a "qualified convention law", in which public authorities may only interfere under certain conditions. Such rights contain optional restrictions, as the government decides whether to apply them or not. For that reason, they are, as a rule, prescribed by general assumptions and not by the method of enumeration (Maganić, 2016, p. 25).

In domestic law, the mentioned restrictions are not contained in Article 40 of the Constitution, the basic article that regulates this right. They are set out in Articles 41 and 42 of the Constitution, but in such a way that they do not fully follow the content of the restrictions under art. 8, par. 2 of the Convention. For example, the provision of Article 41 which reads "the apartment is inviolable" is by its nature a statement which is not normatively rounded, since the apartment is in practice "vulnerable" and it is therefore to be protected under the right of privacy. There is no provision in the Convention that it [the apartment] may be "vulnerable" under the exceptions set out in Art. 8, par. 2 of the Convention.

[5] For more details: Rid, 2007, pp. 407-410.

Instead, Art. 41 sets out guarantees of the inviolability of the apartment relating to the conditions under which a search may be conducted without the consent of the holder, while Art. 42 sets out derogations from the inviolability of the secrecy of letters, telephone conversations and other means of communication. Limitations are also established indirectly in Art. 43 by establishing a ban on the use of personal data beyond the purpose for which they were collected.

This normative approach does not directly respect the standards from Art. 8 of the Convention, but they are divided into several constitutional provisions related to the right to privacy. In such a situation, restrictions for arbitrary interference with the right to privacy are found in the provision of Art. 24 of the Constitution, which is placed within the common provisions on human rights. However, the provision of Art. 24 of the Constitution does not fully cover the limitations set out in Art. 8, par. 2 of the Convention because the Convention explicitly refers to the prohibition according to which public authorities cannot interfere with the exercise of the right to respect for private and family life, while in the abovementioned article of the Constitution it is done in a general way and refers to all human rights.

Furthermore, the Convention states the reasons for derogations from the violation of the right to respect for private and family life (interest of national security, public safety and economic well-being of the country, prevention of disorder or crime, protection of health or morals, protection of rights and freedoms of others). They are in accordance with the law and are necessary in a democratic society. The term "in accordance with the law" includes other acts that are not essentially law (bylaws), as well as case law and standards from the Convention, and finally the quality of legislation in accordance with European standards. The term "necessary" implies that interference in private and family life can be achieved if there is a proportional connection with the legitimate aim. All this is not contained in the Constitution, and the mentioned sub-regulation can, in practice, among other things, be conducive to the non-implementation of the proportionality test.

The presented normative inconsistency may result not only in inconsistency of jurisprudence and inefficiency in the protection of this right, but, ultimately, in violation of the (conventional and constitutional) right to a trial within a reasonable time.

For these reasons, we will analyze the scope of domestic constitutional solutions, their impact on respect for the privacy of individuals, as well as the adequacy of the resulting legal reasoning, using the case law of the European Court of Human Rights in the application of Article 8 of the Convention to Montenegro.

### *4.2. The case law of the ECtHR in relation to Montenegro in application of Article 8 of the Convention (Antović and Mirković v Montenegro)*

The stated ambiguity of the constitutional text in the part related to the right to privacy can be partly seen in the procedure and decision in the case of *Antović and Mirković v Montenegro*, as well as in the judgment of the Basic Court and Higher Court in Podgorica that preceded it.

The judgment in the present case concerns the determination of whether the unlawful installation of video surveillance violated the right to respect for private life under Art. 8 of the Convention. Namely, the applicants (university professors) alleged a violation of their right to respect for private life, which was violated by placing video surveillance in teaching amphitheaters, which endangered their integrity and dignity. The management of the Faculty and the University disputed that respectively, stating that it was done in order to secure property and persons.

Acting on the lawsuit of the mentioned persons, the Basic Court in Podgorica (Application No. 180/12 from 27 December 2012) rejected the lawsuit for damages on the grounds the violation of the right to respect for private life against the University of Montenegro, the Agency for Personal Data Protection and the state of Montenegro. This is explained by the fact that the University is an institution of public interest, that its activities are conducted publicly, that the work of a university professor is open to public, and that individual rights cannot be violated in the described manner (installation and use of video surveillance). The High Court in Podgorica upheld the cited decision, stating that the decision of Basic Court was provided with a "sufficiently related the ECtHR's case-law to the case at issue" and found that the applicant's allegations "did not justify ruling otherwise in the present case" (Judgment Gž. No. 882/13 from 17 July 2013). ECHR case-law was cited in general manner, without describing the relationship between cases in detail. [6]

Acting on the applicants' application, the ECtHR cited the relevant articles of domestic law and noted that the articles of the Constitution cited differed from those cited in other judgments of Montenegrin courts relating to Art. 8 of the Convention.[7] This is the testimony to the fact that the constitutional inconsistency in shaping the right to privacy leads to their different evaluation and "weighing" when interpreting the disputed relationship, both in international and national law. It also makes it harder to determine the "margin of appreciation" or to have it invoked by the Government before the ECtHR, or to determine positive obligations for the state, as in the case in *Mijušković v Montenegro*. It has an effect on the absence of a proportionality test in those cases where there is interference with private life, which should be justified by the notion of "necessity in a democratic society".

In the case of *Antović and Mirković v Montenegro*, the Court also made reference to the principles developed through the ECtHR's case law, and the Court emphasized the broad scope of the term „private life" which cannot be reduced to the term "inner circle" in which an individual can live his personal life how he chooses and excludes from it the whole outside world not included in that circle. In contrast, the national court did not treat the lecture halls as a space where the right to privacy could be violated, which in this case intersects in a broader context with the right to inviolability of the home.

The one-sided approach and rigidity in the application of law in this case is reflected in the fact that neither Basic Court nor the High Court considered the compliance of

[6] For more details about citing desicions in this manner: Cozzi *et al*, 2016, pp. 99-102.

[7] Various constitutional grounds are found in other judgments challenged before the ECtHR, such as *Mijušković v Montenegro*, *Milićević v Montenegro*, *Drašković v Montenegro*.

the actions of the "educational authorities" (Universities and faculty) with the Law on Personal Data Protection which in the general provisions, among other things, stipulates that "personal data may not be processed to an extent greater than necessary to achieve the purpose of processing or in a manner inconsistent with their purpose" (art. 2, par. 2 of the Law). Thus, the provision of art. 8, par. 2 of the Convention that respect for "private life" and "home" can be limited only "in accordance with the law" was not respected as a relevant right.

Also, the opinion of the Council of the Agency for Personal Data Protection of 28 April 2011 was not taken into account either, as the Council stated in its decision that the conditions for the introduction of video surveillance provided by law were not met, primarily because there was neither evidence of danger to safety of people and property in amphitheaters, nor to confidential information. Based on that, the Council stated that video surveillance of lectures was not a legitimate basis for installing equipment in that direction, invoking the provisions of art. 35-40 of the Law.[8] An analysis of this and other privacy cases shows that national courts did not focus at all or did not sufficiently focus on the proportionality test.

The distinction between the "right to privacy" and the "right to private life" in the way that these are two rights, and not a relationship between a part and a whole, is also in favor of constitutional sub-regulation. Based on such normative inconsistency, the decision of the Basic Court established that the right to privacy is related to the "strictly private and intimate sphere of life as the right of everyone to live their own life", while the "right to private life" is qualified as a restrictive right "to the extent that the individual himself brings his private life into contact with public life". However, this is one of the principles of interpretation of the Convention in relation to this article, because "the right to privacy" implies a more restrictive approach and field of action that limits the traditional notion of privacy, while "private life" has a very broad meaning and is more similar to the notion of personal autonomy.

Based on that, it was concluded that in the amphitheater, "the professor does not perform any private work, nor can he at any time feel the privacy in that capacity, which could be violated in connection with the performance of work duties". Thus, the violation of private life is related to the nature of work (work engagement or private work), which is a feature of narrow interpretation that is not inherent in the modern concept of application of human rights provisions. In contrast, the ECtHR in the case of *Nemec v Germany* concluded that "there is no sufficient reason to exclude professional or business activities from the concept of private life".[9]

In addition to considering Art. 8 of the Convention and constitutional provisions directly related to the right to privacy (Art. 40, 41, 42, and 43), the lack of direct application of Art. 9 of the Constitution, which determines the primacy of international law over domestic law, should be pointed out. Recognizing the fact that the Convention establishes derogations from privacy in a more complete and at the same time different way, there was

[8] For more information: Braithwaite, Harby & Miletić, 2017, p. 27.

[9] For more details: Krstić & Marinković, 2016, p. 170.

room for the Basic and Higher Courts to directly apply art. 8, par. 2 of the Convention, as was done in the jurisprudence of the Supreme Court of Cassation of Serbia (Supreme Court of Serbia, No. 336/2017 from 25 January 2018).

All of the above may be a consequence of constitutional inconsistency in the formulation of this right and combined with insufficient application of ECtHR's case law it may affect the quality of human rights protection in internal legal order. In support of (non)application of the ECtHR's case law goes the fact that the decision of the Basic Court incompletely and superficially cites its [ECtHR's] case law, without quoting the name and reference number of the cases in which the ECtHR ruled.

## 5. Concluding remarks

Content of the paper and analysis of the topic proved that the selected topic does not include only nomotechnical level. Contrary to that, this topic includes and has impact on wider legal phenomena, especially protection of the human rights and effectiveness of legal remedies used for that purpose.

Starting from the complexity and challenge that the process of implementation of international law into domestic law opens, especially in the part related to human rights and the application of the Convention, it is necessary to take normative and other measures to enable full realization of the right to privacy.

More specifically, in order to expand the scope of the right to privacy, it is necessary to:

- propose a revision of the provisions of the Constitution of Montenegro, in the part related to the right to privacy, in a way that merge those articles of the Constitution (40, 41, 42 and 43), which individually regulate certain segments of this right. In the new constitutional solutions, the name and constituent elements of this right should be consistently aligned with the provisions of art. 8 of the Convention, namely stipulate right to respect for private and family life protecting: private life, family life, correspondence and home. Having in mind the complexity and duration of the procedure of constitutional changes, it is necessary, until the adoption of new solutions, to fully apply the case law of the ECtHR in relation to the protection of this right, as well as to draft legal positions of the Supreme Court that would facilitate the process of law enforcement;
- in accordance with art. 8, par. 2 of the Convention, to supplement and specify the grounds for restricting this right in order to avoid arbitrary interference of the state in its exercise and any action that is not "in accordance with the law" and not "necessary in a democratic society";
- to intensify the activities of institutions and organizations that, besides the courts, employ various activities to promote and protect numerous segments of right to privacy (Protector of Human Rights and Freedoms, Montenegro's Representative before the ECtHR, Parliamentary Committee on Human Rights, NGOs, professional associations of lawyers, etc.);

- undertake activities so that in the teaching process (law faculties), at professional conferences, as well as in the initial and continuous training delivered by the Center for Education of Personnel in the Judiciary and State Prosecutor's Office, this topic is represented in proportion to its importance. To this end, it is necessary to conduct multidisciplinary research in order to consider all aspects of the right to privacy, especially those that are the product of new dimensions of IT development.

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## ČLAN 8 KONVENCIJE O ZAŠTITI LJUDSKIH PRAVA I OSNOVNIH SLOBODA I PRAVO PRIVATNOSTI U USTAVU CRNE GORE

Sažetak

Predmet rada je uporedna analiza prava na poštovanje privatnog i porodičnog života u Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda i prava na privatnost sadržanog u Ustavu Crne Gore. U tom cilju vrši se prezentacija relevantnih odredbi u ovim dokumentima, uz kritički pristup njihovoj (ne)usaglašenosti, kako u određenju konkretnih prava, tako i slučajevima njihovih ograničenja. Rad treba da ponudi odgovor na pitanje - da li je u Ustavu Crne Gore na primjeren način implementirano ovo pravo, kao i da li njegov drugačiji sadržaj, na konkretnom primjeru, zahtijeva neposrednu primjenu

normi međunarodnog prava. Istovremeno, cilj autora je da pruži saznanja da li nedovoljna usklađenost odredaba međunarodnog i nacionalnog prava na ovom planu može uticati na potpuniju zaštitu ovog prava. U tom cilju u radu je analiziran jedan od predmeta u kojima je Evropski sud za ljudska prava odlučivao o povredi člana 8 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda u odnosu na Crnu Goru. Polazeći od izložene materije, na kraju rada, izvedeni su odgovarajući zaključci o mogućim pravcima dogradnje postojećih rješenja i prakse u kojoj se ona ostvaruju. U radu su korišćeni normativni i komparativni metod, zajedno sa analizom sudske prakse.

**Ključne riječi:** pravo na privatnost, Konvencija za zaštitu ljudskih prava i osnovnih sloboda, Ustav Crne Gore, sudska praksa.

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# REDEFINING THE CONCEPT OF SECURITY FROM THE ASPECT OF MODERN IMIGRATIONS

***Abstract***

*The paper analyses the contemporary security concept, with a special review of the security aspects of migrations. After the introduction, which primarily offers certain terminological concerns, and a review of the historical development of the term security, the paper points to the impact of globalization to national security, and the existence of interdependence of countries in modern age. For this reason, the paper especially emphasizes the importance of international organizations, as well as international documents, which present the basic guidelines for treatment of security risks modern society is facing. Although literature points to a series of security challenges and threats, it seems that in recent years the problem of mass migrations is a special problem, which was the reason for the other part of the paper to be dedicated to security aspects of migrations, in two basic directions: first, pointing to the principal problems appearing as the consequence of migrations, and second, presentation of the model for a response to the migration crisis. The last part of the paper is dedicated to conclusive contemplations.*

***Keywords:*** *security, redefining of the security concept, national and collective security, migrations, security risks and migrations.*

## 1. Introduction

The term *security* is an elastic and multi-dimensional term that can be understood in various ways, depending on its subject: perception of threats, protected values, means that could help protect these values (Baldwin, 1997; Buzan, 1983) and at what price (Wolfers, 1952). This multi-dimensional character of the security construct is not a novelty. Dimensions of security changed after the Cold War, but essential specifications of these dimensions convenient during the Cold War differ from those adequate for the XXI century (Baldwin, 1997, p. 23). In the context of modern social development and redistribution of

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political, economic, and military power of dominant countries, terms like economic security, social and military security, environmental security, and also security of the individual and his/her identity, have found their way in the context of contemplating the term security.

Ethimologically, the term security in Serbian language (*bezbednost*) originates from the word *bez* (non-existence, absence) and *beda* (great poverty, despicable position, trouble, bad luck, evil) and presents a state of someone safe from danger, protected, unthreatened (Sretović, Talijan & Beriša, 2016, according to: Mijalković, 2009, pp. 44-45). Definition of the term security is most often linked with the state of being endangered (unsafe), as a social phenomenon and category which destructively affects the principal values which security safeguards and defends (Vulević, 2018, p. 56), or as a freedom to implement certain values, i.e., as "absence of threats to acquired values" (Wolfers, 1952, p. 485).

In the first part of the paper, the authors attempt to understand how the term security has modified, what it implied during the so called Cold War period, how the term security is perceived today, during the globalization period, and what national and collective security imply. Also, the paper offers a short review of the role the international law plays concerning maintaining and propagation of collective and international security. The second part of the paper analyses security aspect of contemporary migrations, and risks illegal migrations pose to security of countries, regions and people.

## 2. The expanded conception of security

Traditional view of security, defined basically in the military sense, was primarily focused on protection of countries from threats to national interests (Nasu, 2011). Such interpretation was also presented in the well-known paper of Hans Kelsen *Collective Security under International Law* (Kelsen, 1957, p. 1), in which the author limited the scope of the study to the *protection of people from others' force*, and it was absolutely linked with national security and protection of territory from foreign military threats and attacks, which was recognized as the final goal of souvereign states. However, the traditional term security, as defined by references within the framework of national survival, physical protection of state territory and military power, extended its scope in the second half of the XX century, especiallly since the end of the Cold War.

*Barry Buzan* spoke of security as an aspiration toward freedom from threats and capacity of countries and societies to protect independence of their identities and functional integrity from changes perceived as hostile changes (Buzan, 1991, p. 432). Because of the justifiable fear from war, the central, reference object of security was the state and its territorial integrity (Nasu, 2011). However, with the newly developed situation at the world scene, new threats become the focus, which do not exclusively concern the military sector. With the fall of the Berlin Wall, demise of the Soviet Union and the Warsaw Pact, and the end of the Cold War, attention was not any more focused on military and political issues, and economic, social and ecological problems paved their ways toward the agenda of the international security system (Buzan, 1991, according to Vulević, 2018).

Namely, after World War II, Europe became the destination of many from the countries of the global East. Furthermore, the liberalization of migration policy in the context of European integration has enabled mass migration to the countries of the European Union, primarily to those with "strong economies". At the same time, in recent years, conflicts have intensified in the territories of the countries of Central Eurasia (Afghanistan, Iraq, Syria), which has encouraged mass migration, again in the direction of Europe. Unprecedented wave of refugees seeking for a refuge in Europe during 2015, most of them being Muslims, intensified the already existing intolerance to immigration. Among some of the Europeans, immigrations are constructed as a threat to their personal employment, standard of living, the welfare state and the national economy, but also as a threat to their own (personal and collective) European and Christian identity (Mijalković, 2016, p. 44).

In the last several decades there have been increased attempts to reconsider security problems, as well as to conceptualize security at levels not within frameworks of nation-states (Baldwin, 1997). UN General Secretary talked about the necessity of a "conceptual breakthrough: which should include "armed territorial security", but also "security of people at home, at work, and in communities". It is possible that the world needs a theoretical view which would allow for better understanding of the contemporary world, a normative breakthrough which would broaden the idea of a moral community, an empirical breakthrough which would facilitate recognition of increased interdependence, and a political breakthrough which would strengthen the will to follow the extended security agenda (Baldwin, 1997; Rothschild, 1995).

An interesting explanation of the way in which traditionally understood security was redefined into a contemporary concept of security was offered by Emma Rothschild, who offered four principal forms of extension. In the first, security is extended from security of nations to security of groups and individuals. In the second, it is extended from security of nations to security of the international system, or beyond national physical environment (vertical extension, from the nation to the biosphere). The extension, in both cases, concerns types of entities whose security should be ensured. In the third form, security is extended horizontally, toward types of security for nations. The concept of security, thus, is extended from the military one to the political, economic, social and human security. In the fourth form, political responsibility for ensuring of security (or for strengthening of all these "security concepts") is extended: it is extended in all directions from nation-states toward a broader, international level, including here international institutions, regional or local administrations, non-governmental organizations, public opinion, and abstract forces of nature and the market (Rothschild, 1995, p. 55).

Extension of the security concept was advocated by the Copenhagen School, which emphasized social dimensions of security and rejected the sovereign state as a primary subject and agent of security (Vietti & Scribner, 2013, p. 27).

Geometric presentation of the redefined concept of security, regardless of complexity, has a common scheme, which has become noticeable in all international political discussions since the late 1990s, and concerns returning the emphasis on security and sovereignity

of the individual, which had a certain influence also in East-European revolutions[1]. The International Committee for Global Management too states the necessity of extending global security - from the traditional, focusing on security of the state, to security of people and the planet (CGG, 1995).

It is noticeable that the concept of the individual security is incorporated in all the stated constructs of security. We find confirmation for the said statement in literature, thus McSweeney states that "contrary to the orthodox viewpoint (...) security must make sense at the basic level of the individual human being, in order to make sense at the international level" (McSweeney, 1999). Individual (human) security is in the center of all real international security systems built on liberal-democratic ideals, while protection and promotion of basic freedoms must be a nucleus from which all other forms of security originate (Kajtez & Gostović, 2010). The phenomenon of human security added a new dimension to the extension of the security concept when the United Nation`s Program (UNDP) included it into the political discourse in its Human Development Report from 1994 (UNDP, 1994), and with that offered basis for development of the concept of "responsibility for protection"[2] as a political agenda, which was approved in the results of the World Summit in 2005. One of the new aspects of this concept is that human population, in contrast to souvereign states and the international community, is recognized as an object which is protected from threats of genocide, war crimes, ethnic cleansing, and crimes against humanity (Nasu, 2011).

The redefined concept of security, which does not define the referent object, does not make much sense, since a simple specification, such as 'state' or 'individual', is not sufficient any more. Taking into account the number of states, nations and individuals, and the interdependence of their security, the author claims that "defining of the referent security object "must run" hand-in-hand with the conditions for realization of its security". For the purpose of making a precise concept of security, a broad spectrum of answers to the question "security for whom" - the acceptable answer is: individuals (some, the majority, or all individuals), states (some, the majority, or all states), international systems (some, the majority, or all international systems) (Buzan, 1983, p. 26). The next question that needs to be answered in the context of a redefined security construct is the question which values are to be protected? The concept of national security traditionally includes political independence and territorial integrity as values to be protected, but today it includes also social values, such as physical security, economic welfare autonomy, psychological welfare, etc. (Baldwin, 1997, p. 13).

It seems that for understanding of security we must bear in mind that its segments cannot be simply classified into individual, collective and general, global security, because

[1] Vaclav Havel wrote (following John Stuart Mill) „the sovereignty of the community, the region, the nation, the state, makes sense only if it is derived from the one genuine sovereignty - from the sovereignty of the human being". See: (Havel, 1992).

[2] Human security is here defined as „survival and dignity of man through freedom from fear (violence) and freedom from depravity (poverty)", i.e., as „security of people from all possible forms of oppression, primarily from threats to life, health, earning, personal security, and human dignity". More details in: UNDP, 1994, pp. 25-33.

they are interdependent. Security is more and more understood and defined as the final product of joint effects of economic, social, demographic, political, cultural, ecological and military features of the state, region, or global community (Kajtez & Gostović, 2010, p. 102). In the modern world a multi-dimensional approach to security is the only valid, efficient and credible approach to solving security challenges and threats, in the aim of preservation of the international peace and stability, taking into account the complexity of threats and risks. Goals and activities within the framework of the political-military dimension, economic-ecological, and finally human dimension of security, are aimed at promotion of the position of the individual in the broadest field, in various aspects of social, political and economic life, from human rights and basic freedoms, democracy, free elections and the rule of law, to freedom of religious beliefs and fight against intolerance and discrimination (Jovanović, 2015, p. 12).

### 3. National security in the context of globalization

A comprehensive picture of modern development, often designated with the term *globalization,* includes increased economic interdependece, appeareance of the world market in the field of capital, finance and merchandise, and increased interdependence which is the result of cheaper and faster transport, global reach of the media, and new communication and information technologies (Kalm, 2005). In the context of globalization, security of a state is not any more possible to be achieved through isolated efforts, since security risks are becoming common, and security is more and more dividable geografically and according to the content, so it is necessary to remove security challenges, risks and threats with joint efforts. Threats to security of the individual in a state, coming from external or internal risks and threats, in present times means that other nations also feel insecure, which some authors call "globalization of worries" (Kajtez & Gostović, 2010, p. 102).

National security today includes security of the society (regardless of ethnic, ethical, racial and ideological origin or commitment of its members) and security of the state, but also their participation in international and global security. It involves a certain condition of protection of their vital interests and values which is optimized by the function of military and civilian, state and non-state sector of the national security system, with relying on numerous international (non-governmental and inter-governmental) subjects in many aspects of international cooperation in the field of security. Entities at all levels of security - individuals, societies, states, and the international community - participate in the protection of national security. States still have all resources (human, material-technical and organizational) for the protection of all levels of security against most challenges, risks and threats (Mijalković, 2011, p. 160). Thus national security implies the state of unhindered implementation, development, enjoyment, and optimal protection of national and state values and interests which is achieved, maintained, and improved through the function of security of citizens, national security system and supranational security mechanisms, the absence of (individual, group, and collective) fear of being endangered, as well as collective sense of serenity, certainty and control over the future events and developments of importance for the life of society and the state (Mijalković, 2011, p. 161).

In addition to traditional national values, modern ones include the survival of the state and nation, the quality of life of the citizens and nations, and social welfare, the constitutional and legal order of the state, public order, economic prosperity, the stability of energy supply and information resources, political stability and national unity, national pride and dignity, i.e. honour and reputation, national identity, healthy environment, and other values. National interests are benefits of importance to society and the state and they are related to the attainment, enjoyment and development of national values. One of the most important principles of the post-Westphalian model of national security is also lawfulness. This includes standardization of vital state and national values but also mechanisms and organisations responsible for security (their establishment, jurisdiction, duties, powers, responsibilities, and control). This includes national legislation (constitution, laws and by-laws), but also international law (conventions, resolutions, charters, covenants, recommendations, rulings and decisions of international courts). Generally, national legislation should be based on international law. In this sense, it is possible to speak about international legal basis of national security (Mijalković & Blagojević, 2014, p. 52).

## 4. International (collective) security and the role of the international law in its preservation

*The idea of international security, which is different from national (state) security, appeared with the development of the system of collective security. The League of Nations recognized attacks of aggression and war actions which began because of disrespect of the procedures for avoiding wars, according to its Pact, as threats to security of all members of the League* (Covenant of the League of Nations 1919, art. 10 and 16). *On the other hand, founding of the UN Security Council, which is primarily responsible for preservation of the international peace and security* (Charter of the United Nations 1945, article 24) *and its* functioning in practise, gradually made numerous countries accept the idea that security of the international community, not only security of one state, can easily be undermined.

The international security law, based on the system of collective security of the United Nations, is based on two elements. The first element is contained in the norm of non-use of armed forces according to article 2(4) of the Charter of the United Nations, while the second element is based on the institution of the United Nations Security Council, which is primarily responsible for preservation of the international peace and security from article 24 of the Charter of the United Nations (Koskenniemi, 1996, p. 456).

Collective, global security is the product of the law, based on delegating powers of sovereign states to the collective entity (Orakhenshivili, 2011, p. 2), offering a normative basis and means for regulating behaviour of sovereign states and conflicts among them. Collective security offers institutionalized procedures which legalize collective response, designed, at least originally, to deal with traditional, military-oriented threats to preservation of the international peace and security. However, challenges to collective security focused on sovereignty appeared, especially after the Cold War, because of the diversity of perceived security threats, increase of transnational security worries, larger role of nongovernmental

actors, and certain efficiency of the existing international arrangements in response to dynamic security challenges (Cuéllar, 2004, p. 233).

However, as technological development improved international trade flows, movement of capital, finances and information, but also research and exploitation beyond state boundaries, thus, on the other hand, security worries spread geographically and spatially to various zones, which extend also to the maritime zone of security, cyber space (Roscini, 2014), Arctic and Antarctica. New security fronts, thus, are not immune to the impact of the extended security concept, and impose new challenges to the existing legal regimes which regulate security activities. On the other hand, in contrast to the traditional territorial context, in which the only security subject are sovereign states, in present times, with extension of limits security covers, it is possible to find an extraordinary number of challenges which give rise to security issues.

The progress in recognizing of numerous issues which potentially present security threats has opened new fields of the security domain, so now more and more frequently there are talks about economic security, environmental security, security in the field of energy and resources, biosecurity and health security (Nasu, 2011, p. 18). Today, "non-military security threats" and the "comprehensive security concept" are rooted in the vocabulary of diplomats and politicians throughout the political spectrum (Koskenniemi, 1996, p. 460).

Extension of the field of security threats has been recognized also by international organizations, thus the Security Council (1992) emphasizes social, economic, ecological and humanitarian sources[3] as threats to the international peace and security, while the report of the UN General Secretary for the year 2004 states six clusters of global security threats contemporary worlds is facing, which are challenges that require prevention (see: United Nations-General Assembly, 2004, p. 25). They include economic and social threats, including poverty, contagious diseases and degradation of the environment, interstate conflicts, civil conflicts, including wars, genocide and other crimes, but also terrorism, nuclear, radiological, and biological weapons, and transnational organized crime.

Collective security, which often academically differs from the balance of political power, is considered as summons for an "automatic response" in case of existence of a potential aggressor (Mearsheimer, 1994, p. 5). However, the system of implementation of rules which ensure collective security, according to the United Nations Charter, is not automatic, but, referring to the Charter, decisions are made on whether and in which way the Council shall response, and the Council itself has a broad discretionary right. The point is that, according to the Charter, member states have renounced some of their freedoms of activities, by giving the Council power to decide on their behalf on collective actions and (legally) related decisions the Council passes (Koskenniemi, 1996).

Security Council, in accordance with the extended security concept, also extended its tasks in the aim of preservation of the international peace and security. Traditionally, collective security, and with it also powers of the Council, were viewed as a military

[3] In literature there is no unique position on whether this, many times quoted sentence, should be understood literally, or as a real indication of the readiness of the Security Council to use its collective security powers in accordance with Chapter VII of the Charter, to deal with economic, social, humanitarian, or ecological development, which are serious enough to justify such treatment. More details in: Koskenniemi, 1996, pp. 456-488.

affair, dealing primarily with prevention of interstate violence and over the border use of force. However, most violences in modern times do not imply formal armies marching across borders, but derive from violence within a state`s borders, i.e. civil wars, which are threats to the international peace and security, and situations when the Security Council intervenes. Whatever conceptual difficulties exist because of traditional implementation of collective security in resolving of national conflicts and limitation of violence in a state, they did not prevent the Security Council to use its mandate for interventions in the last several decades (Koskenniemi, 1996, p. 461).

## 5. Security aspect of (im)migration

Contemporary migrations are not perceived any more only as internal or international movement of people for existential reasons (economic migrants, refugees from conflict zones, political asylum seekers and ecologic migrants) (Mijalković & Petrović, 2016, p. 1), or as a separate, temporary phenomena, as were conceptualized until recently, but as a permanent issue of the contemporary, social, political and economic life (Berne Initiative, 2003), linked with numerous globalization aspects. Migration pattern is clearly linked with the increasing *globalization*, while factors which contribute to migrations are smaller transport costs, information-technological revolution, global reach of the media, and the consciousness about discrepancies of the living standard between rich and poor countries (World Commission on the Social Dimension of Globalization, 2004).

Twenty first century has been designated also as the century of migrations, since global mobility is a highly stratified phenomenon, because of the large number of refugees forced to leave their home countries because of wars, poverty, and climate changes (Castles & Miller, 2009). In the European Union there are two noticable demographic movements, relevant for analysis of the relation of security and demography - the increasing migration flows (European Commission, 2014) and the continual aging of the population. The development of information and communication technologies has enabled the population in all parts of the world to access information on living conditions in rich countries, their social and immigration policies, and the possibility of going to these countries (Tatalović, 2018), which made migrants move toward stable and rich countries, which, because of the economic development and bad demographic trends, need new population (Tatalović & Malnar, 2016, p. 219).

Literature often states that migrations, especially transnational ones, are linked with key issues such as security, but also social, economic and political stability (Solomon & Bartsch, 2003). If we take into account that contemporary migrations are becoming global, organized, and mass migrations, it is clear that risks and consequences for human, national and international security have multiplied (Mijalković & Petrović, 2016).

Different positioning and perception of migratory movements in contexts of national securities and defense strategies of the European Union member states, because of various security strategic cultures and approaches to the migratory-security link, block development and implementation of a joint and efficient strategy for solving of the migration crisis (Estevens, 2018). Removal of international borders within the European Union has

stimulated spreading of the narrative which suggests security deficit and has formed new challenges to the public order, which derive from the removal of international borders, and bring about an increasing politization of and securitization of the issues of migration and asylum (Guild, 2009; Bourbeau, 2011; Vietti & Scribner, 2013).

This denationalization of state souvereignty requires cooperation, and, although it seems that close cooperation in security and defense is necessary in the European Union (and the European ground), there is no joint position on how to proceed and how to exit the framework of managing humanitarian crisis after the so-called migrant crisis, so different strategic cultures end with implementation of various security and defense policies within the Union (Biehl, Giegerich & Jonas, 2013), but also out of it.

Faced with the need for integration of the increasing number of migrants, some countries approach the migration problem primarily from the security aspect, which has brough about securitization of migrations[4] in some countries, such as the United States of America, Australia, or Hungary. Humanitarian approach[5], social-economic approach and securitization are models with which countries reacted to the migration crisis, where some countries accepted migrants, others allowed their transit, and some didn`t allow them to pass through their territories (Tatalović, 2018; Tatalović & Malnar, 2016, p. 287).

In order to find out why migrations can be perceived as a security threat at various levels, it is necessary to state that security is based on a collection of discourse or narratives and historical practices based on institutionally divided understandings, which thus become a political and social construct (Wæver, 1995). During this process, dominant political elites in power and analysts define the existing risks and threats at a certain moment and for different levels (national, regional, global), activating, when possible, means for their neutralization. Thus, inclusion of a specific approach to security into state practice or international organizations usually derives from the existing power structure. The process of globalization has added new functions of responsibility of the state and has changed some of the previous ones, since the traditional function of guaranteeing defense of the territory and political independence is now linked with the obligation to ensure economic independence, cultural identity and social stability. Globalization has transformed the existing risks and threats, which are now impossible to neutralize by only focusing on the state, and/or by the strategy of national security which is limited to state borders (Mabee, 2009; Ripsman & Paul, 2010).

[4] Simić points out (referring to Philippe Bourbeau) that as for the process of securitization of migrations it is important to differ politization of migrations from securitization of migrations. Because, in contrast to securitization of migrations, which implies a „process of integration of migrations in the institutional and discourse sense, into the security framework, which emphasizes police and defense affairs, while politization of migrations relates to the process of extracting migrations from the limited network and/or bureaucracy, and bringing them into the public arena". According to him, it is one thing to deal with technical issues concerning the status of refugees, their accomodation, and other accompanying things, from a completely different one of „proclaiming that migrants are a security threat". More details in: Simić, 2017, pp. 4-10.

[5] The criterion of a humanitarian approach is defined based on the highest standard of treatment of the migrant population, in accordance with the relevant documents of the United Nations (UN) which regulate treatment of refugees as the most vulnerable migrant group, including the ban on racial, religious, or discrimination linked with the country of origin, provision of medical and other protection, protection of the family union, necessary aid and accomodation, etc. More details in: Tatalović & Malnar, 2016, pp. 285–308

When studying the impact migrations may have on security, five cases are most often identified "in which refugees or migrants may be considered threats to the countries from which migrants are coming, countries receiving them, or relations between the countries of origin and countries of destination". The first case is when refugees and migrants are considered threats (or at least a source of problems) - between the countries of origin and the countries of destination, which is a situation that arises when refugees and migrants are opposed to the regimes of their countries of origin. The second is when migrants or refugees are perceived as a political threat or a security risk for the destination countries. The third is when immigrants are perceived as a cultural threat, and the fourth one is when they are perceived as a social and economic problem for the society of the host country. Finally, the fifth case is when the society of the destination country uses immigrants as an instrument of threat to their countries of origin (Weiner, 1992, pp. 105–106).

Securitization of migrations has a tendency to include four forms: socio-economic, because of unemployment, increase of informal economy, crisis of a social state, and degradation of urban environment; securitarian, which takes into account loss of control narration which connects souvereignty and borders, and internal and external security; identity one, where migrants are perceived as a threat to national identity and demographic balance of the host society; and a political form, which is the result of anti-immigration, rasistic and xenophobic discourse (Ceyhan & Tsoukala, 2002, p. 24). Since migrations can affect various aspects of souvereignty of a state, they thus affect national security (Adamson, 2006), and also contribute to a disbalance of power among states. In accordance with the previously stated, the position seems correct that migrations contribute to changes in structures and institutions in global political, economic and social relations (Castles, 2010, p. 1566).

Migration is identified as being one of the main factors weakening national tradition and societal homogeneity. It is reified as an internal and external danger for the survival of the national community or western civilization. This discourse excludes migrants from the normal fabric of society, not just as aliens but as aliens who are dangerous to the reproduction of the social fabric. The discourse frames the key question about the future of the political community as one of a choice for or against migration. But it is not a free choice because a choice for migration is represented as a choice against (the survival of) the political community. The discourse reproduces the political myth that a homogenous national community or western civilization existed in the past and can be re-established today through the exclusion of those migrants who are identified as cultural aliens (Huysmans, 2000, p. 758).

The process the securitization of migration has included multiple actors such as national governments, grass roots, European transnational police networks, the media, etc. The securitization of migration is a structural effect of a multiplicity of practices. If one wishes to interpret how this structural effect has been produced by the political, professional and social actors involved, one has to focus on the relation between the positions of these actors and the practices they perform. Instead of focusing on how this effect was produced by which actors, we should to concentrate on the logic of securitization that characterizes this field and on how the European integration process is implicated in its reproduction.

As Huysmans wrote, the securitization of migration in the EU and its Member States has developed on the basis of three relating themes: internal security, cultural security and the crisis of the welfare state (Huysmans, 2000, p. 758).

Illegal migrations have security repercussions. They unavoidably bring about increased danger for domestic population with regard to crime, terrorism and contageous diseases. For a host country, because of the excess inflow of cheap labour and unexpectedly large social welfare costs, they may present a source of destabilization ot its economic security, and also increase the risk from internal and international conflicts (Simeunović, 2017, p. 37).

The risks migrations carry are reflected not only at the level of threatening national, regional and international security, but also at the level of threatening fundamental human rights of migrants. Mass migrations may, on one hand, affect demographic structures at local and regional levels, if migrants are systematically placed in certain geographic areas, which significantly changes demographic structures of populations, and may give rise to conflicts based on geographic, ethnic and religious, and racial identity (Mijalković & Petrović, 2016, p. 10). However, if migrants are not integrated into host communities, especially if they come from completely different cultural environments, potential risks from religious and ethnic conflicts increase, which requires adequate efforts in the aim of integration of national minorities into national communities (Savage, 2004).

Aspiration of a significant number of migrants to emigrate inspite of restrictive migration policies of economically developed countries, has inspired the idea of smuggling of migrants (Mijalković, Petrović, 2016, p. 3), which exposes this population to organized and transnational crime. Secondary victimization of the migrant population is especially obvious during illegal entering of host countries - because of human trafficking networks (Czaika & de Haas, 2013), which often results in a loss of human life, especially on routes from North Africa to countries of South Europe, and in recent times they are linked with the civil war in Syria (Ferreira, 2016, pp. 1–2). There are a lot of data pointing to cases of illegal labour, exploitation of labour, involvement in prostitution and networks of organ trade (Burgess, 2011, p. 15), which creates space for legal marginalization of (im)migrants based on the use of nationalistic values in the aim of justification of social separation of migrants (Geddes, 1995, p. 198).

Illegal immigrations present, in conditions of globalized security, a very serious and complex challenge. On one hand, countries have a souvereign right to control their own borders and to define conditions for entry and exit from their territories, in accordance with the interests of national security, economic welfare, public moral, and political stability. On the other hand, the principles of protection of human rights and principal norms and principles of humanitarian law impose the obligation to take into account the causes of mobility and immigaration waves, and acceptable treatment of vulnerable people seeking protection in more stable areas closeby or farther away (Jovanović, 2015, p. 18).

Cooperation of countries in redefining policies and legal frameworks, in order to enable a broader framework of regular models of migrations, is the key factor in finding solutions for challenges which countries of origin, transit countries and final destination

countries face. This shall not stop irregular migrations, but shall reduce moving of people who do not have identity documents, especially via smuggling networks. If migrations are recognized as an unavoidable mark of the times we are living in, not necessarily as a negative phenomenon, then policies of migration management should be adjusted to real trends and problems of migrants, because restrictively defined policies which impose strict rules are in a large degree in discrepancy with protection of basic human rights. Countries have a souvereign right to decide which foreigners may enter and reside at their territories, however, criteria must be defined in accordance with international legal standards. All migrants, regardless of their status, are entitled to protection as human beings, and, depending on the status they are subject to, additional systems of protection within the framework of international conventions (Marković, 2017, p. 14). Restrictive policies for treatment of migrants shall not stop illegal migration flows, nor shall they ensure security in Europe (Völkel, 2017, p. 93).

Mobility of people is a reality in the world we are living in, and societies and communities should be led in the direction of abandoning stereotypes, while decision-makers have a special responsibility to fight xenophobia and rasism. The International Organization for Migration has been advocating now the position that migrations are not a problem or a crisis situation which should be solved by short-term, ad-hoc measures, but a reality and a process to be managed, that migrations are unavodable (if we bear in mind the causes for people`s migration in today`s world), necessary (because of adequate distribution of labour and development of economy), and desirable (because of the contribution migrants make both in destination countries and their home countries) (Marković, 2017, p. 15). Cooperation with regard to migrations is not a general standardized process, but has a bilateral, multilateral or intergovernmental character, and should be established among all European countries. The issue of migrations with regard to partial integration creates difficulties to European countries and institutions, emphasizing democratic deficit of the Union`s institutions and establishing the need for intergovernmental cooperation for building of joint migration policies (Geddes, 1995). The lack of focus in this multi-layered approach also contributes to explaining the spectrum of unintentional consequences of migration control in the Mediterenian region (Collier, 2016, p. 621).

Migration policy, at whatever level it is developed, has to address the reality that European countries have become countries of immigration. Immigrants, asylum-seekers and refugees are present and are challenging the myth of national cultural homogeneity. They are a multicultural presence in everyday practices, and are indicative of the fact that cultural identity is not constant but variable (Martiniello, 1997). The political rendering of cultural identity involves a mixture of issues, including multiculturalism, European identity, nationalism, and xenophobia and racism. But the key element is that the cultural mixing resulting from migration is politicized on the ground that multicultural developments challenge the desire for coinciding cultural and political frontiers (Martiniello, 1997, p. 14). Letting migration figure as a dangerous challenge to the vaguer notion of social and political integration of society has strong securitizing effects (Heisler & Layton-Henry, 1993). Discourses representing migration as a cultural challenge to social and political integration have become an important source for mobilizing security rhetoric and institutions (Huysmans, 2000, p. 762).

## 6. Conclusion

Security concept, viewed in its broadest sense, is certainly a field which is constantly evolving. The path of its evolving moved from the political-military concept, focused on the state and its sovereignty, to a new one - more comprehensive and holistic view of peace and international stability, based on protection of the individual. In this sense, the state does not present any more the only reference object of the security concept. Nevertheless, security of man has not replaced national security, but has integrated new security dimensions, such as protection of human rights, economic development and security of the individual. Extension of the security concept had its institutional conceptualization in the UN Report on Human Development from 1994, which defined a universal, broad and flexible approach and interdependence of security components - economic security, food security, health security, environmental security, personal security, security of the community and political security. For these reasons, vitality of this matter contributed, under the auspices of the UN and other international organizations, to a series of documents being adopted, of importance for this field which, it seems, is still continually evolving.

As for globalization, security of a state cannot any more be achieved by isolated efforts, because security risks are becoming common, and, as it is rightfully emphasized - security can less and less be divided geographically and by content, so it is necessary to remove security challenges, risks and threats with joint efforts. National security today includes security of the society (regardless of ethnic, ethical, racial and ideological origin, or commitment of its members) and security of the state, but also their participation in international and global security. It involves a certain condition of protection of their vital interests and values which is optimized by the function of military and civilian, state and non-state sector of the national security system, with relying on numerous international (non-governmental and inter-governmental) subjects in many aspects of international cooperation in the field of security.

The increasing globalization is visibly linked with the concept of migrations. Factors that contribute to migrations are reduced transport costs, information-technological revolution, global reach of the media, and awareness of discrepancies in the living standard between rich and poor countries. It seems that the latter factor - the gap between rich and poor countries - plays a big role in migrations. Historically viewed, we may say that is not a novelty, since migrations of people, if we exclude forced migrations because of wars, often happened because people were seeking better living conditions. At the present, modern age, we may state that migrations, especially transnational, are linked with key issues, such as security, but also social, economic and political stability. Still, if we take into account that contemporary migrations are becoming global, organized and mass, it is clear that risks and consequences for human, national and international security have multiplied. Different positioning and perceptions of migratory movements in contexts of national security and defense strategies of the European Union member countries, because of different security strategic cultures and approaches to the migration-security connection, block development and implementation of a joint and efficient strategy for solving of the migration crisis.

At this point, it is necessary to emphasize once again the following: The process the securitization of migration has included multiple actors such as national governments, grass roots, EU transnational police networks, the media, etc. The securitization of migration is a structural effect of a multiplicity of practices. This crisis has developed on the basis of three relating themes: internal security, cultural security and the crisis of the welfare state. This is one of the starting points in solving of this problem.

As for the state response to the migration crisis, two basic models are noticeable, based on which states responded: humanitarian approach on one hand, and social-economic approach on the other hand, where some states received migrants, others allowed them, while some did not allow them to to pass through their territories. We believe that determination for the first, humanitarian approach to migrations is necessary, which would primarily be reflected in integration, and a unique migration policy, with absolute protection of human rights. In this sense, such ideas should be strenghtened primarily at the international plan, with adoption of adequate conventions under the auspices of the United Nations, which would be a good sign-post and basis for unique proceeding. This way, although migration crisis would not be solved in all its aspects, certainly a unique way would be set which would contribute, along with a series of other mechanisms, to realization of the principle of humanity on which modern societies are founded.

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## (RE)DEFINISANJE KONCEPTA BEZBEDNOSTI IZ ASPEKTA SAVREMENIH IMIGRACIJA

Sažetak

Autori u radu analiziraju savremeni koncept bezbednosti, uz poseban osvrt na bezbednosne aspekte migracija. Nakon uvodnih napomena, u kome su pre svega date određene terminološke odrednice, kao i osvrt na istorijski razvoj shvatanja pojma bezbednosti, ukazano je na uticaj globalizacije na nacionalnu bezbednost, te postojanje nužne međuzavisnosti država u savremenom dobu. Iz navedenog razloga, u radu je posebno istaknut značaj međunarodnih organizacija, kao i međunarodnih dokumenata koji predstavljaju osnovne smernice za postupanje sa bezbednosnim rizicima sa kojima se savremeno društvo susreće. Mada se u literaturi ukazuje na niz bezbednosnih izazova i pretnji, čini se da se poslednjih godina kao poseban problem javio problem masovnih migracija, što je bio razlog da druga velika celina u ovom radu bude posvećena upravo bezbednosnim aspektima migracija i to u dva osnovna pravca: prvo, ukazivanje na osnovne probleme koji nastaju kao posledica postojanja migracija i drugo, predstavljanje modela reagovanja na migracionu krizu. Zaključnim razmatranjima, posvećen je poslednji deo rada, pri čemu su se autori pre svega okrenuli pitanjima državne reakcije na migrantsku krizu. Kada je reč o poslednjoj krizi, primetna su dva osnova modela na osnovu kojih su države reagovale i to: humanitarni pristup sa jedne strane i socijalno-ekonomski pristup i sekuritizacija, sa druge strane, pri čemu su neke države primale migrante, druge omogućavale njihov tranzit, a neke zabranile prolaz. Smatramo da je neophodno opredeljenje za prvi, humanitarni pristup migracijama, koji bi se pre svega ogledao u integraciji, te jedinstvenoj migracionoj politici, uz obavezno poštovanje ljudskih prava. U tom smislu, ovakve ideje bi trebalo osnažiti pre svega na međunarodnom planu, uz donošenje adekvatnih Konvencija pod okriljem Ujedinjenih nacija, koje bi bile dobar putokaz i osnov za jedinstveno postupanje. Na taj način, iako migrantska kriza ne bi bila rešena u svim svojim aspektima, zaisgurno bi bio trasiran jedinstven put koji bi doprineo da se, uz niz drugih mehanizama, ostvari princip humanosti na kojima počivaju moderna društva.

**Ključne reči:** bezbednost, redefinisanje koncepta bezbednosti, nacionalna i kolektivna bezbednost, migracije, bezbednosni rizici i migracije.

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# WESTERN BALKANS REGIONAL COMMON MARKET. WHAT LESSON CAN BE TAUGHT FROM EEA? – A CASE STUDY OF PUBLIC PROCUREMENT**

***Abstract***

*The European Union pursues on the international scene to safeguards its values, support the rule of law, foster the sustainable economic, social and environmental development and support the integration of all countries into the world economy including through the progressive abolition of barriers on international trade.[1] Trade agreements are used as an effective tool to this end. Within its present external action, European Union tries to cover its trade relations regionally homogenously. Through regionally homogenous trade agreements, Union can export its values, principles, and rules easier, which is also a way of strengthening its position geopolitically. This paper analyses trade agreements concluded between the European Union and candidate countries from Western Balkans. All these agreements recognise the accession to the European Union as their final goal. To achieve it, candidate countries need to fulfil various conditions, including the approximation and harmonisation of their legal orders with the EU acquis. Just recently (in November 2020), Western Balkans countries' leaders announced the creation of Regional Common Market which shall serve as a tool for approximation with European Union´s Internal Market Rules. To this regard, author analysed the European Economic Area, where the export of European Union´s Internal Market Rules was successfully realised, and which might therefore serve as an example for pre-accession cooperation between Western Balkans countries and European Union. Author chose the area of public procurement as a model case study.*

***Keywords:*** *integration, Western Balkans countries, common market, European Union law, public procurement.*

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[1] See in this regard an Article 21 of the Treaty on European Union.

## 1. Introduction

Trade agreements are typical tools used by the European Union (hereinafter EU) for expansion of its values, principles or even legislation. The World Trade Organization currently registers 44 trade agreements concluded by the EU.[2] When analysing all these agreements, we can see, that EU concludes agreements, which are homogenous within the geographic region (e. g. trade agreements with Caribbean countries, Central America countries, South-East African countries, Western Balkans countries, etc.). It brings a greater transparency and helps contracting parties to implement compatible rules regionally which results in increase of mutual trade connected with economic and social development. In Europe, economic prosperity was also seen as primary means for achieving peace: it was felt that a close trade economic dependence would reduce the risk of future hostilities (Arrowsmith, 2010, p. 44).

As said above, European Union conducts its external policy also in Western Balkans countries: Albania, Montenegro, North Macedonia, Serbia, Bosnia and Herzegovina and Kosovo[3] (hereinafter Western Balkans Six). All of them formalized their relations with EU through international trade agreements which final goal is the *accession to EU*. Albania, North Macedonia, Montenegro, and Serbia already applied for EU membership and have been enjoying status of a candidate country[4]. Bosnia and Herzegovina and Kosovo (UNMIK) at this time remain potential candidates for EU accession. The EU strongly supports integration ambitions of Western Balkans Six which was repeatedly confirmed in 2000 Zagreb, 2003 Thessaloniki, 2018 Sofia and 2020 Zagreb summits: "the EU once again reaffirms its unequivocal support for the European perspective of the Western Balkans" (Zagreb Declaration, 2020, par. 1). However, to become a full member of the EU, candidate countries must fulfil the Copenhagen criteria[5] as well as adopt and implement all EU legislation.

To this regard, leaders of Western Balkans Six declared at Sofia summit held on 9 November 2020 a common ambition: "a democratic, prosperous region that promotes

[2] All of them are available at WTO website.

[3] According with the provisions of Resolution 1244 (UNSCR 1244), integral part of the Republic of the Serbia - Autonomous Province of Kosovo and Metohija was under the supervision of the administration UN: United Nations Mission in Kosovo (UNMIK). Regarding the using the name of "Kosovo" the European Commission in its 2020 Report explicitly declared that "this designation is without prejudice to positions on status and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence."

[4] EU opened accession negotiations with Albania in 2019, with Montenegro in 2012, with North Macedonia in 2019 and with Serbia in 2014.

[5] Section A (iii) of the Conclusion of the Presidency of the European Council held in Copenhagen (21-22 June 1993): "The European Council agreed that the associated countries in Central and Eastern Europe that so desire shall become member of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved *stability of institutions* guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, *the existence of functioning market economy* as week as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the *candidate´s ability to take on the obligation of membership* including adherence to the aims of political, economic and monetary union."

open societies based on shared values of pluralism, solidarity and justice, underpinned by a strong rule of law" (Common Regional Market Action Plan, 2020, p. 1) and announced a commitment to develop a Common Regional Market "based on the EU rules and standards with purpose to bring the region closer to EU markets" (Western Balkans Leaders Declaration on Common Regional Market, 2020, p. 1). European integration and regional cooperation are therefore closely intertwined in this case.

Common Regional Market shall be built on the achievements of the Regional Economic Area[6] which follows up on Central European Free Trade Agreement's (hereinafter CEFTA) objectives[7] and expand them. Basically, it shall lead to a CEFTA rules-based and EU compliant free movement of goods, services, capital, and persons, establishment of investment area, integration to pan-European digital market and transformation of industrial and innovation sector by the end of 2024.

European Union has already successfully achieved similar goals within European Economic Area (hereinafter EEA). Author therefore finds it suitable to introduce how EEA works. Surely, a comprehensive analysis of whole EEA market would need much bigger space than is dedicated for this article. Author therefore focused her analysis to a specific part of the market – public procurement.

This selection was realised regarding the fact, that public procurement is already regulated regionally between Western Balkans countries themselves (in CEFTA Agreements) as well as internationally in trade agreements concluded with the EU. This provides solid starting point for comparative analysis.

Methods used in this article comprise mostly of doctrinal analyses, comparison, deduction, and synthesis. Author also refers to relevant case law.

## 2. From Western Balkans towards EU public procurement rules

The aim of public procurement is to spend effectively public sources when purchasing goods, services and works by public authorities. To confirm it by words of Steinicke & Vesterdorf (2018, p. v), its aim is to obtain the purchases through methods that optimize the cost/benefit value of such procurement to the benefit of the public. To achieve these goals, procurement procedures must comply with principles such as transparency, non-discrimination, equal treatment, proportionality, or fair competition. Various legislations foster various levels of regulations of public procurement. In international context, the minimum standard is set by the Revised Government Procurement Agreement (2012) adopted within the World Trade Organization.

CEFTA (2006) provides such standards, as it (in Article 34) explicitly refers to definitions set out in Article 1 of the Revised Government Procurement Agreement

[6] Regional Economic Area is a regional initiative comprised of Western Balkans Six, Austria, France, Germany, Italy, Croatia, and Slovenia. It organised 5 high-level diplomatic summits which supports Western Balkans countries to their path to EU. Currently, Multiannual Action Plan for Regional Economic Area is being implemented.

[7] Trade liberalization (goods, services, public procurement), improvement of conditions for investments, fair competition rules, intellectual rights protection.

(2012), which shall apply to all laws, regulations, procedures or practices regarding any procurement by central or sub-central government entities or other relevant entities. Public procurement under CEFTA must comply with principles of transparency, non-discrimination, proportionality, equal treatment and open and effective competition.

If either Party in the future should grant a third party advantages with regard to access to their respective procurement markets beyond what has been agreed upon CEFTA, it shall offer adequate opportunities to the other Parties to enter into negotiations with a view to extending these advantages to them on a reciprocal basis.

Surveillance and administration of this agreement is realised by the Joint Committee, which is composed of representatives of contracting parties. It holds consultations if any divergence with respect to the interpretation or application of CEFTA arises. If satisfactory solution was not achieved through consultation, party may request for arbitration in front of the arbitral tribunal.

As there are not available any decisions or recommendations of Joint Committee or arbitral tribunal relating to public procurement, effectiveness of such regulation might be questionable.

However, European Union went far beyond the WTO and CEFTA public procurement standards and followed the best practices introduced by the OECD (2015 OECD Recommendation of the Council on Public Procurement). Under EU public procurement law,[8] public procurement is a key market-based instrument to be used to achieve smart, sustainable and inclusive growth while ensuring the most effective use of public funds (Public Procurement Directive, 2014, Recital - par. 2). Contracting authority shall obtain best value for paid money. This concept is not reduced just to the purchase of the cheapest items, but considers also other factors as are life-cycle costs, post-warranty care, environmental issues, social inclusion, etc.[9]

To achieve these goals, contracting authorities may procure goods, services or works through procurement methods such as open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue, innovative partnership or even negotiated procedure without prior publication. Procurement must be realised electronically, which contributes to the transparency of procurement process.

Applicable principles of procurement origin from legislation (principle of non-discrimination, principle of transparency, principle of integrity, principle of competition, principle of proportionality, principle of equal treatment, best value for money, accountability, balancing principle), but also from the case law of the Court of Justice of the EU - principle of effectivity (*Orizzonte Salute* C-61/14), principle of sound administration (*Vakakis kai Synergates*, T-292/15) or principle of effective judicial protection (*Cooperativa Animazione Valdocco*, C-54/18).

[8] The basic legal framework of EU public procurement rules is contained in Public Procurement Directive 2014/24/EU, Utilities Directive 2014/25/EU, Concessions Directive 2014/23/EU and Remedies Directive 89/665/EEC.

[9] See e. g. Shakya (2019) or Sjåfjel & Wiesbrock (2016) to this regard.

Contracting authorities must apply the EU public procurement rules when minimal thresholds set by the Commission[10] are met. During the procurement process, contracting authorities use Common Procurement Vocabulary (Regulation 2195/2002), which simplifies cross-country access of tenderers to published calls for tenders.

Contracting authorities use qualification registration systems as well as European single procurement document. It is a self-declaration form, which frees tenderers from physical submission of proofs of certain facts (e.g. on having paid taxes, on not having been convicted of criminal activity) until they win the tender.

European Commission controls the compliance of the Member States with EU law. If the Commission considers that a Member State has failed to fulfil an obligation under the EU law, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. Besides, Court of Justice of the EU has the exclusive jurisdiction to give preliminary rulings concerning the validity and interpretation of EU law. Where such a question is raised before any court or tribunal of a Member State, that court may (and if it's a court against whose decisions there is no judicial remedy under national law then must) request the Court to give a ruling thereon. At national level, Member States are obliged to establish at least one control authority responsible for precise and effective implementation of EU public procurement rules.

*2.1. How will the EU transpose its public procurement rules to Western Balkans laws?*

The EU negotiated public procurement rules bilaterally with every Western Balkans country through the Stabilisation and Association Agreements (hereinafter SAA). All these agreements have the character of economic integration agreements. To achieve economic integration, a compliance of laws must be realised. To this regard, every single SAA contains the explicit commitment of associating country to approximate its existing legislation to that of European Union´**s** and of its effective implementation.

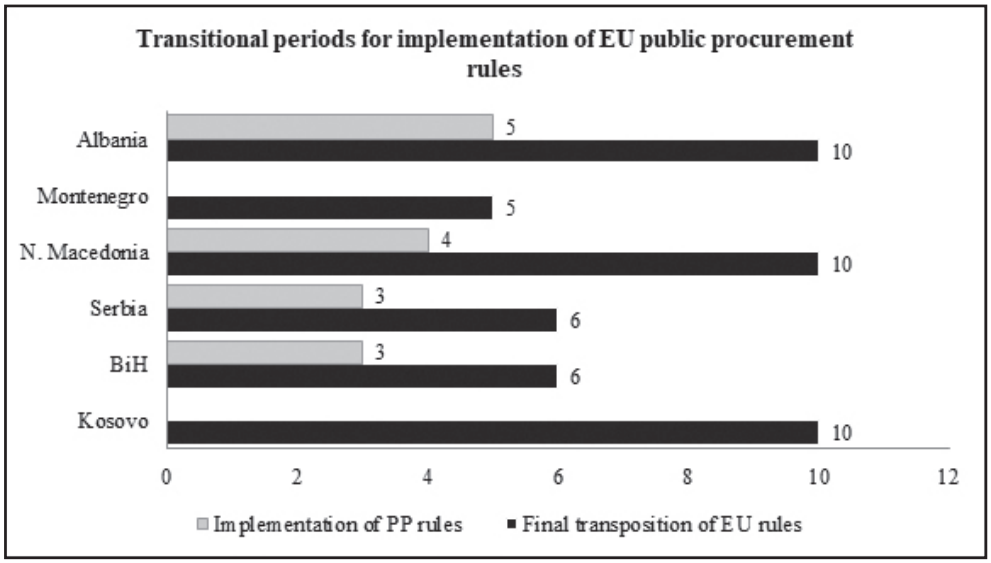
Transitional period for approximation then started from the date, when the agreement enters into legal force[11] and varies from 5 years (Montenegro), 6 years (Serbia, Bosnia and Herzegovina) to 10 years (Albania, North Macedonia, Kosovo (UNMIK). If

[10] Current thresholds are available at: European Commission. n.d.

[11] SAA with Albania (2006) came into legal force on 1 April 2009, SAA with Montenegro (2008) on 1 May 2010, SAA with North Macedonia (2001) on 1 April 2004, SAA with Serbia (2008) on 1 September 2013, SAA with Bosna and Herzegovina (2008) on 1 June 2015 and SAA with Kosovo (UNMIK) (2015) on 1 April 2016.

the agreement counts with phasing of transposition, public procurement law was supposed to be always part of the first phase (see the Graph 1 below to this regard).

*De lege lata*, except Kosovo (UNMIK), whose transitional period ends in 2026, all other countries should already comply with EU law in question (Albania in 2019, Montenegro in 2015, North Macedonia in 2014, Serbia in 2013 and Bosnia and Herzegovina in 2014).




Graph 1: Time periods for implementation of EU public procurement rules by Western Balkans Six (Source: author, SAAs with Western Balkans countries)

To verify the progress and level of compliance, the European Commission provides on yearly basis a monitoring of the implementation of approximation of legislation and law enforcement action to be taken.

As we can conclude from European Commission's 2020 country reports, any of Western Balkans countries has fully implemented the EU public procurement rules. Despite the fact, that most of the countries already broadly align their legislation with 2014 Public Procurement Directive and Utility Directive, and surely made some progress towards effective and transparent public procurement, some issues remained open. Electronic procurement was not completed yet (except Montenegro). Further efforts are needed to improve compliance with procedures and prevent corruption in the procurement cycle. The capacities of the main bodies that implement public procurement needs to be strengthened and countries need to increase efforts that prevent irregularities during the procurement cycle. Commission also pointed out, that even if the national legislation complies with the Union's the application practice of contracting authorities may contravene to the practice assumed by the CJEU case law. Besides, in every report Commission noted that none of the countries fully implemented Commission's previous recommendations. Achieved progress of every country is shown in the Table 1 below:

| Country | Level of preparedness | Alignment with 2014 PP Directives | Electronic procurement | Institutional capacities | Anti-corruption measure | Efficient remedy system | Independence of regulatory bodies |
|---|---|---|---|---|---|---|---|
| Albania | moderate | not yet, but widely aligned to 2004 PP Directive | partially/ need for strengthening | weak | ineffective | not yet/ only procurement information portal | weak |
| Montenegro | moderate | yes | ready for use | weak | ineffective | aligned with Remedy Directive | sufficient |
| North Macedonia | moderate | yes, but the practice with excluding tenderer is not in line with the CJ EU case law | not completed | weak | ineffective | formally aligned with Remedy Directive but need staff professionalization | weak |
| Serbia | moderate/ limited progress | not yet/ partially | ready for use | weak | ineffective | aligned with Remedy Directive | weak |
| Bosnia and Herzegovina | low | not yet/ partially | no (just documents to be downloaded from PP portal) | weak | ineffective | formally aligned with Remedy Directive but need staff professionalization | weak |
| Kosovo (UNMIK) | low/ moderate | not yet, but widely aligned to 2004 PP Directive | not yet/ only procurement information portal | weak | ineffective | formally aligned with Remedy Directive but decision-making lacks consistency and the quality needs to be improved | weak |

Table 1: Achieved progress of Western Balkans Six (Source: author, Commission's 2020 country reports)

To conclude this part, we must say, that despite the delay, Western Balkans countries are undoubtedly on the way to approach the set partial goal – approximate their national public procurement legislation with the Union's one.

However, even if they fully comply with Union's legislation, public procurement presents only one of thirty-three negotiation chapters to be completed. Public procurement regime within European Economic Area might therefore represent model, which would be suitable to trade relations between EU and Western Balkans Six after the completion public procurement chapter (and/or other market-based chapters as well) and before their accession to EU.

### 3. European Economic Area model

EEA is an excellent example of trade liberalization and export of Union´s law and principles into EU non-members legislations. EEA Agreement[12] was signed between the European Community and its Member States of the one part and Iceland, Liechtenstein and Norway (EFTA States[13]) of the other part. The aim of this Agreement (Article 1) is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.

EEA Agreement therefore includes provisions on incorporation of EU legislation (Protocol 1) and case-law of the CJEU (Article 6) to EFTA States legislation. The gradual incorporation of the Union's law takes place through activities of various working groups and is legally expressed in annexes to the EEA Agreement. These annexes are regularly updated.

EEA creates a single market, where, within EU-EFTA territory (except Switzerland) a free movement of goods, persons, services, and capital is realized. Legal framework for public procurement can be found in Article 65 and Annex XVI of the EEA Agreement. Through the Annex XIV, 15 EU public procurement sectorial directives, implementation regulations and decision were implemented fully or with partial derogations to EEA law. Public contracts market within EEA is therefore fully liberalised and substantive public procurement law identical with the EU law is applicable.

Compliance with the rules by contracting parties is controlled in dual way: EFTA Surveillance Authority monitors the fulfilment of the obligations by EFTA States and European Commission controls EU Member States. In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the European Commission cooperate, exchange information and consult each other on surveillance policy issues and individual cases.

Decisions of EFTA Surveillance Authority may be revised by the EFTA Court, which is competent to decide on actions concerning the surveillance procedure regarding the EFTA States, on appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; or provide advisory opinions on interpretation of EEA Agreement to national courts of EFTA States.

Besides that, EFTA Court in its judgement *Ski Taxi* (E-3/16, para. 27) established that:

> "where domestic legislation, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances

[12] Agreement on the European Economic Area was signed on 2 May 1992 and entered in force on 1 January 1994.

[13] Switzerland as the fourth EFTA State is not a party to EEA Agreement as it declined accession in 1992 referendum. Switzerland rather concluded separate trade agreement with the EU. Public procurement is not a part of that agreement.

> in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law".

By saying that, EFTA Court found its competence to give preliminary rulings even in purely national cases, if the national court decides to request for such action and the national law is identical with those of EEA.

Up to this date, there are only four decisions of EFTA Court relating to public procurement (*Ski Taxi*, *EFTA Surveillance Authority v Norway*, *Fosen Linjen and AtB* and *Fagtún*). However, it is still a proof that EU public procurement law is being applied within EEA. Moreover, in all these judgements, EFTA court referred to the case law of the Court of Justice of the EU, which shows how effectively two jurisdictions may be interlinked and cope.

## 4. Conclusion

Western Balkans Six are facing difficult tasks on their way to European Union. However, if they succeed to create functioning Regional Common Market, it will jump them much closer to the final goals than anything else. Even if they would not complete other chapters, until the time they do so, they can cooperate with European Union upon similar platform as most of EFTA States do. European Economic Area is such platform, which might be duplicated.

Functionality of CEFTA public procurement market, which is regulated only by basic procurement principles and enforcement of this law is practically non-existing, is highly doubtful. On the other side stands the EEA procurement market with harmonised procurement law, which is effectively enforced either by EFTA or EU authorities. Judicial continuity is ensured by the acceptance of case law of the CJEU from pre-contracting period and EFTA Court does not hesitate to refer to it. Activity of these authorities ensures fulfilment of obligations by contracting parties, which enables system to be functional and effective.

Deep trade liberalization, application of the highest market legal and procedural EU standards, creation of a permanent surveillance authority with strong competences, as well as permanent court therefore provides a positive answer to the question whether there is a lesson to be taught from EEA while creating the Regional Common Market.

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## REGIONALNO ZAJEDNIČKO TRŽIŠTE NA ZAPADNOM BALKANU. KOJE LEKCIJE MOŽEMO DA NAUČIMO OD EEP? – STUDIJA JAVNIH NABAVKI

Sažetak

Evropska unija na međunarodnoj sceni teži da očuva svoje vrednost, da podrži vladavinu prava, neguje održiv ekonomski, društveni i ekološki razvoj i da podrži integraciju svih država u svetsku ekonomiju i kroz progresivno ukidanje barijera za međunarodnu trgovinu. Trgovinski sporazumi se koriste kao efikasno sredstvo za postizanje tog cilja.

U okviru svog trenutnog spoljno(političkog) delovanja, Evropska unija pokušava da na homogen način reguliše svoje trgovinske odnose u regionu. Kroz regionalno homogene trgovinske sporazume Unija može lakše da širi svoje vrednosti, principe i pravila, što takođe predstavalja način jačanja njenog geopolitičkog položaja. Rad analizira trgovinske sporazume zaključene između Evropske unije i država kandidata sa zapadnog Balkana. Svi ovi sporazumi prepoznaju pristupanje EU kao svoj glavni cilj. Kako bi se on postigao, države kandidati treba da ispune različite uslove, uključujući i usklađivanje svog pravnog poretka sa zajedničkim vrednostima EU. Nedavno (u novembru 2020. godine), lideri zemalja zapadnog Balkana su najavili stvaranje regionalnog zajedničkog tržišta koje će poslužiti kao sredstvo približavanja pravilima unutrašnjeg tržišta Evropske unije. U tom smislu, autorka analizira Evropski ekonomski prostor (EEP) gde se uspešno realizuju ideje unutrašnjeg tržišta EU i koji može da posluži kao primer predpristupne saradnje između država zapadnog Balkana i Evropske unije. Autorka je odabrala oblast javnih nabavki za studiju slučaja.

**Ključne reči:** integracija, zajedničko tržište, Evropska unija, javne nabavke.

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# GENERAL CHARACTERISTICS OF THE BASIC CONCEPT OF TERRORISM**

***Abstract***

*Scientists trying to reach a consensus on the meaning of the term "terrorism" and how to deal with it have concluded that it is almost impossible to find a framework for a single generally accepted definition. When considering the conceptual determination of the word "terrorism", fragmented attitudes should serve as a warning that we are walking on thin ice where there is a collision of numerous definitions, a wealth of determinations with numerous discrepancies, contradictions, inaccuracies, and ambiguities. Some of the definitions are short and precise, and some implicitly explain what 'terrorism' means, some concepts coincide with those on which the content of the notion of terrorism is based, whereas some formulations are based on the delimitation of this criminal act in the field of national legislation. Ultimately, to summarize, at no point in history has this complex theme been discussed as it is today, while the results have been modest, even unsatisfactory. In short, progress in that sense has not been made. However, individual and collective scientific thought has contributed to defining the legal outlines of terrorism. Finally, its features have been determined significantly by international contracts and case law, which have clarified this concept, its main features. Based on this reference, as the author points out, significant differences exist between the aforementioned theoretical positions. The author says that a look at the level of substantial delimitation of concept terrorism will enable us to obtain interesting and applicable conclusions, which can be further used in explaining and scrutinizing both the characteristics and the specific content of the notion of terrorism, all in the function of looking for the most suitable model to fight against it.*

***Keywords:*** *concept of terror, definition of terrorism, distinction between terrorist and freedom fighter.*

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## 1. Introduction

The introductory definition of the phenomenon that will be discussed should enable us to see the reason and meaning of a certain phenomenon, to understand its essence. However, if it is not possible to define it precisely, then a path must be charted that leads to its boarder definition. In terms of concrete analysis, the fundamental and initial analytical category includes the reasonable meaning of the term "terrorism", where its numerous and various aspects are considered separately: motivation, geographical contexts, aspects of terrorist association or their individual operation; future forms of terrorist engagement; certainly, various ethical issues and problems play an important role, with particular attention being drawn to the illuminating of the of image of terrorism which is being created by the media.

The concepts of terror and terrorism are still vague and greatly misused. Simultaneously, their connection to other forms of violence and crime is often and quite noticeably ambiguous. It is just that intricate web of subjective factors and reactions to the topic of terror and terrorism that makes these concepts significantly more complicated to define.

Precisely those who endeavored to reach a consensus related to the meaning of the word "terrorism" and how to tackle its problem concluded that it is nearly impossible to find a frame for a simple and generally accepted definition (Smidt, 2004). All of us use this term, however, no one can explain it adequately, despite numerous attempts which are mostly directed at and limited to highlighting intentional causes and dreadful consequences.

However, although a consensus in defining terrorism does not exist, there is a generally accepted understanding that terrorists today operate globally and that their activities have become more frequent. In the last couple of years, this tendency has shown its true face by bringing about extreme chaos and violence.

The peculiarity of the problem is reflected, among other things, in the fact that the concern regarding the scope of terrorist activities is more than ever focused on the possibility that the terrorists might acquire chemical, biological, or even nuclear weapons of a smaller range. The world is facing an immense risk "in its own yard", and terrorism is already "at our doorstep".

Why is it so difficult to define terrorism?

There are a few words that have imposed themselves on our day-to-day vocabulary like this one. Like the word "Internet", so has the word "terrorism" found its way into wide usage, without us understanding its real meaning. These inaccuracies have also arisen as a consequence of the imprecise usage of the word in the media, which attempt to convey a complex message in a limited time or space, by simply labeling the most varying forms of violence as terrorism (e.g. bombing a building, assassination of the president, massacre of the population by a military unit, poisoning the population with a certain product from the supermarket or intentionally contaminating medicine in a pharmaceutic unit, etc. are all called the same – terrorism).

Today, the meaning of the word terrorism is of a fundamental political nature (Stuurman, 2019, pp. 1-2; Jazić & Batrićević, 2016). It is inseparable from the word

"power" – seeking to attain power, acquiring power, the usage of force etc. All of this is used to achieve political goals. Terrorism is also violence or the threat of violence, which is used in direct service for a political goal or towards achieving a political goal. When this essential part is explained and clarified, only then do we understand another definition of "terrorist" given by US Department of Defense (DoD): a terrorist is anyone who tries to impose their views through a system of coercive intimidation (Smidt, 2004). This definition underlines a few more of the fundamental characteristics of terrorism – that it is a planned, calculated, and systematic act.

## 2. Approaching the Problem

The problem of defining terrorism has plagued the international community for years. The UN General Assembly has scheduled international conferences on several occasions, precisely intending to resolve this problem (Duchemann, 2013, p. 179).[1] Unfortunately, the general definition of terrorism was difficult to reach. Today, certain efforts are re-emerging to reach an international consensus on the definition of terrorism, and which would derive from existing definitions of war crimes "as a detour, across swamps and ponds" (Jenkins, 1981, pp. 3-10; Petrović, 2007, pp. 44-59).

Terrorism is manifested by a series of various criminal activities calculated to lead to human casualties or damage to property or other goods and interests. But definitions can become standards if each circumstance is analyzed individually, providing a broader framework for understanding the definition only in terms of ultimate goals, and do not define it from the aspect of ideology or the way in which terrorist actions are carried out.

In that context, any more detailed presentation of the general concept of terrorism would be superfluous, because this reference is enough to show how the permeation of political power and authority through the various motivations of their actors is expressed in a kind of diversity of terrorist acts. A multitude of acts that are labeled or can be classified under the term terrorism, with the irrevocable accuracy of warning of the unique conclusion that, above all, the basic reason for a comprehensive and generally accepted definition of terrorism should be sought here.

From this general position, all formulations determined by different criteria have a lot in common (they had a basic core). Also, there are quite a few different points of view.[2]

On this list of numerous and diverse definitions, there are differences in emphasizing different things. Some definitions (referring to the official ones) reflect institutional positions. For example, the FBI emphasizes illegality, as well as, the undertaking of property crimes to

[1] In European Union terrorism is defined by the Framework Decision of 13 June 2002. See Matić Bošković, 2016, pp. 106-108.

[2] It is difficult for the United Nations to reach a minimum of consensus in defining terrorism. Some (smaller) member states of the United Nations somehow narrow the usual meaning of terrorism by excluding various variants of armed struggle believing that national liberation and resistance movements against foreign occupation should not be labelled "terrorism". Others, in defining terrorism insist on such a concept implying "the means by which the fight is waged" but not the goal. In the absence of consensus, the United Nations has opted for such a theoretical position that reflects a medium approach to interpreting that particular phenomenon (Arlacchi, 2001; Scharf, 2001, p. 135).

achieve social and political goals, while the State Department emphasizes that actions are pre-planned (Stuurman, 2019). The potential political motivation of para-national groups is also mentioned. Spontaneous violence is not mentioned, nor are psychological moments of threats considered. In that sense, the US Department of Defense acts more comprehensively and attaches equal importance to real and threatening violence, gives a wider range of targets by classifying not only governments but also entire societies as possible targets.[3]

In the United Kingdom definition of terrorism is given in a law of 2000. There is a controversy that this definition is too broad and could lead to the government restricting or even rejecting the legitimate rights of a large number of groups to protest (Duchemann, 2013). Several authors emphasize an intimidation strategy that instills and incites fear and feelings of personal vulnerability among the civilian population (psychiatrist Reich), while some authors focus on the use of intentional intimidation, citing attitudes and behaviors as examples (Sederberg), and finally, some definitions are full of emotional charge and condemning resentment (Walker, 2002, pp. 20-21).

At this point, it is important to note that there are a number of different problems that block efforts to "finally define" terrorism.[4] First, there is an understandable but confusing tendency to confuse explanations, justifications, and reprimands with many definitions. Second, the confusion between action (terrorism), actor (terrorist), and effect (terror) negatively affects our ability to distinguish between terrorism and the higher class of violent behavior of which it is a part (Stuurman, 2019). Finally, the option to focus on different subtypes of terrorism (e.g., air piracy, suicide bombings[5]) does not explain what it is in these subtypes that motivates individuals to become terrorists. Although we could formulate a certain policy for responding to certain terrorist activities, we would be forced to stop looking for a greater general understanding and strategy (Whittaker, 2003, pp. 4-5).

### 3. Necessary general framework

Starting only from the external definition, therefore ignoring the nuanced differences here in the precise limitation of the meaning of the term "terrorism", a high degree of agreement was shown in the following.

*Terrorism* is a strategy of violence designed to achieve the desired results by spreading fear and insecurity:

[3] Institutional definitions emphasize the illegal use of force and committing crimes against property, goods and infrastructure. In 2001, the US government made every effort to express its disgust towards those who dared to attack the centuries-old symbols of democracy and state order in front of their doors. Academics, psychologists, criminologists and journalists are especially careful when emphasizing in their definitions the reasons why political activism has become violent, as well as the fact that terrorist threats have made the public very vulnerable (Whittaker, 2003, pp. 4-5; Stuurman, 2019).

[4] Since then, scholars, organizations, and government agencies across the world have created more than 260 definitions of "terrorism", which have been chronicled by Schmid, a research fellow at the think tank the International Centre for Counter-Terrorism. And debates continue about whether some historical figures, such as Gavrilo Princip who in 1914 assassinated Archduke Franz Ferdinand and his wife in Sarajevo leading up to World War I, are terrorists, heroes or something else entirely (Schmid in an interview: Kelkar, 2017).

[5] See more in: Petrović, 2009.

- this is the illegal use of force or threat of force, through a continuous campaign or sporadic incidents;
- this is a deliberate use of violence against civilians and non-military targets;
- here the power and force are inextricably rooted in political violence - from their acquisition through manipulation to using them to achieve the effect of change;
- revolutionary terrorism: aims to bring about complete changes in the state;
- sub-revolutionary strategies aim to lead to political changes, without leading to the collapse of the political system;
- in a word, these are carefully planned covert activities related to the goals, means, targets of attacks, and accession of participants (Petrović, 2014);
- goals can be political, social, ideological, or religious - without them terrorists would be considered ordinary delinquents and criminals (Wilkinson, 2004, p. 192);
- terrorist actions are usually carried out by sub-national groups, and sometimes by lone individuals committed to a goal;
- an important goal of these actions is to achieve maximum publicity;
- zones of activity include a specific country, a specific location, or a special segment of society; they quickly acquire a transnational character because the echoes of the action transcend the borders of a country (Petrović, 2007, pp. 34-45).

A cursory reading of the above list shows the reasons for the general disapproval of terrorism and the readiness to condemn such an uncontrolled and unrestrained, ruthlessly destructive phenomenon of the modern world. In fact, this brings us back to the beginning: it is as if the understanding of terrorism revolves in a vicious circle, which is why we must once again resignedly state that under various definitions of terrorism, warns only of its necessary general framework. Hence, we will only indicate the theoretical issue of "content and dynamics" which we will deal with in the next part of the text, which is dedicated to these segments in explaining the marked topics.

The definition of terrorism is extremely vague due to political disagreements. On the other hand, the law is by its very nature obliged to provide an authoritative determination of criminal activities. However, there is always a danger that politically motivated linguistic opportunism will produce simple labeling of this term.[6]

It seems that terrorism, as a derivation of the word terror, has acquired the meaning it deserves. However, much also depends on the aspect in which it is used. Differences in views can be expected between the authorities responsible for order and peace, observers who have witnessed these activities directly (Stuurman, 2019) "first-hand" or through the media, as well as the victims of terrorists themselves. All of them are specifically identified with terrorism (Baudrillard, 2003, p. 141).

[6] In its narrower and specific meaning, terrorism is "considered a pejorative expression, so that the names of action and reaction underline determinants such as freedom, defence, liberation, the army and just revenge" (Pinjo, 2015). Noting that new definitions, arguments, and counter-arguments are constantly being presented about terror and terrorism, the impression was created that all (regardless of the differences determined by socio-political and religious-cultural approaches to the problem) and small groups, entire people's movements and state regimes use terrorism to a greater or lesser extent as an instrument of "just struggle." See more about it: Pinjo, 2015.

Authorities must tackle behaviors they believe go beyond ordinary protests and demonstrations. Therefore, the state reacts quickly to remove the threat to order, peace, and security. This approach, which does not allow "unreasonable activities", leaves little room to consider the true, internal causes.

Naturally, the observers do not approve of deadly, malicious and anti-social forms of behavior. However, often among conservative media, any more violent form of behavior is characterized as malicious, so the term terrorism is often used to describe the whole range of protests such as hooliganism among fans, street riots or the appearance of people in a drunken state.

The *victims*, regardless of whether targeted or accidental, innocent bystanders consider the violence by which they are victimized as a dramatic end because it endangers their health, mobility, even life. When political violence restricts the freedom of movement of people (as in the case of the Palestinians and Israelis, for example), then terrorist operations are an exclusive factor that violates basic human rights, and large number of people are unhappy in the true sense of the word.

Terrorists are called destructive maniacs, people with a distorted mind and irresponsible violators of all codes of civilized behavior. While the public is more inclined to deal with the consequences rather than the causes of terrorist activities, especially when in a state of shock, those who have resorted to political violence do not accept to be labeled as terrorists and try to prove they had no choice but to react. They would draw attention to their idealistic, sometimes even altruistic goals (Stuurman, 2019).

Therefore, it is clear that the meaning of the terms terrorism and terrorists are largely determined by the point of view of those who define them. Numerous prejudices cannot be ruled out either (Schmid, 2004, pp. 377-378). After all, perhaps this is illustrated the best by the view of professor Richard Falk, who expressed it in an interview (1997) with the words that terrorists are often viewed in a simplified way through the prism of self-respect and moral-legal principles emphasizing the positive values of the western system which threatens unbridled political violence.

Thus, problems in determining the meaning and essence of terrorism remain. Faced with the lack of a generally accepted, universal definition, any state can sign a declaration against terrorism without having to fully implement its commitments in practice. States that have signed the Convention on the Suppression of Terrorism often define terrorism in different ways (principle of "double standards") (Duchemann, 2013). For example, terrorist activity within its state borders is rigorously punished, while violent political activities that take place in the territories of some other states are not considered fanatical or are even ignored. On the other hand, it is necessary to provide a minimum of basic agreement (at least give coordinates) on a framework definition that defines terrorist activities as the intentional use of violence outside the battlefield, aimed at the civilians to achieve a particular political goal. Brutal attacks of this kind would be considered a barbaric, unacceptable form of behavior. They would have nothing to do with conventional warfare between conflicting military forces whose characteristics, principles and limitations are strictly defined by the Geneva and Hague Conventions. They should also differ from the

guerrilla mode of warfare, which is significantly different from terrorism, because the targets are military, not civilian.

Of course, in theory and practice, the prevailing opinion is that in order to better understand this phenomenon, it is necessary to expand the context in which it is observed and researched, i.e. interpreted and explained.

Different words and attitudes interfere with the meaning of the word terrorism, especially when there are difficulties in trying to expose terrorists and guerrillas and freedom fighters. There are differences between these three notions in terms of their use of violence:

- the targets of terrorists are civilians,
- guerrillas attack soldiers and military officials and facilities,
- freedom fighter campaigns in order to free his people from dictatorial directing or occupying power.

Providing a broader framework for understanding, another problem has arisen in explaining this topic. Namely, terrorism traditionally means a "two-way fight" between a group of terrorists, on the one hand, and a sovereign state on the other. However, in the modern world, attention is drawn to countries that use terrorist organizations to promote their interests internationally.

Here, it should be emphasized once again that the lack of consensus on the definition of terrorism at the international level significantly hinders the effective fight against terrorism. More precisely, international cooperation aimed at preventing states from "sponsoring terrorism" is weak. In many cases, governments that fund terrorist actions are authoritarian, and their people are not interested in opposing them or even supporting them (as is the case in most Muslim countries) (Baer, 2003, p. 98).

Can countries that fund this horrific phenomenon do anything more, significantly differently, to divert their "clients" from persevering in actions that the rest of the world finds disgusting and unforgivable? There are certain indicators of how this process is already happening.[7]

## 4. Special answers common to the general notion of terrorism

1. When considering the issue of terrorism, there are many factors that contribute to its complexity, including the emotional nature of the issue, political disagreement around it and even the degrading connotation of the term. Although it is difficult to find a definition of terrorism that does not contain the word violence, this concept of using violence, which can be used by almost everyone and in almost all conflict situations, is related to certain actors and certain types of conflicts. The phrase "For one terrorist, for another patriot" is

[7] In many cases, the criteria used by Americans and Israelis to condemn Hezbollah or Hamas are not supported by most of the Arab world, especially in Lebanon and Syria. Palestinians believe that Israeli punitive expeditions to their cities and farms unfairly classify them as terrorist states. Many countries that sponsor terrorism in the Middle East view terrorist actions as jihad, a holy mission, and a war against the godless West. Terrorism can be defined here as a redemptive, pan-Islamic struggle.

often mentioned as proof that this concept is subject to double standards.[8]

2. In this way, quite understandably, terrorism also appears as a problem of morality – we can say attempts to define it are precisely based on it [the morality] (Barber, 2004, p. 16; Petrović, 2007, pp. 59-63).

The assumption is that some types of political violence are morally justified, while others are not. Violence is defined in terms of coercion, the authority of legitimacy, so it is difficult for governments, politicians, and lawyers to remain impartial. One of the problems of criminal prosecution occurs in the case of terrorist acts that produced terror by threatening violence, without physical destruction, i.e. injuring of people and damage to the property. However, violence is a crucial element of terrorism, recognizable in cyber-terrorism as well, although it is potentially disruptive and directed against the system rather than a physical human body (Combs, 2016, p. 6).

The UN General Assembly could not agree on a standard definition of terrorism, which must contain a universal rather than a pro-Western meaning. As Kelkar (2017) says:

> "The United Nations has spent more than 20 years trying to form a consensus on what constitutes terrorism, but has yet to succeed. Sticking points are usually about conflicting national interests and unwillingness to change national legislative traditions. Having sat in some of the meetings, Schmid noted during a presentation on terrorism at a symposium in 2014 that the political value of the term to individual nations continued to prevail over a legal definition that would make it universally punishable. He recently wrote in an email that his best short, legal definition that he proposed during the symposium was the, 'peacetime equivalent of war crimes'".

International terrorism can be distinguished from terrorism at the national level in the presence of an element of international jurisdiction. Transnational terrorism, a term often misused as a synonym for international terrorism,[9] can be considered a subgroup of qualifiers whose terrorism with a specific focus on non-state and non-political actors (Zirojević Fatić, 2014, pp. 163-166).

3. The word terrorism is often used with the terms: "often", "mostly", "generally" and "usually". These attributes make it possible to express a personal opinion when assessing whether an act is terrorist or not. Definitions of terrorism would have a significant level of objectivity if they were focused on the nature of the act and not only on the identity of the perpetrators or their targets.

This makes it possible to distinguish between transnational terrorism and terrorism of autonomous non-state actors (who may have some form of foreign support), and

[8] In the absence of a generally accepted international definition, certain states have decided to appear "as a community" in the fight against terrorism. Authorities (both in the East and in the West) tend to call their opponents terrorists, even when they have not used violence. Guerrillas refuse to be called terrorists by regime governments. Many government actions involving violence are considered legitimate because governments are democratically elected (Whittaker, 2003, p. 11).

[9] See: Petrović, 2007, pp. 232-242.

international terrorism perpetrated by individuals or groups under the control of sovereign states (Milbank, 1976, p. 11).

4. Terrorism is carried out for various reasons. Individual acts of terrorism may involve making specific concessions, such as releasing an important person from prison. Terrorism can also be carried out to deliberately provoke repression which would bring a government into a position of self-destruction. In the Irish case, terrorist acts were carried out with to punish the opponents. But respect for such circumstances as the perpetrator's social, cultural or national situation disrupts the objectivity of labeling an act as a terrorist (Miller in: Kelkar, 2017).

5. Terms such as freedom fighter or liberator are attempts to downplay the seriousness of an essentially very "ugly and filthy" profession. However, there is a thin line between the terms terror and terrorism (Petrović, 2007, pp. 69-74). The terror practiced by a legitimate government is served as if it were law enforcement and is aimed at the opposition, while terrorism involves defying the law and is the opposition's means of destroying power (Milbank, 1976, pp. 11-19).

6. The definition of terrorism is further complicated if we consider the typology, i.e. the location where terrorist groups are formed and where terrorist activities are carried out. Here we distinguish three points of view: terrorism committed outside the territory of the state whose citizen is the perpetrator of the terrorist act; terrorism calculated to endanger the interests of a state by its citizens and terrorism calculated to damage, significantly disrupt relations between different states.

When defining terrorism, one concept often emerges in favor of terrorists and that is that all acts of violence (hijacking, bombings, assassinations and destruction of infrastructure, etc.), are a consequence of human nature, which is inherently aggressive and destructive (Petrović, 2014).

What happened is that terrorist campaigns achieved their goals. In some cases, terrorism has been proved to be more effective and cheaper than conventional and guerrilla warfare because its goal was not to destroy the adversary but to break his will so that he capitulated.

7. Thus, definitions of terrorism must be analyzed in the context of the following sciences: history, philosophy, psychology, sociology, politics, statistics, linguistics, and law. In considering the definition of terrorism, the basic assumption is objectivity, which implies being open to every possibility and suggestion. And only in that sense, it is necessary to stand on the positions of those theories that are aware of the limitations of language and the possibility of interpretation, but which try to create the necessary general framework, at least a relief pattern for formulating goals and programs in the fight against it.

8. While no official agreement can be reached globally on the definition of terrorism, almost all of us have a basic idea of what terrorism is. It manifests itself in different variants: repression, fraud, racism, exploitation, control of information, violation of privacy, endangerment of human freedoms, corruption, etc. The eternal question of the morality of terrorism does not focus so much on the achievement of political goals as on the release of oppressed people, the end of colonial rule, the collapse of the authoritarian regime, the release of political prisoners and similar. The conditions that accompany terrorist actions

influence the shaping of public opinion. Lethal violence against some person in so-called democratic countries is considered less acceptable than a violent uprising of oppressed people in a colonial state (Petrović, 2015, pp. 645-660).

9. Terrorism is a calculated activity primarily aimed at creating a general atmosphere of fear to influence the political course of events. The result of terrorist actions must be terror; otherwise, they could not be characterized as terrorist actions. Terrorism can be a single act of violence. However, it is an incomplete definition that comes down only to the element of violence, the threat of violence, repressive actions, and similar. Such an approach cannot be leading to a final definition of this phenomenon. Success of a terrorist action is measured by how much it has succeeded in weakening the capacity of elected representatives of the government and causing feelings of personal insecurity, i.e. "sowing doubt in the duties and obligations of the state".

To conclude, some key generalizations in this field can be found in the literature, such as substitution for the conventional way of warfare, weapons of the weak, pathological acts of violence, the state's reaction to violence, etc. These generalizations made it even more difficult to define terrorism. Misconceptions about terrorism appear because the definitions are exclusively a 'product' of the West or third world countries. New polarizations and political relations, technological achievements, new motivations, and types of violence additionally prevent the adoption of a clear concept of terrorism, which is a condition for an effective fight against terrorism at the international level. Unfortunately, the fight against terrorism seems to have no end and the next generations should be ready so that it can never be eradicated. The age of terrorism can last for centuries.

## 5. Conclusion

Despite the rapid increase of terrorism on a global scale, the term "terrorism" still is not clearly defined nor nearly acceptable. Some governments tend to call all acts of violence committed by their political opponents as terrorism. On the contrary, anti-government extremists claim that they are the victims of state terror.

The imprecise nature of this term enables it to be used for labeling as terrorism all the activities which "bring about fear in order to achieve various goals". The term can in the broadest sense be used for describing other types of violent acts, such as kidnapping and abducting an aircraft, for which the perpetrators had not planned to grow into terror. Unfortunately, political sociologists deem that a simple and universal definition cannot be obtained, because the very process of defining the term represents a bigger part in constellating ideological and political goals. The struggles in defining the term support the argument that the perspective changes based on when and where the terrorists have committed their act. The question of defining terrorism is central for understanding this phenomenon, as well as for the success of measures taken against it. Therefore, the problems in defining the meaning and essence of terrorism remain. Confronted with a lack of a generally accepted and universal definition, each country can sign a declaration against terrorism, without having to fully perform its obligations in practice. Countries

that have signed the International treaty against terrorism often define terrorism differently (the double standard principle). On the other hand, it is necessary to ensure a minimum basis of the agreement (at least, providing coordinates) about an approximate definition which describes terrorist activities as purposeful usage of violence outside of the battlefield, aimed at civilian populations to accomplish certain political goal. Brutal attacks of this kind would be considered a barbaric and unacceptable way of behavior. These acts would not have anything in common with the conventional way of leading a war between conflicting military forces whose features, principles, and limitations are strictly defined by the Geneva and Hague conventions. They would also have to be differentiated from guerrilla warfare, which as mentioned before is notably different from terrorism because the targets involved are military and not civilian.

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## OPŠTE KARAKTERISTIKE OSNOVNOG POJMA TERORIZMA

Sažetak

Definisanje nečeg predstavlja uvod u nešto ili u idealnom slučaju, davanje preciznog objašnjenja šta nešto znači - proces koji omogućava da se sagleda razlog i smisao određene pojave, pronikne u njenu suštinu. Međutim, ukoliko se ne može postići preciznost takve vrste, onda se mora ocrtati put ka njenom širem utemeljenju. Na planu konkretne analize, osnovna i polazna analitička kategorija podrazumeva razumno značenje termina – „terorizam", pri čemu se posebno razmatraju njegovi mnogostruko raznovrsni aspekti kao što su motivacija, geografski konteksti, aspekti udruživanja terorista ili njihovo individualno delovanje, buduće forme terorističkog angažovanja. Naravno, tu figuriraju i brojna etička pitanja i problemi, a posebnu pažnju privlači i osvetljavanje „imidža" koji se o terorizmu kreira kroz medije. Upravo, oni koji nastoje da postignu konsenzus u pogledu značenja termina „terorizam" i kako se sa njim uhvatiti u koštac, došli su do zaključka da je gotovo nemoguće pronaći okvir za jedinstvenu opšteprihvatljivu definiciju. Međutim, iako ne postoji konsenzus u definisanju terorizma, postoji opšteprihvaćeno shvatanje da teroristi danas deluju globalno i da eskaliraju svoje aktivnost proizvodeći ekstremni haos i nasilje.

Za razmatranje pojmovnog određenja ili definisanja „terorizma", ovi fragmenti ili izloženi stavovi će nam poslužiti kao upozorenje da se krećemo po veoma „klizavom terenu", gde se neprekidno sudara veliki broj definicija, bogatstvo određenja sa brojnim neusaglašenostima, protivrečnostima, nepreciznostima, nedorečenostima. Neke od definicija su kratke i precizne sadržine, neke samo implicitno kažu sta je „terorizam", neki koncepti se poklapaju sa onima na kojima počiva sadržaj osnovnog pojma, neke formulacije se baziraju na sasvim suprotnim pristupima u omeđavanju ovog krivičnog dela na oblast nacionalnog zakonodavstva itd. Na kraju, kada se sve svede na jednu ravan, proizilazi da se kao sada nikada nije raspravljalo o ovoj kompleksnoj temi, a da su rezultati do kojih se došlo veoma skromni, čak nezadovoljavajući. Jednom reči, mora se priznati da u tom pogledu i nije ostvaren neki napredak. Pa ipak, individualna i kolektivna naučna misao je na svoj način doprinela definisanju pravnih obrisa terorizma, i najzad njegova obeležja su u značajnoj meri izložena ili određena posebnim ugovorima i precedentnim pravom, za koje se može reći da su ipak kristalizovala ovaj pojam ili njegova osnovna obeležja, tj. glavne karakteristike. Iz ovog upućivanja, kako ističe autor, izvesno je da među mnogobrojnim teorijskim pozicijama postoje znatne razlike. Upravo, kaže on, pogled na ravan suštinskog omeđavanja pojma terorizma omogućiće nam da u sveukupnom pristupu (uz određenu selekciju) dobijemo zanimljive i aplikativne zaključke koji nam, dalje, mogu koristiti u objašnjavanju i proučavanju kako karaktera, tako i specifičnog sadržaja pojma terorizma, a sve u funkciji iznalaženja najoptimalnijeg modela borbe protiv njega, odnosno

pronalaženja načina pomoću kojih ovaj cilj može da se ostvari. I to uvek iznova, istražujući tu permanentnu društveno-negativnu dimenziju ljudskog ponašanja, ukazujući uvek na nove i nove međusobne veze u kretanjima i modalitetima njenog manifestovanja.

Ovo treba potcrtati, jer daleko više od drugačijih načina vršenja krivičnih dela, terorizam intenzivira opasnost pri određenim uslovima. Posmatran kroz prizmu društvene stvarnosti, on je životna činjenica, sve češća i sve monstruoznija u ispoljavanju kriminaliteta sa svojom osobenom pojedinačnom i kolektivnom štetnošću, pa stoga i posebna kategorija u krivično-pravnom smislu koja nužno mora da ima i svoje specifičnosti, zaključuje autor. U našem zakonodavstvu ovo krivično delo se tretira članom 391 KZS.

**Ključne reči:** koncept terora, definicija terorizma, razlika između teroriste i borca za slobodu.

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# REVISITING THE DOCTRINE OF STATE JURISDICTION IN INTERNATIONAL CRIMINAL LAW

***Abstract***

*This article aims at analysing the main mechanisms available, for setting limits to the exercise of State Criminal Extraterritorial Jurisdiction, mainly as it applies to International Crimes in the absence of direct links between the conduct of the accused person and the State.*

*Initially, jurisdiction is examined as a legal concept, for later to be approached within the delimitation of the State power to exercise its jurisdictional competence horizontally (among States), as it is not in the scope of this article the vertical exercise of State Jurisdiction (State & International Courts).*

***Keywords:*** *international criminal law, jurisdiction.*

## 1. Introduction

In order to revisit the doctrine of state jurisdiction in international criminal law, that article is structured as follows:

In Part 1 - International jurisdiction as a legal concept, the concept of jurisdiction is focused from the perspective of domestic and international law, as arguably the concept has in the doctrine a two-folded definition that requires a clear understanding of the parameters that apply to its international dimension.

In Part 2 - Types of jurisdiction, jurisdiction is analysed based on the concept of international jurisdiction, demonstrating the mechanisms through which the state exercises its jurisdictional power, as part of its sovereignty.

In Part 3 - Jurisdictional grounds are addressed as a method for setting limits to the state exercise of criminal extraterritorial jurisdiction. In the absence of a direct link between the conduct of the accused person and the state, international criminalisation comes as the one criterion currently available that constitutes arguably, a legal ground for the exercise of state criminal extraterritorial jurisdiction.

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## 2. International jurisdiction as a legal concept

Initially, the term 'jurisdiction' is defined from the perspective of the present doctrine, as a form of power (Capps, Evans & Konstadinides, 2003) that expresses itself as competence. As a consequence, state jurisdiction will be defined as the judicial, legislative and executive competence of a certain state based on international law to govern persons and property (Akehurst, 1972-1973, pp. 145- 259). According to Lord MacMillan observed in *Compania Naviera Vascongado v SS Cristina* (Triggs, 2006, p. 344):

> 'It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits.'

Brownlie, Professor at Oxford University, approaches the concept of 'jurisdiction' as interconnected with the concept of 'sovereignty', as a complement of state rights (Verzijl, 1968, pp. 256-292, according to: Brownlie, 1990). Based on his understanding, 'sovereignty' is the legal personality that comprehends statehood, whereas 'jurisdiction' addresses certain aspects of the content, rights, liberties and powers (Brownlie, 1990).

Therefore, there would be a direct relation between 'sovereignty' and 'jurisdiction', with the former depending upon the latter.

Cassese (2001), Professor at Florence University, understands that 'jurisdiction' constitutes one of the powers and rights that result from 'sovereignty'.

Once again, it is possible to notice how broadly the concept is used, which leads to the conclusion that there is a distinction between the notion of jurisdiction applied by the municipal law and that applied to international public law.

According to Mann (1990 [1984]), in approaching the issue of 'jurisdiction' the international public law experts have in mind the right of a specific state, based on international law to regulate the conducts not exclusively domestic.

Therefore, the legal concept of 'international jurisdiction' applies to the international right of the state to create rules, apply them to a certain case and enforce them. Jurisdiction relates to what has been described as a pillar of public international law, as its function is to regulate and limit state competence (Mann, 1990 [1984], p. 8).

## 3. Types of jurisdiction

'Jurisdiction' in international law, describes, in general, the state legal power to define and enforce rights and duties. Based on this broad notion of the concept, the state exercises its jurisdiction by setting norms (*prescriptive jurisdiction*), by setting the legal procedure aiming the identifying the violation of norms and the consequences for such violation (*adjudicative jurisdiction*) and the enforcement through the loss of liberty or property as means of sanction (*executive/enforcement jurisdiction*).

In criminal law, *prescriptive* and *adjudicative* jurisdictions are two sides of the same coin, as states do not apply foreign criminal law. If a certain court has jurisdiction, it will apply its material law, therefore if a court has jurisdiction, *lex fori* comes into play (Akehurst, 1972-1973, p. 179).

As the paper focuses on state criminal jurisdiction, the analysis is centred on *prescriptive* and *executive/enforcement* jurisdiction.

### *3.1. Prescriptive jurisdiction*

'*Prescriptive* or *legislative* jurisdiction' must be distinguished from sovereignty. Being so, the doctrine of prescriptive jurisdiction should apply to the issue of whether and in what circumstances a state can exercise its right to legislate (Mann, 1990 [1984], p. 9).

Whatever is the international aspect in play, in principle 'jurisdiction' belongs to a state, and is limited by international law norms (Advisory Opinion No. 4, pp. 23-24, in: Mann, 1973 [1964]), following certain criteria. Therefore, 'jurisdiction' has the role of allocating legislative powers to States and in doing so, the relationship with conflict of laws, becomes also relevant (Mann, 1984, p. 9).

As Mann (1973 [1964]) elaborates on this criteria, the concept of conflict of laws as a central part of international private law is revisited, as this is a field of law that essential works on the issue of 'conflict of laws' and is then, applied as a relevant tool for international public law (Mann, 1990 [1984], p. 10).

The question of 'what are the limits of the right of a state to impose its laws', 'which are the persons and events subject to it', are issues related to the '*prescriptive jurisdiction*' (Lowe, 2003, p. 333). Without it, everything is *rancour* and *chaos* (Higgins, 1994, p. 56).

### *3.2. Executive/enforcement jurisdiction*

The fact that a state has '*prescriptive* jurisdiction' concerning certain crime committed abroad, does not authorise this state to take measures against the accused in a foreign state, neither to arrest him and bring him for a trial in its territory.

'*Prescriptive* jurisdiction' of a certain state ensures '*enforcement* jurisdiction' to be exercised in its territory. However, '*enforcement* jurisdiction' concerns the situation in which a state exercises its '*prescriptive* jurisdiction' in a foreign state, and therefore the issue of how to regulate this type of exercise emerges. It relates to the state authority under international law to apply its criminal norms using the force, if necessary, through police and its courts (O'Keefe, 2004, p. 736).

Therefore, '*enforcement* jurisdiction' is manifested as a criterion to determine the circumstances under which a State can exercise its sovereignty as O'Keefe (2004) observes:

> (…) Enforcement jurisdiction concerns not the law prescribed by a State to *regulate*, *inter alia*, acts outside its own territory, but the lawfulness of the State's own acts to give effect to such regulation. Enforcement jurisdiction, therefore,

is concerned with the question whether and if so in what circumstances a State may act in the sense of exercising sovereign authority, performing acts *jure imperii*. The case of a State entering into a commercial transaction or being a party to commercial arbitration, acting *jure gestionis*, being involved in '*actus qui a rege sed ut a quovis alio fiant*', is entirely outside the scope of the present discussion (Mann, 1990 [1984], p. 18).

### 4. Jurisdictional grounds: the role of international criminalisation

The classical grounds for jurisdiction have been territory and nationality. However, states have cautiously also relied on other grounds, as the principle of national protection, passive personality - where the victim of the wrongful act is a national of the state (Triggs, 2006, p. 344). Lately, the concept of international criminalisation has come into play, mainly in a two-folded jurisdictional ground: international crimes and the principle of universality.

Therefore, this paper suggests that there must be a clear distinction between the jurisdictional grounds, based on the direct link with the state that claims jurisdiction over a certain 'conduct/act' qualified as a 'crime' in its domestic criminal law, and 'international criminalisation', which does not require any direct link, simply the fact that this 'conduct/act' is *per se* an 'international crime'.

This paper focuses on the mechanism of international criminalisation, as presupposes the concept of 'international crime' and generally in other for the state to incorporate it in its criminal law, the principle of jurisdiction as a 'jurisdictional ground' is used.

Within the system of national repression, international criminality may have a customary or conventional origin, in this case direct (criminality directly instituted by an international convention) or indirect (criminality instituted by domestic law, based on an international obligation) (Yokaris, 2000, pp. 897-904). However, in general, for 'civil law' countries, customary origin requires the existence of a law, which allows the 'entry' of this legal rule into the internal system. It is in reality an issue widely debated in international law, concerning monism and dualism.[1]

In practice, there is also the incrimination derived from an institutional act of an international organization, as is the case with international criminal courts, and it can also occur through international custom, as is the case with piracy.

For the hypothesis of direct conventional criminality, the constitutive elements are defined in the convention; therefore, it is not for the state to take legislative measures in material terms, it is enough to establish only the applicable procedural rules, especially regarding the competence of its internal organs.

[1] [t]he dualist view, is that international law and national legal systems are two separate legal orders, existing independently of one another [...]. A consequence of these differences is that national courts are not bound to apply international law unless and until that law has been made part of the law of the land by domestic usage or legislation (Triggs, 2006. p. 105). The monist view is proposed by Kelsen (2005), according to which international and municipal law are considered not as two separate systems, but interconnected in such a way that international law is supreme.

According to Yokaris (2000, p. 897), it is an obligation to achieve certain results: states agree to punish and commit to editing the internal rules necessary for this type of repression.

As an example, we can cite article 4 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, according to which:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Following the same reasoning (Yokaris, 2000, p. 897), this would be based on an obligation of means: states undertake to propose to their legislators the measures necessary to implement the obligation to incriminate and prosecute imposed by the Convention or by an institutional act of an international organization.

*4.1. International crimes*

The term tends to be used with some frequency; however, it must be clarified if it is being used generically, in relation to common crimes (as opposed to international ones) with international ramifications, opposing to crimes of merely local impact, or whether it should be applied to crimes created by international law.

For the purposes of this work, we opted for the second approach, according to which these crimes are defined based on their historical evolution in the context of the processes of elaboration of international criminal law.

In general, they are considered an application of the principle of universality, but this understanding is not entirely correct, as clarified by Brownlie (1990). The violated norm is that of international law, which considers the act to be a crime, not a norm of national law founded on the freedom conferred on states by international law, in which case the act is not considered a crime under international law.

*4.2. Principle of universality*

A considerable number of states have adopted, generally with limitations, a principle allowing the exercise of jurisdiction in relation to the acts of non-nationals, in which circumstances, including the nature of the crime, justify their repression as a matter of international public policy.

According to Lowe (2003), the principle applies to crimes that, due to their gravity, all states have a legitimate interest in their repression. In his opinion, this would be the traditional justification for this principle.

Employing this *ground of jurisdiction*, national courts have prosecuted and tried violations of the Geneva Conventions, including Article 3 and the Protocol II, as demonstrated by the Belgian legislation of July 16, 1993, *Crimes de droit International* (Meron, 1998, p. 30; Fernandez-Jankov, 2020, pp. 95-109).

From the perspective of the criminal jurisdiction of states, universal jurisdiction, or better known as the principle of universal jurisdiction, is configured as the possibility for the state to exercise prescriptive jurisdiction in the case of non-existence of any other recognised jurisdictional link, on the lapse of time in which the crimes in question takes place (O'Keefe, 2004, pp. 735-760; Vešović, 2020, pp. 7-30).

Therefore, according to the principle of universality, a state affirms its competence without any criteria of direct connection with the violation, even without the need for the perpetrator to be present in its territory (see Arrest Warrant of 11 April 2000).

O'Keefe (2004, p. 745) also points out that the term 'universal jurisdiction' is the abbreviation for 'universal jurisdiction to prescribe (legislate)' or 'universal prescriptive jurisdiction' and the reference point for applying this to a given case is the 'moment when the putative conduct was committed'.

Some authors distinguish this principle, applicable to certain crimes, from the principle of conditioned universality (*principe de l'universalité conditionnelle*), which requires the satisfaction of certain conditions, including the presence of the alleged perpetrator in the State's territory (*judex loci deprehensionis*), so that jurisdiction can be exercised in response to his non-extradition to another country.

In this hypothesis, subsidiary competence (*subsidiaire; subsidiary universality principle*) is present. Some still speak about almost universal competence. Others talk about a *quasi*-universal (*quasi universelle*) or alternative, given that the state that detains the accused has a choice between judging - through due process of law or extraditing (*aut dedere aut judicare ou aut dedere aut prosequi*).

According to this reasoning, the principle of absolute universality (*principe de l'université absolute*), applicable to all states, must be distinguished from the principle of conditional universality (*principe de la compétence relative, délégue*), applicable between states parties to an international agreement or a treaty.

However, for the purposes of this work, it is argued that in setting the limits of the right of all states to repress these conducts, there is a duty based on a minimum standard established by states, based on the exercise of this right, which creates a constant obligation in an international agreement '*aut dedere aut judicare*' type.

## 5. Conclusion

[1] The legal concept of international jurisdiction is interconnected with the concept of sovereignty and has a two-folded mechanism of exercise. One is centred on its domestic application, where it is manifested as a form of legal power that is arguably intrinsically related to sovereignty, which constitutes the power of the state to wield authority over a person living on its territory and the power to freely use and dispose of its own territory

(Cassese, 2001, p. 89). The other is centred on its international application, which requires the coordination in a vertical level of the extraterritorial exercise of jurisdiction as a power previously defined on its domestic application. In this sense, it relates to what has been portrayed as one of the essential roles of public international law, the role of regulating and delimiting state competence.

It is relevant to point out at this level how that concept of jurisdiction shifts to competence once the interrelation of all 'states' jurisdictions' in horizontal level needs to be coordinated by international law. For the purpose of the current study this second approach is addressed, as the focus is to analyse the limits to the exercise of State criminal extraterritorial jurisdiction.

[2] The exercise of international jurisdiction is three dimensional based on the notion that states exercise their jurisdiction by setting norms (*prescriptive jurisdiction*), by setting the legal procedure through which such norms apply to a concrete case (*adjudicative jurisdiction*) and the consequent enforcement of the 'concrete norm applied to the case' (Dworkin, 1986) (*enforcement/executive jurisdiction*).

As the state judiciary does not apply, as a general rule, the material law of another state, in criminal law prescriptive and adjudicative jurisdiction end up as the same pattern of jurisdiction exercised. Based on this understanding, it is possible to conclude that the exercise of extraterritorial State jurisdiction refers to the exercise of '*prescriptive* jurisdiction'.

Moreover, as it applies to criminal law, 'prescriptive jurisdiction' 'refers to a State's authority under international law to assert the applicability of its criminal law to a given conduct' (O'Keefe, 2004, p. 736).

[3] Jurisdictional grounds as a mechanism that arguably is central to the delimitation of the state's international jurisdiction should be split into two main aspects: the presence of a direct link between the conduct of the accused person and the non-existence of such link.

The jurisdictional grounds based on the presence of a direct link have been extensively studied by the doctrine, thought the works previously mentioned in this article, among other scholars. Arguably their application does not impose a challenge to the States having the Territorial Principle as the essential ground in the legislation and in some cases the nationality of the victim and rarely the nationality of the accused person.

[4] The exercise of Criminal Extraterritorial Jurisdiction in the event of the non-existence of a direct link can only be justified, arguably, in the presence of 'International Criminalisation', which implies the presence of 'International Crimes' and its repression thought the Principle of Universality. This Principle was previously in this article defined in terms of the States exercise of 'prescriptive jurisdiction', which is arguably limited by the concept of International Crimes and its repression, that even though, having its origin on the right of the States to exercise its Extraterritorial Criminal Jurisdiction, sets a minimum standard as a constant obligation in an international agreement of '*aut dedere aut judicare*' type.

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## PREISPITIVANJE DOKTRINE NADLEŽNOSTI DRŽAVE U MEĐUNARODNOM KRIVIČNOM PRAVU

Sažetak

Ovaj članak ima za cilj analizu glavnih raspoloživih mehanizama za postavljanje ograničenja u vršenju državne krivične eksteritorijalne nadležnosti, uglavnom pošto se odnosi na međunarodne zločine u odsustvu direktnih veza između ponašanja optuženog i države.

Prvobitno se nadležnost ispituje kao pravni koncept, da bi mu se kasnije pristupilo u okviru razgraničenja državne vlasti da svoju jurisdikcionu nadležnost vrši horizontalno (među državama), jer u delokrugu ovog člana nije vertikalno vršenje državne nadležnosti Državni i međunarodni sudovi).

**Ključne reči:** međunarodno krivično pravo, nadležnost.

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